



Victorian Equal Opportunity
& Human Rights Commission

Putting principle into practice

> Overview and recommendations - Submission to the
Four Year Review of the Charter of Human Rights and
Responsibilities Act 2006

1 July 2011

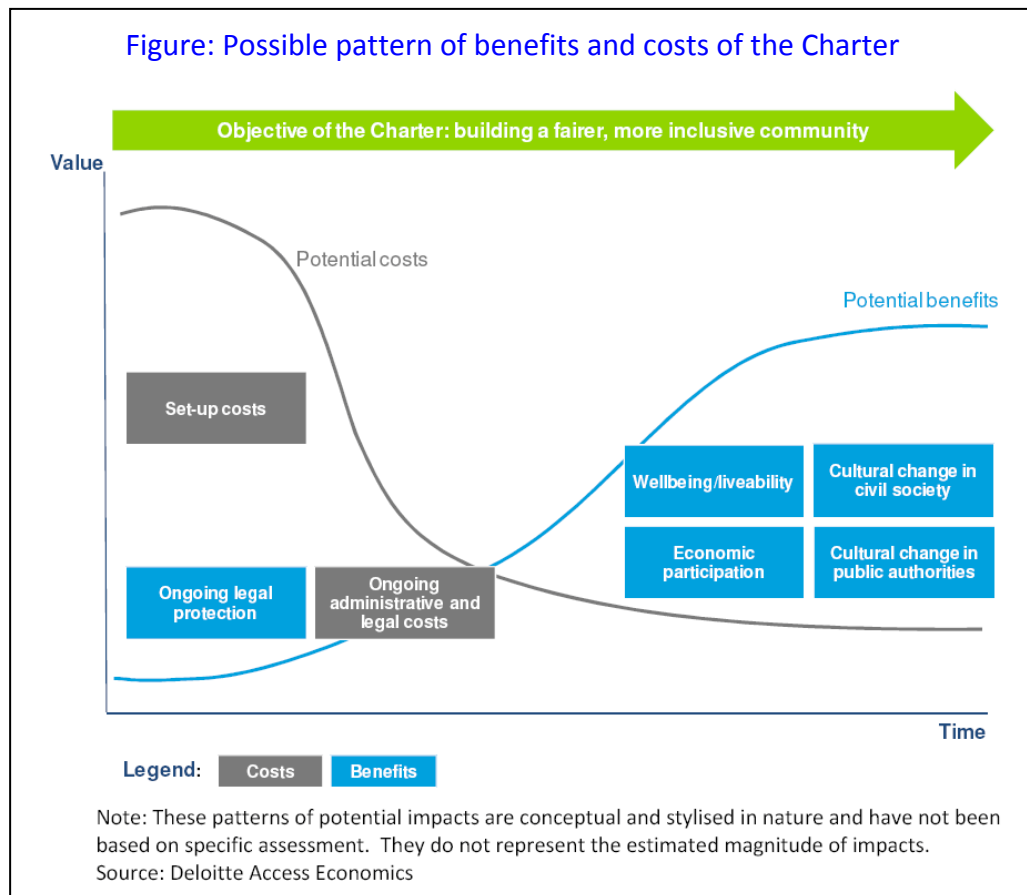
Overview

The great strength of the Victorian model of rights and responsibilities is that it accommodates the discourse of rights with a respect for both the intended and the practical workings of all three arms of government. It recognises that government every day -rights are not abstract, but are played out in the way Victorians experience government every day – with real implications for their ability to live decent and productive lives, as they see it. It understands rights an evolving concept that demands constant conversation – not as a set of rules and institutions that impose themselves on the community – but as a body of principles that works within and alongside the processes of a lively democracy. It acknowledges that rights are not absolute and may be subject to limits, but these limits must be reasonable, necessary, justified and proportionate.

Rev Tim Costello, CEO World Vision, launching the
Victorian Equal Opportunity and Human Rights Commission's
Talking Rights Report, 19 May 2011

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the Four-Year Review of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). Over the last four years, government and the community have made an investment in building the human rights culture in Victoria and applying it in ways that improve the work of government. The benefits of this investment will continue to be felt over the long-term.

The graph below outlines one way to look at that investment – monetary start up costs begin to pay dividends over the longer term, in the form of cultural change, economic participation, and wellbeing/liveability. This was the original vision for the human rights culture to build gradually and to improve the performance of government.



The Four-Year Review is an important opportunity for us to reflect on the operation of the Charter and for the community to engage with government about human rights protection in Victoria.

In making this submission, the Commission brings a unique perspective through our statutory role under the Charter and our engagement with the Charter on a day-to-day basis with government, in the community and in the courts over the last four years.

The Commission has a number of roles under the Charter, these include:

- reporting on the operation of the Charter on an annual basis, to the Attorney-General who then tables this report in Parliament
- educating the community about human rights and the operation of the Charter
- reviewing human rights compliance by invitation,¹ and
- interventions in selected cases where there are human rights considerations before the courts or tribunals.²

The Commission also has a statutory role to assist the Attorney-General with the Four-Year Review.³ In preparation for this, we have prepared materials over the last four years to further the community's consideration of: economic, social and cultural rights; Indigenous self-determination; women's rights; the rights of people with disabilities; and children's rights. The outcomes of this work accompany this submission.

The Commission addresses the Terms of Reference for the Review in the material that follows. In doing so, we set out observations about how the Charter has been working to improve government practices and deliver better outcomes. We also make recommendations for improving and strengthening the Charter in the future.

These observations and conclusions are drawn from the evidence-base of our own experience working with the Charter, our interaction with government, and our consultations with people in the community. Drawing this together, we have made recommendations that support the objects of the Charter as set out in the legislation – to protect and promote human rights – and will maintain the Charter as a practical and accessible tool for all Victorians.

¹ *Charter of Human Rights and Responsibilities Act 2006*, s 41

² *Charter of Human Rights and Responsibilities Act 2006*, s 40

³ *Charter of Human Rights and Responsibilities Act 2006*, s 41(e)

The Commission's approach is also informed by the following key points:

- The Charter reflects the values of the Victorian community and rights that are reflected in existing domestic and international law. The Charter consolidates these rights in one place and provides a clear statement about the contract between government and the people that it serves – these are our fundamental rights.
- Human rights protections can be taken for granted by the community as a whole, but often they are most important where citizens rely on government or where the work of government impacts on vulnerable groups. The Victorian community as a whole is enhanced and strengthened where these rights protections are transparent and the obligations are clear.
- Compliance with the Charter should continue to be integrated into the existing framework of government. The Charter, like other areas of law such as privacy, should be part of 'business as usual' across government.

The Charter in action

Four years is early in the life of any new legislation, but even so, there is clear evidence that the Charter is performing. The Charter encourages a process of change and the development of a human rights culture within the work of government. It is a single law that says: these are the rights that every arm of government will consider, observe, protect and uphold on behalf every Victorian. It does this in a number of ways.

1. Supporting Parliamentary supremacy

There is evidence that the first four year's of the Charter's operation has supported Parliament sovereignty in law-making. A number of mechanisms in the Charter are designed to give Parliament the information it needs to make informed decisions about human rights: the Commission's annual reports, statements of compatibility on bills, reports from the Scrutiny of Acts and Regulations Committee, declarations of inconsistent interpretation from the Supreme Court. Each one of these is about communicating to Parliament and then letting Parliament make the decisions it thinks best on behalf of the community.

The Charter has also provided a clear and transparent human rights framework to many areas of challenging law making, where there may be competing interests in the community or where individual rights must be balanced against the interest of the broader community. This can be seen through the reviews of major pieces of legislation such as the *Mental Health Act 1986* and the *Guardianship and Administrative Act 1986*, both of which deal with the limitation of liberty and the protection of the human rights of vulnerable people (page 133).

Where the Parliament chooses to limit human rights, it does so transparently and demonstrates to the community why it has taken this course of action. This was evident in the passage of the *Summary Offences and Weapons Control Amendment Act 2009*. The Commission strongly supports the role of the Charter in supporting the exercise of parliamentary sovereignty.

2. Improving the work of government

Through our annual reports to the Attorney-General, the Commission has outlined the impact a human rights approach has had on the work of government, and most notably central government departments, statutory entities, Victoria Police, and local government. These reports acknowledge that progress is gradual and incremental, consistent with the 'dialogue model' and cultural change process anticipated when the Charter was introduced.

Agencies have generally been positive about the impact of the Charter on their service delivery outcomes and their accountability to the public. For some agencies, human rights have become part of their normal business practices, from business planning to service delivery. The Office of Police Integrity, for example, has made Charter compliance as one of its key areas of work. The Charter has also been used by agencies such as the Office of the Public Advocate, the Ombudsman, and Victoria Police to help avert future problems and review and improve practices (page 158).

The Charter has also helped government agencies better understand their obligations against a range of human rights considerations that are found in existing laws, by consolidating a positive duty to comply with the rights in one domestic law; this has been evident for example in the planning for the *Transport Integration Act 2010*, (page 128) and the Office of Housing briefing note for staff on human rights decision making by staff (page 153).

3. Improving outcomes for the community

The benefits of the Charter have also been demonstrated through the positive outcomes that it has brought to the Victorian Community, as outlined in the case studies in this submission. This includes for example, the Department of Health's consumer and carer participation strategy, the development of relevant and accessible consumer protection services through Consumer Affairs Victoria (page 151), the work of the State Revenue Office in developing a flexible approach to outstanding taxation debt from Global Financial Crisis and the 2009 Bushfires (page 152), and the practical work of statutory entities such as the Child Safety Commissioner, the Office of the Public Advocate and the Health Services Commissioner (pages 155-156).

4. Empowering the community

The Victorian community has also become increasingly aware of the Charter as a means of protecting the rights of individuals. The Charter has provided a single domestic law that articulates the standards that the Victorian Community can expect of government agencies. It has also provided a way for people to test government policies, laws and decisions against a human rights framework.

Notwithstanding this, the evidence suggests that there is still much to do to build an understanding of how human rights change the work of government, and can be used to provide better outcomes for all Victorians. This is why the Charter must have the leadership of government, a clear cause of action, and must continue to require that the different arms of government to incorporate a human rights based approach in the development and delivery of policies and services to the community.

Challenges and concerns posed by the operation of the Charter

There are many positive benefits that have been derived from the operation of the Charter. However, the past four years of its operation has not been without challenges and concerns about its impact. Some of these have been addressed in practice, others identify areas for improvement in the future.

1. Clarifying the definition of ‘public authority’

There have been questions about which bodies fall within the definition of ‘public authority’ and so have obligations under the Act. This has been clarified for the operation of courts and tribunals. It remains unclear for bodies like universities and the Four-Year Review is an opportunity to address this.

2. The balance between Parliament and the courts

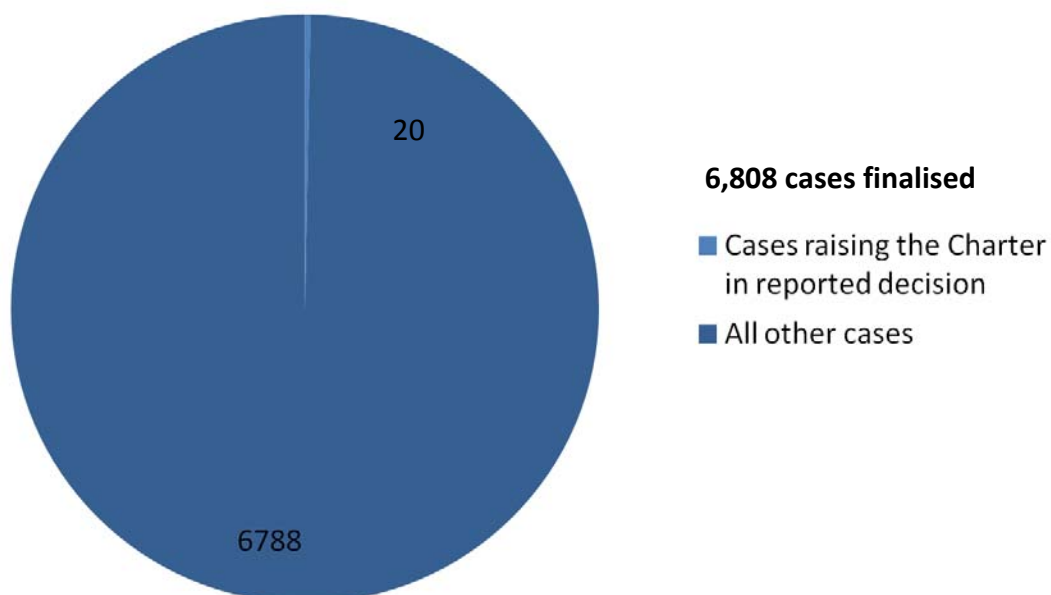
There have also been concerns that the Charter would threaten the traditional balance in our Westminster system between Parliament and the courts. The evidence of the first four years of the operation of the Charter has been that the role of the courts has been modest but appropriate and authoritative.

The concerns about ‘judicial activism’ are not evident in practice. The Victorian courts have used the Charter as a traditional tool of statutory interpretation and the role they have played has been exactly what Parliament has asked of them. Where the courts have used the Charter, their findings have been useful in clarifying the scope of rights, such as the rights of the child in *DPP v Brian Pottinger* [2010] VCC unreported, and the responsibilities of public authorities in areas like housing. The Charter has also helped to promote a more thorough consideration of issues such as those of racial discrimination in the *Raytheon* exemption (*Raytheon Australia Pty Ltd Exemption Application* [2011] VCAT 796) application at VCAT or the best interests of the child in the *Adoption Act* case (*AB v Department of Human Services* [2010] VCC AD-10-003). Charter rights have proven to be accessible and, in many areas of the law, such as those before VCAT like tenancy and guardianship, provide clearer guidance and protection than common law standards.

3. Clogging up the courts

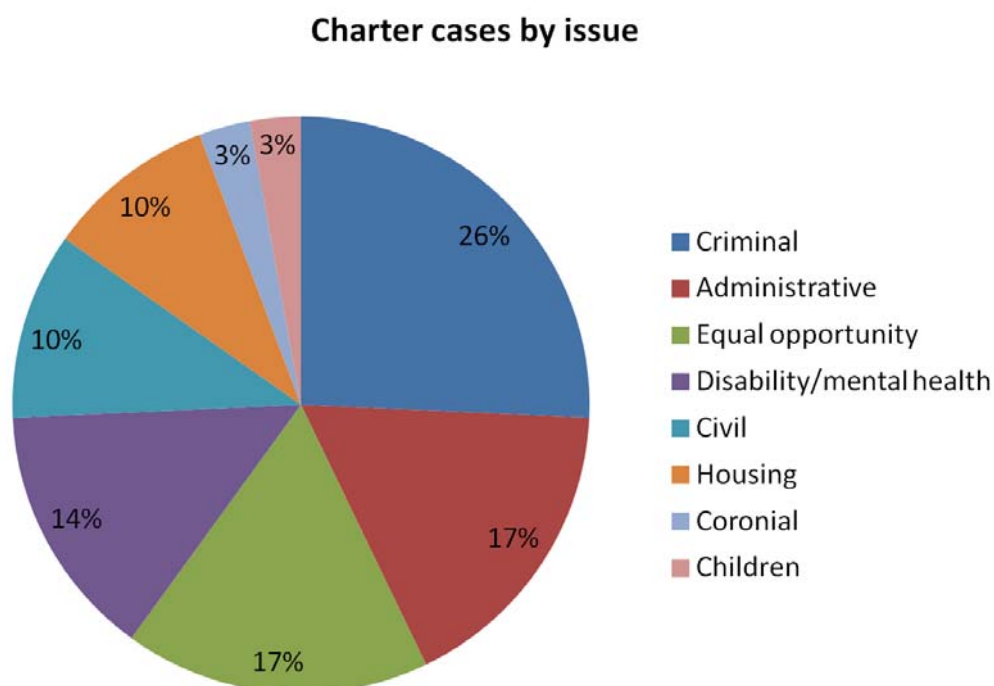
Concerns about the Charter ‘clogging up the courts’ have not been demonstrated in practice. In Victoria, and other jurisdictions like the Australian Capital Territory and New Zealand, litigation under the human rights laws have been modest. In its research, the Commission have found just over 200 cases where the Charter has been referred to in the decisions on the matter. To provide some context, the Supreme Court, including the Court of Appeal finalised 6,808 cases in the last financial year. Twenty of these raised Charter issues.

Cases before the Supreme Court and Court of Appeal in 2009-10



5. A Charter for criminals

There have also been concerns that the Charter only provides rights for criminals. This has not been the case. It is natural that the Charter is raised in criminal cases. The Charter protects everyone's rights and criminal law is a significant area where the powers of government can impact on the rights and freedoms of individuals. It is appropriate that this is subject to scrutiny and review. It also an area where people are likely to be legally represented and where the courts and lawyers are used to working within a rights framework. Criminal cases have helped to develop the jurisprudence and provide clarity about the operation of the Charter. However, as the chart below shows, it is being used across many areas of the law.



6. Freedom of religion and the Charter

There have also been concerns about the Charter and protection of the freedom of religion. Firstly, it is important to note that the Charter places obligations on public authorities, not the community as a whole so will only impose obligations in religious bodies when they are acting as a public authority such as a provider of publicly funded services. Secondly, the Charter preserves the balance between religious rights and other rights that is found in other state laws such as the *Equal Opportunity Act 2010* and the *Racial and Religious Tolerance Act 2001*. The evidence from the first four years of the Charter's operation has demonstrated that the Charter is just as effective and indeed, provides a transparent framework for decision-making, when different rights and interests need to be taken into account. The Commission agrees that protection of religious freedoms in the Charter should more closely reflect international law and the Four-Year Review is an opportunity to address this.

7. The need for remedies

There has also been concern, and at times cynicism, because of the absence of an independent cause of action where human rights breaches have occurred. The current provisions for joining or ‘piggy-backing’ human rights considerations to existing matters has led many to question how genuine Victoria’s human rights commitment are when a simple cause of action is not available when public authorities act unlawfully.

The way forward

The Charter is now at the heart of the legal human rights framework in Victoria and has demonstrated its value. The fact is that the Charter improves outcomes for Victorians. The Four-Year Review is our opportunity to make sure it is strong and continues to work well into the future.

The Commission has made a number of recommendations to support this work and in response to the Terms of Reference set by the Government. These recommendations fall broadly into four categories:

1. Coverage that reflects community values

The Charter should be extended to accommodate additional rights, many of which are already reflected in aspects of Victoria’s legal framework. They are important to the community and should form part of our central human rights instrument. In particular, the Commission recommends the inclusion of:

- the right to health, the right to housing and the right to education.
- the right to Indigenous self-determination.
- the children’s rights in section 17 of the Charter should be expanded to include the right of children to participation in decisions that affect them as appropriate to their age and maturity.
- women’s rights and the rights of people with a disability should be reflected in the objects of the Act and so inform the interpretation of all of the Charter rights.
- gaps between the International Covenant on Civil and Political Rights and the Charter should be addressed. Specifically, the right to birth registration, the right to found a family, and the liberty of parents to raise their children in the religion and morals of their choosing should be respected.

2. Transparency and accountability in government

The Charter has proven to be a useful mechanism for good government. This could be enhanced through:

- integration of the Charter into ordinary business practices, including annual reporting and government decision-making
- improved independent oversight through a review function, and
- better public engagement on human rights issues by, for example, providing draft statements of compatibility when consulting the community on exposure drafts of bills.

3. Achieving better outcomes for Victorians

The Charter's accessibility to many Victorians could be improved. The Commission recommends:

- an increased focus on human rights in service delivery areas
- a dedicated dispute resolution mechanism to provide free and independent assistance to help resolve disputes about human rights issues with government (along the lines already provided by the Commission under the Equal Opportunity Act)
- a clear and freestanding cause of action with appropriate remedies so that when government acts unlawfully the community has a clear course of action to address it, and
- strengthening parliamentary processes to ensure that human rights are taken into account when decisions are made on behalf of the community.

4. Promoting clarity and efficiency

The first four years of the Charter's operation have revealed a number of areas that could be clarified or made more efficient by:

- providing further guidance on the definition of a 'public authority'
- ensuring that the issuing of section 35 notices to the Attorney-General and the Commission as interveners in Charter cases does not cause undue delay in the courts
- streamlining reporting and compliance mechanisms across government, and
- taking a longer-term view of the costs and benefits of the Charter.

Finally, the Commission is concerned that the Four-Year Review provides an important opportunity to gain cross-government support for the human rights framework. The Charter is at its core about the relationship between government and the community and it is a commitment from government about the fundamental rights to which we are all entitled. This requires leadership from government, the public service and other parties to the human rights dialogue. This Review and any changes made to the Charter as a result provide the opportunity for ownership and engagement with the Charter, similar to the other standard regulatory framework that support good government.

Recommendations

Term of Reference 1 - Additional rights

Recommendation 1: The Charter should be amended to directly incorporate new economic, social and cultural rights from the International Covenant on Economic, Social and Cultural Rights: the right to health,⁴ the right to housing,⁵ and the right to education.⁶ They should be subject to the same range of obligations and mechanisms as existing Charter rights, but would also be considered through the lens of progressive realisation.

Recommendation 2: The Charter should be amended to incorporate the broader notion of children's rights contained in the Convention on the Rights of the Child. This would mean recognising the right to participation and involvement that is commensurate with their age and maturity. This should be built into existing section 17⁷ of the Charter, which addresses the best interests of the child.

Recommendation 3: The Charter should be amended to incorporate an acknowledgement of the women's rights contained in the Convention on the Elimination of All Forms of Discrimination Against Women. This should be added to the objects of the Charter. The objects of the Act help set out the purpose and intent of the legislation and inclusion of women's rights would add a gender-perspective to all of the Charter rights.

Recommendation 4: Rights under the International Covenant on Civil and Political Rights should be included in the Charter unless they fall within purely federal jurisdiction (such as Article 6 - genocide, Articles 12 and 13 - migration, Article 23 -marriage). The line between federal and state matters has not been drawn in the right place as the Charter stands. The right to found a family (Article 23(2)) and the right to birth registration (Article 24(2)) are relevant to State activities and should be included in the Charter. Respect for a parent's liberty to ensure the religious and moral education of their children in conformity with their own conviction (Article 18(4)) should also be included in the Charter to ensure full protection of religious freedoms.

⁴ Article 12 of the ICESCR provides for the right to the enjoyment of the highest attainable standard of physical and mental health (article 12).

⁵ Article 11 of the ICESCR provides for the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

⁶ Article 13 of the ICESCR provides for the right to education, including free and compulsory primary education, generally available and accessible secondary education and higher education that is equally accessible to all, on the basis of capacity.

⁷ Section 17(2) of the Charter says: 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.

Recommendation 5: In our consultations with the community, people told the Commission that the rights of people with disability need greater recognition and support in Victoria. The Charter should specifically recognise the rights of people with disability. In particular, it should respect individual autonomy, the right to enjoy legal capacity on an equal basis with others, and protection of the integrity of the person. This should be added to the objects of the Charter. The objects of the Act help set out the purpose and intent of the legislation and recognising the general principles from the Convention on the Rights of Persons with Disabilities in these provisions would help inform the interpretation of the rest of the Charter.

Term of Reference 2 - Self-determination

Recommendation 6: That the Charter should include a right to self-determination for Victorian Aboriginal people.

Recommendation 7: The Government should resource education and consultation programs for the Victorian Aboriginal community to facilitate understanding and awareness about the practical impact of the Charter and the right to self-determination.

Term of Reference 3 - Auditing, reporting and review – supporting transparency and accountability in government

Recommendation 8: All public authorities should integrate reporting on their compliance with human rights in their annual reports.

Recommendation 9: Government should conduct a review and consolidation of reporting requirements and develop a streamlined consolidated mechanism for reporting on compliance with human rights, privacy, multiculturalism and other areas of compliance reporting where reporting is required.

Recommendation 10: The annual report by the Commission on the operation of the Charter should continue to be tabled in Parliament as a resource for public authorities and a central accounting mechanism for public authorities to the community.

Recommendation 11: The Charter should be integrated into the normal compliance procedures of public authorities, such as the work of audit and risk committees and the Victorian Risk Management Framework.

Recommendation 12: The Commission should be able to review the compliance of a nominated public authority's policies, programs or practices with human rights, consistent with similar powers held by other regulators, such as the Victorian Auditor-General's Office, the Victorian Privacy Commissioner and many others.

Term of Reference 4 - Remedies when the government acts unlawfully

Recommendation 13: Section 39 should be amended to provide a free standing cause of action for breaches of human rights with matters to be determined by the Victorian Civil and Administrative Tribunal at first instance.

Recommendation 14: The Charter should provide a statutory complaint handling process with access to an alternative dispute resolution service.

Recommendation 15: Section 39(1) of the Charter should be redrafted to make clear that unlawfulness under the Charter is the basis for administrative review.

Recommendation 16: Section 39(2) of the Charter should provide Courts and Tribunals with discretion to provide an administrative remedy in first instance and only consider damages if an administrative remedy does not adequately address the harm caused by the breach of human rights.

Recommendation 17: Section 39(2) of the Charter should provide that Charter breaches may influence the calculation or award of damages where that remedy has been sought in relation to a non-Charter cause of action.

Term of Reference 5(a) - Shaping laws in Victoria

Recommendation 18: A draft statement of compatibility should accompany exposure drafts of Bills. This will provide transparency about the human rights issues involved and allow for informed community engagement.

Recommendation 19: The impact of proposed measures on human rights should be part of the assessments that are prepared with Cabinet submissions. This would inform the Government's internal decision-making processes and give structure to the obligations of public authorities to consider relevant Charter rights when making decisions.

Term of Reference 5(b) - Human rights and the work of Parliament

Recommendation 20: Statements of compatibility and SARC reports should address Charter rights that are likely to be limited or infringed by a Bill in a substantive way. This should include an analysis of the reasonableness and proportionality of any limits on human rights.

Recommendation 21: A supplementary statement of compatibility should be issued if substantive amendments are made to a Bill while it is before Parliament.

Recommendation 22: SARC should be given time to report and Ministers should answer SARC's questions before a Bill is voted on unless urgent circumstances can be shown. This process should be recognised in parliamentary procedures.

Recommendation 23: Where significant human rights issues are identified, SARC should be required to provide an opportunity for community consultation that enables human rights issues to be subject to broad scrutiny.

Recommendation 24: SARC should be able to recommend to Parliament that further debate on a Bill be adjourned for a set period of time to allow for consultation when a Bill raises significant human rights issues.

Recommendation 25: SARC must be adequately resourced to fulfil its mandate. Consideration should be given to expanding SARC and creating a specialist Human Rights Sub-Committee to assist with this.

Recommendation 26: SARC should be required to report on regulations where it forms the view that they may infringe human rights.

Term of Reference 5(c) - The Charter and public authorities: Encouraging client-focused services and decision-making

Recommendation 27: The Charter should retain the requirement in section 38 that public authorities comply with human rights in decision-making and continue to integrate human rights into their normal planning, policy, risk management, and service delivery work.

Recommendation 28: The Government should require public authorities to report on human rights compliance through a streamlined mandatory annual reporting framework to ensure the consistent integration of human rights compliance into front line service delivery.

Recommendation 29: The Government should continue to require public authorities to train and educate staff and the community about the Charter and the impact of human rights on service delivery and decision making.

Term of Reference 5(d) – The Courts

Recommendation 30: The section 32 interpretive mandate is an essential component to develop meaningful and robust human rights outcomes for Victorians. It should be maintained in order to achieve transparency and accountability in government decision-making and good judicial outcomes for Victorians.

Recommendation 31: The Attorney-General's power to intervene under section 34 and the Commission's power to intervene under section 40 should be retained at this early stage in the development of Charter case law.

Recommendation 32: The section 35 notification requirement should be retained. Section 35 should allow for a residual discretion in the judge to relieve a party from giving immediate notice where to do so would unduly delay or disrupt a proceeding. No set period of notice should be required.

Recommendation 33: The need for a notification requirement should be reconsidered in the eight-year review of the Charter when the jurisprudence is further developed.

Recommendation 34: The section 36 declaration of inconsistent interpretation is an integral feature of a robust human rights dialogue, supports parliamentary sovereignty, and should be retained.

Term of Reference 5(e) – Better outcomes for Victorians

Recommendation 35: The Charter should be amended to give the Commission jurisdiction to receive human rights complaints, and to handle complaints by way of a free, impartial and voluntary dispute resolution service in the model offered under the *Equal Opportunity Act 2010*.

Recommendation 36: There should be continued financial support from Government for education and advocacy work so that the community can continue to build their understanding of the application of the Charter.

Term of Reference 6 – Benefits and costs of the Charter

Recommendation 37: The Government undertake a cost benefit analysis of a human rights regulatory framework to inform the further review of the Charter. This work should identify:

- the long-term impact of the human rights framework
- the economic benefits to disadvantaged communities within Victoria, if any
- costs and benefits associated with the work of government.

Recommendation 38: Existing audit and review frameworks should require human rights compliance to be incorporated as a core requirement in the assessment of performance of public authorities against legislative obligations and other key indicators.

Term of reference 7 – Strengthening the Charter

(a) Clarifying the term ‘public authority’

Recommendation 39: The Charter needs to continue to cover functional public authorities so that the Government cannot simply contract out of its human rights obligations. However, section 4(2)(b) of the Charter should be amended to clarify what is meant by a function that is ‘connected to or generally identified with functions of government’.

Recommendation 40: When passing laws that create a statutory authority, Parliament should clearly indicate its intention that the body is a public authority for the purposes of the Charter or not.

Recommendation 41: National schemes and model laws should be Charter-compliant when they are implemented in Victoria. Charter obligations are based on international law that applies across Australia. There is no reason to give Victorians lesser protection when entering into these arrangements.

(b) The Charter should apply to all public authorities – exemptions should be removed

Recommendation 42: The Parole Boards’ exemption from the Charter should be removed.

Recommendation 43: What has now become the ‘exemption provision’ should be removed from the Charter. This means removing section 4(1)(k) and amending section 46 to remove the power of the Governor in Council to make regulations prescribing entities not to be public authorities.

(c) Clarifying the limitations on rights

Recommendation 44: Section 7(2) should be retained as it provides a clear and workable test for determining whether limitations on rights are reasonable and proportionate. However, the Charter should also recognise that some rights are absolute.

Recommendation 45: Training programs for public authorities and parliamentarians should include practical guidance on how reasonable and proportional limits should be applied.

Recommendation 46: Internal limitations adapted from international law should be applied consistently in the Charter to avoid confusion in the interpretation and application of these rights.

(d) Equality and non-discrimination

Recommendation 47: The interaction between the right to equality and the definition of discrimination in the Equal Opportunity Act should be monitored and considered in the Eight-Year Review of the Charter. This would allow a better opportunity for examination of how this provision is operating in practice.

(e) Eight-Year Review

Recommendation 48: The Government should develop a plan of action leading up to the Eight-Year Review. This should include:

- government-led consultation on a model for improvements to the Charter for consideration by the community
- an assessment of the progress of public authorities in implementing their obligations under the Charter including their integration of the Charter into core business activities
- consideration of how human rights complaints have been addressed
- an examination of the operation of the right to equality and its relationship with the Equal Opportunity Act
- a cost-benefit analysis of the human rights regulatory framework identifying:
 - the long-term impact of the human rights framework
 - the economic benefits to disadvantaged communities within Victoria, if any, and
 - costs and benefits associated with the work of government.