



Victorian Equal Opportunity
& Human Rights Commission

Putting principle into practice

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

1 July 2011

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Glossary of key terms and abbreviations

Term/abbreviation	Meaning
AHRC	Australian Human Rights Commission
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Cause of action	A legal ground or claim through which to seek judicial redress or relief.
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
Charter	<i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i>
Common law	This refers to the law developed by the courts and the decisions of judges, as distinct from the law contained in statutes.
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
Damages	A sum of money granted to a plaintiff in satisfaction of his or her claim.
Declaration of inconsistent interpretation	Where in a proceeding before the Supreme Court, the Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right and the Court makes a declaration to that effect.
Discrimination	In relation to a person, means discrimination within the meaning of the <i>Equal Opportunity Act 1995 (Vic)</i> on the basis of an attribute set out in section 6 of that Act. Section 6 sets lists a number of attributes in respect of which discrimination is prohibited, including age; impairment; political belief or activity; race; religious belief or activity; sex; and sexual orientation.
EOA	<i>Equal Opportunity Act 1995 (Vic)</i>

ESC	Economic, Social and Cultural Rights.
European Court of Human Rights	European Court of Human Rights is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.
General Comment	A general comment is an interpretation of the content of human rights provisions on thematic issues as published by the Human Rights Committee or another treaty body.
Human Rights Committee	The Human Rights Committee is a United Nations treaty body. It is made up of independent experts and monitors implementation of the International Covenant on Civil and Political Rights by its State parties. It is established under the Covenant.
Human rights dialogue model	The human rights dialogue model established by the Charter requires the three arms of government to consider human rights in developing, interpreting and applying Victorian law. The Charter builds in mechanisms that help the three arms of government communicate with each other about human rights issues.
International human rights instruments	International human rights laws may be found in international treaties, conventions or protocols. These are written agreements between States. International human rights may also be found in declarations, being statements of the United Nations, however, these are not legally binding.
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
Interpretive mandate	The interpretative mandate under the Charter provides that as far as it is possible to do so consistently with their purpose, all statutory provisions contained in Victorian legislation must be interpreted in a way that is compatible with human rights.

Intervention	An intervention is where the Attorney-General of Victoria or the Victorian Equal Opportunity and Human Rights Commission intervenes in a proceeding involving a question of law that relates to the application of the Charter or the interpretation of a statutory provision in accordance with the Charter, or where the Supreme Court is considering making a declaration of inconsistent interpretation. The interveners are parties to the proceedings but are there to make points about the law, not represent individuals.
National Human Rights Consultation Committee	Committee responsible for the National Human Rights Consultation initiated by the Australian Government. It aimed to seek a range of views from across Australia about the protection and promotion of human rights
National Human Rights Framework	On 21 April 2010, the Australian Attorney-General launched Australia's Human Rights Framework which outlines a range of key measures to further protect and promote human rights in Australia. The Framework acts on the key recommendations of the National Human Rights Consultation Committee and complements a number of actions the Government is already taking to encourage greater inclusion and participation in our community.
Override declaration	An override declaration is where Parliament expressly declares in that an Act or a provision of an Act has a particular effect despite being incompatible with one or more of the Charter rights or despite anything else set out in the Charter.
Progressive realisation	Progressive realisation refers to the duty imposed on all public authorities to take steps to the maximum of its available resources, with a view to achieving progressively, the full realisation of rights recognised in the Charter by all appropriate means, including where appropriate, the adoption of legislative measures.
Public Authority	<p>A public authority' includes:</p> <ul style="list-style-type: none"> • entities established by legislation that have functions of a public nature, and • entities that carry out functions of a public nature on behalf of a public authority. <p>In determining whether a person is carrying out functions of a public nature, it is relevant to consider whether:</p>

	<ul style="list-style-type: none"> • the function is conferred by legislation • the function is connected to or generally identified with the functions of government • the function is regulatory in nature • the entity is publicly funded to perform the function, and • the entity performing the function is a company all of the shares in which are held by or on behalf of the state.
SARC	Scrutiny of Acts and Regulations Committee is a Joint Investigatory Committee of the Parliament of Victoria
Section 35 Notice	A notice (in a prescribed form) that must be given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission, by a party to a proceeding before the Supreme or County Court, where a question of law arises that relates to the application of the Charter or about the interpretation of a statutory provision in accordance with the Charter.
Statements of compatibility	A member of Parliament who introduces a Bill into a House of Parliament must accompany that Bill with a statement setting out whether it is compatible with human rights. The statement must provide how it is compatible and if any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.
Treaty monitoring bodies	United Nations bodies established by the United Nations or under the various international human rights treaties which consider reports by States or in some cases consider complaints by individuals.
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity and Human Rights Commission

The Four-Year Review

The *Charter of Human Rights and Responsibilities Act 2006* requires the Attorney-General to arrange a review of the Charter after four years of operation and again after eight years of operation. These reviews were built into the legislation because the Charter is a new and developing law. The intention of Parliament was to ensure that the Charter remains flexible and effective in supporting community values and aspirations in Victoria.

Section 44 of the Charter sets out requirements for the Four-Year Review. The review is required to look at whether additional human rights should be included in the Charter, 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 must also consider whether: to include the right to Indigenous self-determination; regular auditing should be mandatory, and; a direct remedies provision should be added.

On 19 April 2011, the Attorney-General asked the Scrutiny of Acts and Regulations Committee (SARC) to undertake the Four-Year Review of the Charter.

The Attorney-General also asked the Commission to assist him by 'providing to SARC detailed information about the Commission's role and activities in relation to the Act and about the cases of which the Commission is aware in which the Act has been invoked'.¹

The Commission welcomes the Review and seeks to support SARC in its work. The Review provides an important opportunity for the community to continue to engage with government about human rights. It is also an opportunity for us all to reflect on the work of the Charter and how it can best be utilised to protect and promote the human rights of all Victorians.

The Commission's submission will address SARC's Terms of Reference and the specific request of the Attorney-General.

¹ Attorney-General's media release, 'Inquiry into Charter of Human Rights and Responsibilities Act 2006', 19 April 2011. See at: www.premier.vic.gov.au/media-centre/media-releases/653-inquiry-into-charter-of-human-rights-and-responsibilities-act-2006.html.

**SARC Terms of Reference:
Review of the Charter of Human Rights and Responsibilities Act 2006**

1. Whether the Charter should include additional human rights under the Charter, including but not limited to, rights under the –
 - (a) International Covenant on Economic, Social and Cultural Rights
 - (b) Convention on the Rights of the Child, and
 - (c) Convention on the Elimination of All Forms of Discrimination against Women?
2. Whether the right to self-determination should be included in the Charter?
3. Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?
4. Whether the Charter should include further provisions with respect to legal proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by the Charter?
5. What have been the effects of the Charter Act on –
 - (a) the development and drafting of statutory provisions
 - (b) the consideration of statutory provisions by Parliament
 - (c) the provision of services, and the performance of other functions, by public authorities
 - (d) litigation and the roles and functioning of courts and tribunals, and
 - (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?
6. What if any, have been the overall benefits and costs of the Charter?
7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

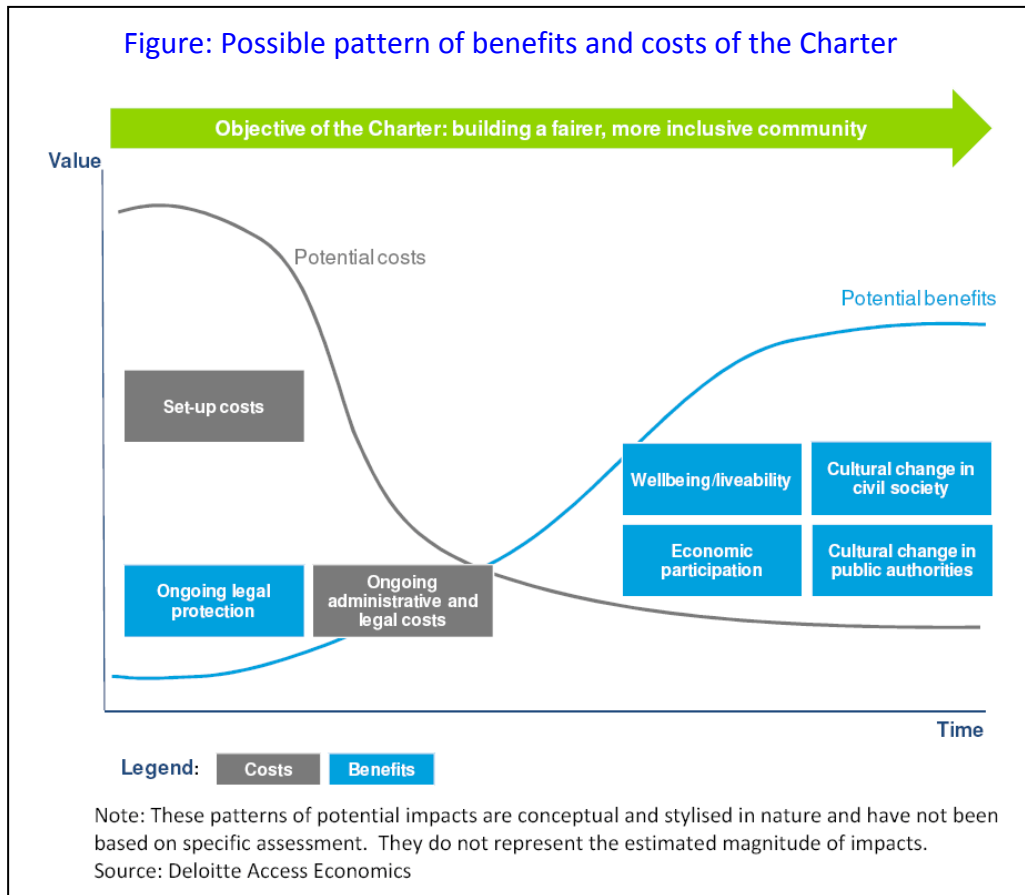
Overview

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,² and
- interventions in selected cases where there are human rights considerations before the courts or tribunals.³

The Commission also has a statutory role to assist the Attorney-General with the Four-Year Review.⁴ 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.

² *Charter of Human Rights and Responsibilities Act 2006*, s 41

³ *Charter of Human Rights and Responsibilities Act 2006*, s 40

⁴ *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

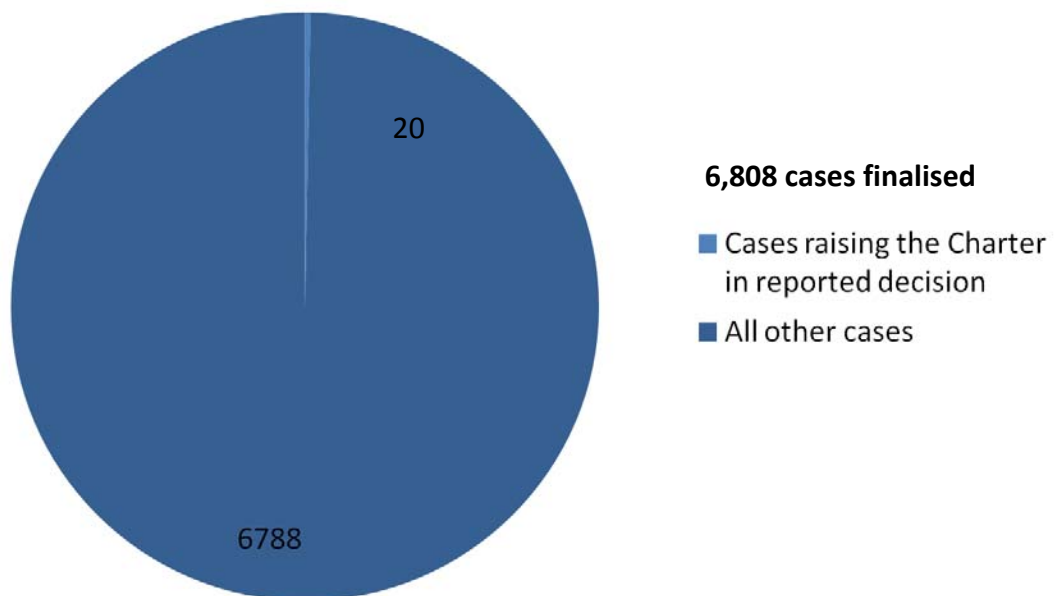
There have also been concerns that the Charter would threaten the traditional balance in our Westminster system between Parliament and the courts. The evidence of the first four years of the operation of the Charter has been that the role of the courts has been modest but appropriate and authoritative.

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

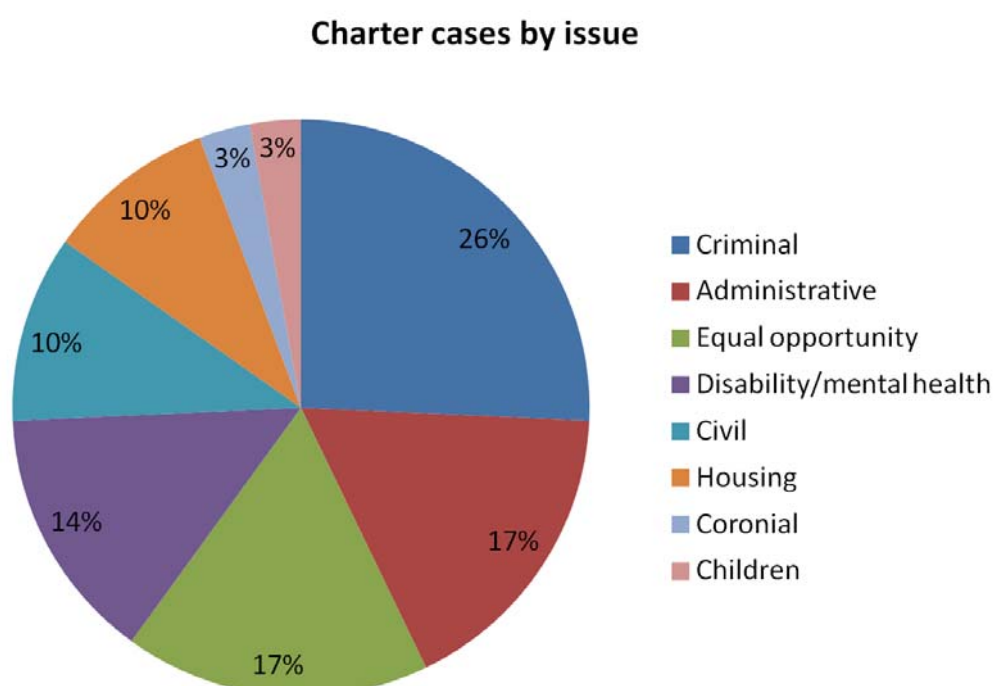
Concerns about the Charter ‘clogging up the courts’ have not been demonstrated in practice. In Victoria, and other jurisdictions like the Australian Capital Territory and New Zealand, litigation under the human rights laws have been modest. In its research, the Commission have found just over 200 cases 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 and 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 year's 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,⁵ the right to housing,⁶ and the right to education.⁷ 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 17⁸ 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.

⁵ Article 12 of the ICESCR provides for the right to the enjoyment of the highest attainable standard of physical and mental health (article 12).

⁶ 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.

⁷ 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.

⁸ 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.

Background

The Charter of Human Rights and Responsibilities

The Charter guarantees some basic human rights of all people in Victoria. These human rights reflect well accepted values of the Victorian community.

Human rights are about promoting and protecting the inherent dignity of human beings. While all of us have a role to respect the rights of others, promoting and protecting fundamental human rights is primarily about the relationship between government and the people it serves.

The Charter places obligations on all three arms of government: the executive, the legislature and the judiciary. The Charter is a clear statement to the Parliament of Victoria, public authorities, courts and the Victorian community about which rights the Victorian Government will protect, how it intends to do this, and what the consequences are for failing to do so. It gives public authorities rules and a framework within which to operate, and the community a language and principles with which to engage public authorities.

A human rights dialogue

The Charter is based upon what has been called ‘the dialogue model of human rights’. Under this model, a public ‘conversation’ or exchange of views about human rights protection takes place between the three branches of government with the aim of promoting compliance with human rights, as well as developing an understanding of what these rights mean in a practical sense.

The Charter’s adoption of a dialogue model means that Parliament retains its sovereignty, because it cannot be forced to adopt a particular position on a human rights issue, and may enact legislation that is inconsistent with the human rights set out in the Charter. The Charter asks Parliament to identify the nature of the inconsistency, but there are no consequences for failing to do so. The dialogue that the Charter sets up around this decision adds to the transparency of the operation of government and encourages full consideration of the issues involved.

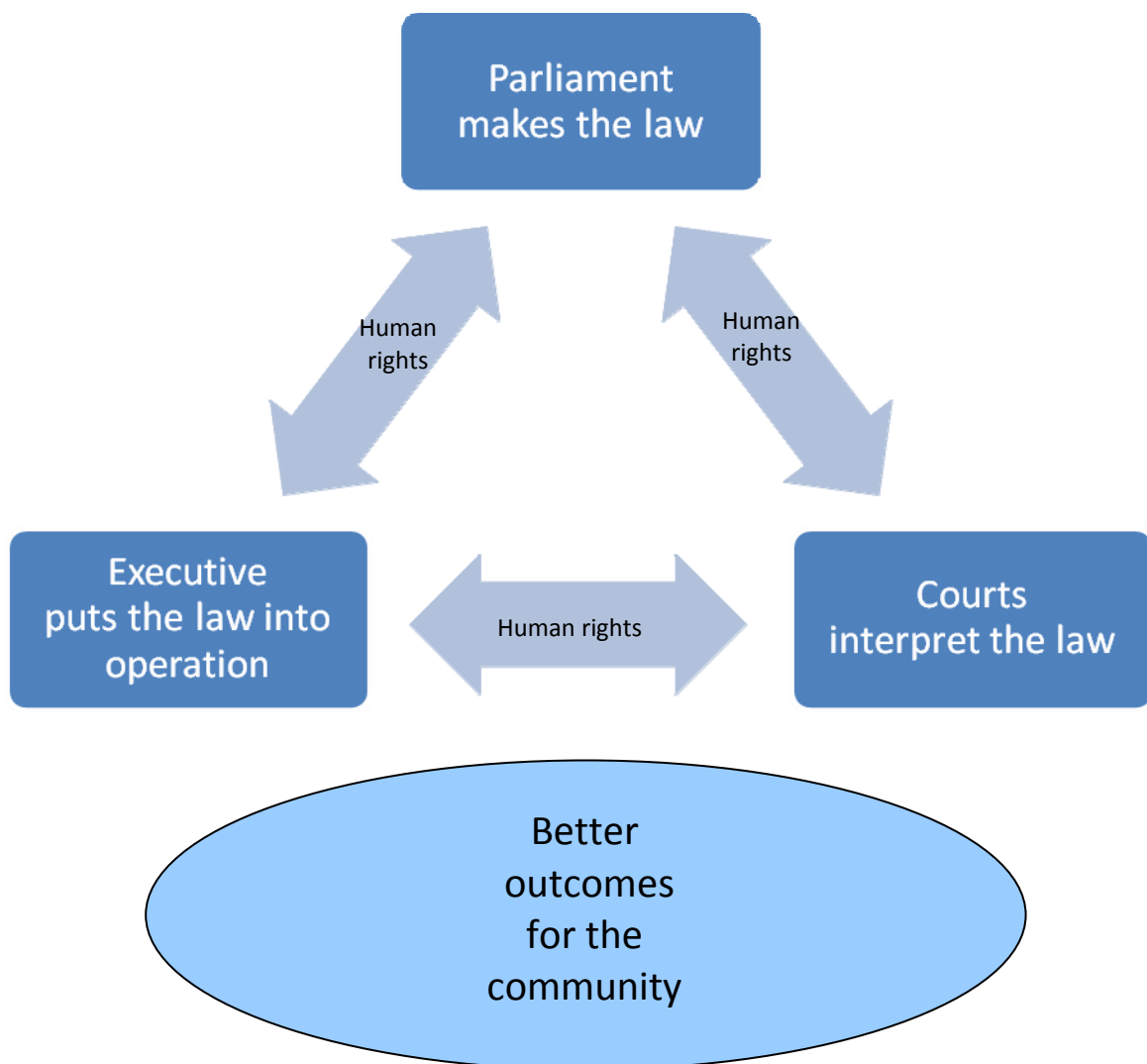
The Charter contains three key mechanisms designed to facilitate a human rights dialogue in Victoria:

- **A duty to act compatibly with human rights.** The executive arm of government and other public authorities have a positive obligation to act compatibly with the human rights contained in the Charter and to give proper consideration to those rights in the course of decision making.
- **Developing new legislation (including subordinate legislation) in compliance with the Charter.** A statement of compatibility with the Charter must be tabled

with all Bills on their introduction to Parliament outlining whether the proposed Bill meets the standards set by the Charter.

- **Interpreting and applying all laws compatibly with human rights.** All Victorian statutory provisions must be interpreted compatibly with human rights as far as it is possible to do so. This obligation is not confined to courts and the Victorian Civil and Administrative Tribunal, but extends to all entities whose role or function involves interpreting and applying the law. The Supreme Court has the power to declare that a law is inconsistent with human rights, but it does not have the power to strike down the law. This maintains the supremacy of Parliament, while at the same time ensuring Parliament is given guidance and can actively consider the human rights issues in the laws it passes.

Human rights dialogue



Charter rights

Victoria's Charter of Human Rights and Responsibilities incorporates 20 fundamental rights into the law of Victoria:

- **Recognition and equality before the law** (including being entitled to protection from discrimination): Everyone is entitled to equal and effective protection against discrimination and to enjoy human rights without discrimination. Both direct and indirect discrimination are prohibited. The definition of 'discrimination' has the same meaning as in the *Equal Opportunity Act* and includes discrimination on the grounds of a number of personal characteristics, including: age, impairment, political belief or activity, race, religious belief or activity, sex and sexual orientation.
- **Right to life**: Every person has the right to life and the right not to be arbitrarily deprived of life. It has no application to the issue of abortion (see section 48 of the Charter).
- **Protection from torture and cruel, inhuman or degrading treatment**: A person must not be tortured, treated or punished in a cruel, inhumane or degrading way. A person must not be subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.
- **Freedom from forced work**: A person must not be held in slavery or servitude, or forced to work, except as part of normal civil obligations, as part of a court order, or during emergency situations.
- **Freedom of movement**: People who are lawfully in Victoria have the right to enter and leave the state, to move around freely within it and to freely choose where they live.
- **Privacy and reputation**: A person's personal privacy, family, home or correspondence can not be unlawfully or arbitrarily interfered with. Privacy relates to personal autonomy as well as one's personal space.
- **Freedom of thought, conscience, religion and belief**: People have the freedom to have or choose a religion or belief, and the freedom to demonstrate their religion or belief. They can do this privately or publicly – at home, at work or in a place of worship – as part of a group or alone.
- **Freedom of expression**: People have the right to hold opinions without interference from the government or from other people. People have the right to seek out, receive and pass on information and ideas of all kinds. There are special duties and responsibilities that come with this right: to respect the rights and reputations of others and lawful restrictions for the protection of national security, public order, public health or public morality.
- **Peaceful assembly and freedom of association**: People have the right to assemble and meet peacefully, to freely associate with others and to form and join trade unions.

- **Protection of families and children:** Families are entitled to be protected by society and the State. Children have the right to protection according to their best interests, without discrimination. A child is a person under 18 years of age.
- **Taking part in public life:** Every person has the right to take part in public affairs without discrimination. Every eligible person has the right to vote, be elected and to have equal access to the Victorian Public Service and public office. This right refers to democratic participation rather than social or community participation.
- **Cultural rights** (including recognition that human rights have a special importance for the Aboriginal people of Victoria): People of all cultural, religious, racial or linguistic backgrounds have the right to enjoy their culture, declare and practice their religion and use their languages. Aboriginal persons possess distinct cultural rights, and must not be denied the right to enjoy their identify and culture, including language, maintenance of kinship ties, and their spiritual, material and economic relationship with the lands and waters and other resources, with which they have a connection under traditional laws and customs.
- **Property rights:** A person must not be deprived of his or her property except in accordance with law.
- **Right to liberty and security of person:** Everyone has the right to freedom and security. The right to liberty refers to arbitrary (unreasonable) or unlawful arrest or detention in any setting. There are very specific procedural rights when someone is arrested on a criminal charge. The right to security of the person in international law refers to personal safety.
- **Humane treatment when deprived of liberty:** All persons deprived of liberty by arrest or detention must be treated with humanity and with respect for the inherent dignity of the person.
- **Children in the criminal process:** A child charged with committing a crime or a child who has been detained without charge must be held separately from all detained adults, brought to trial as quickly as possible, and treated in a way that is appropriate for his or her age.
- **Fair hearing:** 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:** A person who is charged with a crime has the right to be presumed innocent until proven guilty, to be informed of their charge and tried without unreasonable delay, the right not to be compelled to testify or confess guilt and the right to have any conviction and sentence reviewed by a higher court.
- **The right to not be tried or punished more than once:** A person must not be tried or punished more than once for the same offence if he or she has already been convicted or acquitted of that offence in court.
- **Retrospective criminal laws:** A person has the right not to be prosecuted or punished for acts or omissions that were not criminal offences at the time they were committed.

The human rights contained in the Charter are not absolute and may be subject to limitations. The Charter sets out a test for assessing whether particular limitations on a human right are permissible. Under the Charter, a human right may be limited only when doing so can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. This means that any limitation placed on a human right must be reasonable, necessary, justified and proportionate.

For more information about the Charter, visit the Commission's website at: www.humanrightscommission.vic.gov.au.

The broader human rights law context and tradition

The Charter sits in a broader context of human rights protection internationally and locally. It also draws on the experience of human rights legislation in other jurisdictions. While the Charter is not locked into any of these frameworks, they do offer decades of experience of communities and the courts using human rights law. The Charter is informed by these traditions.

International law

Australia has a proud record of respect and acknowledgment of international human rights. In 1948, the United Nations adopted the Universal Declaration on Human Rights. Australia played a role in developing this and several international human rights treaties that followed. Signed by a federal Labor Government in 1972 and later ratified by a federal Coalition Government, the International Covenant on Civil and Political Rights (ICCPR) represents a widely-recognised and accepted standard of human rights that transcend political differences and have widespread acceptance in our community.

The Charter builds on this tradition and is largely based on the ICCPR. The Charter is also interpreted and applied in light of the wealth of experience in the application of international human rights law.

Australia has obligations under seven core international human rights treaties⁹:

1. International Convention on the Elimination of All Forms of Racial Discrimination (CERD): Australia ratified on 30 September 1975.
2. International Covenant on Economic, Social and Cultural Rights (ICESCR): Australia ratified on 10 December 1975.
3. International Covenant on Civil and Political Rights (ICCPR): Australia ratified on 13 August 1980.
4. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Australia ratified on 28 July 1983.

⁹ See Universal Periodic Review National Report – Australia 2010 (UPR), [37] – [40]. The UPR is available on the federal Attorney-General's Department website at: www.ag.gov.au/www/agd/agd.nsf/page/Humanrightsandanti-discrimination_InternationalHumanRights_UniversalPeriodicReview (last visited 27 January 2011).

5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): Australia ratified on 8 August 1989.
6. Convention on the Rights of the Child (CRC): Australia ratified on 17 December 1990.
7. Convention on the Rights of Persons with Disabilities (CRPD): 17 July 2008.¹⁰

Ratifying a convention does not mean that those rights automatically become law in Australia. It means that Australia commits to making sure that those rights are protected in Australian law, policy and practice.

By becoming a Party to these treaties, Australia has assumed obligations and duties under international law to respect, protect and fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of individual's human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

While this obligation rests with the Australian Government, all governments play a role in ensuring that they are fulfilled within their jurisdiction. The Charter helps to do this in Victoria.

Complaints and review under the international system

Australia's obligations under international law are subject to scrutiny.

Some international treaties have procedures that allow individuals to complain directly to the United Nations if they think their rights have been violated.¹¹ A person can only complain to the United Nations through the individual communications procedure if they have exhausted all domestic remedies first; meaning that they must have tried to get justice using all available complaints mechanisms and legal processes in their own country.

¹⁰ The text of the nine core human rights treaties and their optional protocols, along with the text of the other major human rights instruments, are available on the website of the Office of the United Nations High Commissioner for Human Rights at: www2.ohchr.org/english/law/ (last visited 25 January 2011). The two core human rights treaties to which Australia are not a party are: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); and International Convention for the Protection of All Persons from Enforced Disappearance (CPED).

¹¹ The ICCPR, CEDAW, and CERD have optional protocols that allow individual communications. The CAT and CERD contain provisions that allow individual communications. Australia has signed the optional protocols to ICCPR, CRPD and CEDAW, and has ratified CERD and CAT, which allows individuals to take complaints to those treaty bodies.

Each national government that ratifies a treaty is also regularly reviewed by the United Nations Committee responsible for monitoring that treaty. When a country is due for its periodic review, the government must prepare a report to the United Nations outlining how they are meeting their obligations under that treaty. Civil society can prepare 'Shadow reports' to accompany the government report for the Committee's consideration. The Committee will release concluding comments or recommendations after reviewing the country, and the country's next report should address the concerns and recommendations raised during the previous review. The time between periodic reviews varies between treaties, but is usually every two - five years.

In 2006, the United Nations established the 'Universal Periodic Review' process. The Universal Periodic Review looks at each country's human rights performance generally, and against all the treaties it has ratified. Countries report every four years by submitting a national report, and Australia's first Universal Periodic Review took place in January 2011.¹²

In addition to these treaties, there are a number of other international developments that have a bearing on human rights for Victoria. Importantly, the United Nations Declaration on the Rights of Indigenous Peoples (2007) provides a framework for protecting indigenous rights.

Victorian law

The Charter also builds on a strong tradition of rights protection in Victoria. The common law sets out key protections in the relationship between government and citizens, such as the right to liberty and fair trial protections.

Rights are also protected through a range of other laws, such as: civil procedure laws, criminal laws, laws establishing government agencies, equal opportunity laws, and privacy law to name but a few.

The Charter strengthens and clarifies these protections. As we will discuss further below, it fills gaps. The Charter also quite simply puts human rights in one place and makes them easier for the community to use. This helps to ensure that the community and the government are clear on the fundamental rights that we all hold and expect government to observe.

The operational aspects of the Charter also build in steps to ensure that human rights are considered by government at every relevant step along the way. This makes human rights a part of the everyday business of government.

¹² A copy of the Australian Government's Universal Periodic Review National Report is available at: www.ema.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationInternational_Human_Rights

The new Equal Opportunity Act – a proactive approach and aligning obligations

One of the laws the Charter complements is the Equal Opportunity Act, which has operated in Victoria since the 1970s.

A new *Equal Opportunity Act 2010* commences on 1 August 2011. This is an important development that more closely aligns the obligations of public authorities under the Equal Opportunity Act and the Charter.

The *Equal Opportunity Act 2010* still makes it against the law to discriminate against people on the basis of a number of different personal characteristics, and also prohibits sexual harassment and victimisation. The Act applies to activities in eight areas of public life: employment, education, the provision of goods and services, accommodation, clubs, sport, disposal of land and local government.

Both the Charter and the Equal Opportunity Act are part of the framework of Victorian laws that promote and protect respect for human rights. The Commission has important functions under both of these Acts, including a role in educating and informing the community about their rights and responsibilities, and advocating for these laws and their objectives.

The concepts of equality and non-discrimination are at the heart of human rights, as expressed in international human rights law and section 8 of the Charter.

The close link between the two Acts has now been clearly recognised in the objects of the Equal Opportunity Act, directly referring to further promoting and protecting the right to equality in the Charter.¹³ The Equal Opportunity Act and the Charter seek to protect persons from discrimination and promote substantive equality.

The obligations of duty-holders under both Acts are also complementary. The Charter creates a positive obligation for public authorities by requiring them to act compatibly with human rights and to take relevant human rights into account when making decisions.

The *Equal Opportunity Act 2010* will also make the obligations of duty-holders clearer by introducing a positive duty to take reasonable and proportionate steps to eliminate discrimination, sexual harassment and victimisation.¹⁴

The experience of public authorities in addressing their obligations under the Charter will be a great help in their preparation for the commencement of the positive duty obligation.

¹³ *Equal Opportunity Act 2010*, section 3.

¹⁴ *Equal Opportunity Act 2010*, section 15.

As we will demonstrate below, the Charter has led to public authorities:

- scanning their environment for human rights issues
- planning how to best address them
- acting in a way that is compatible with human rights, and
- reviewing their policies and activities on a regular basis to identify systemic issues and improve practice.



This investment will pay off by helping public authorities to comply with the new Equal Opportunity Act from the outset.

Human rights laws in other jurisdictions

The protection of human rights in domestic law has a long and broad history in other countries. While the Four-Year Review is looking at a very short history of the Charter in Victoria, it can draw on a rich tradition elsewhere.

Most democratic countries - from Canada to Chile, Indonesia to Ireland, South Korea to Sweden – have human rights protection in their national law. Some have had modern bills of rights for decades. For example, Canada has had a bill of rights in some form since 1960. That is half a century’s experience of the legislation in operation and before the courts.

The Charter drew significantly on the human rights laws that operate successfully in other jurisdictions, in particular the Australian Capital Territory, the United Kingdom and New Zealand. All of these are statutory human rights laws that recognise parliamentary sovereignty and respect the traditional balance between Parliament and the courts in the Westminster tradition.

A summary of the application and consideration of human rights instruments in other Australian states and federally, and some key international examples are set out at **Appendix A**.

Term of Reference 1 - Additional rights

Term of Reference 1: Should the Charter include additional human rights, including but not limited to, rights under the –
(a) International Covenant on Economic, Social and Cultural Rights
(b) Convention on the Rights of the Child
(c) Convention on the Elimination of All Forms of Discrimination against Women

Key points and recommendations

The Charter review specifically requires consideration of whether additional human rights should be included, including those under the three international instruments listed above.

The Commission has conducted targeted community consultation within particular sectors to inform its response to this Term of Reference. The Commission has also considered rights under the Convention on the Rights of Persons with Disabilities (CRPD), which was ratified after the Charter and therefore not included in the Charter review provision in 2006. The CRPD has wide community support which warranted the Commission to also seek community views on this Convention. The Commission has also considered the additional rights under the International Covenant on Civil and Political Rights (ICCPR), not initially included in the Charter.

The Commission supports the inclusion of specific additional rights in the Charter to reflect the community feedback received about the importance of government recognising key citizens' rights in legislation, in this case the Charter. The community feedback the Commission received has strongly supported the inclusion of additional key rights.

The inclusion of additional human rights in the Charter is consistent with the well-accepted view that human rights are 'universal, indivisible, interdependent and interrelated' and human rights should be respected in a fair and equal manner.¹⁵

Specific treaties mentioned in the Terms of Reference should be addressed in the Charter as well as additional rights under the ICCPR and the CRPD. Many of these rights are already protected in Victorian law (for example, privacy, the right to education, health services, eliminating violence against women, work rights and accommodation). Incorporating them into the Charter would consolidate existing rights protection in Victoria and provide a clear and accessible statement of rights for all Victorians.

¹⁵ Article 5 of the Vienna Declaration and Program for Action (1993) A/CONF.157/23, 12 July 1993 and s 10A(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth).

However, the Charter must remain accessible and workable as a State law. Outlined below are a number of ways additional rights can be incorporated into the Charter to achieve this.

The Commission supports the inclusion of the following rights in the Charter: the right to housing, the right to health, and the right to education (subject to an appropriate limitation that these rights are to be progressively realised).

The right of all children to participation should be included in addition to existing protections in section 17 of the Charter.

Gaps between the ICCPR and the Charter should be filled: the right to birth registration (Article 24(2) of the ICCPR), the right to found a family (Article 23(2) of the ICCPR), and the liberty of parents to raise children in the religion and morals of their choosing (Article 18(4) of the ICCPR).

Women's rights and the rights of people with disability should be recognised in the objects of the Charter to inform the interpretation of all Charter 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,¹⁶ the right to housing,¹⁷ and the right to education.¹⁸ 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 17¹⁹ 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.

¹⁶ Article 12 of the ICESCR provides for the right to the enjoyment of the highest attainable standard of physical and mental health (article 12).

¹⁷ 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.

¹⁸ 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.

¹⁹ 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 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.

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.

Discussion

The terms of the review in section 44 of the Charter requires consideration of whether additional human rights should be included as human rights under the Charter, including but not limited to, those protected under:

- the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the Convention on the Rights of the Child (CRC), and
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

In addition to these instruments, the Commission’s submission addresses: (1) gaps in coverage between the ICCPR and the Charter, and; (2) the rights under the CRPD.

Since commencement of the Charter on 1 January 2007, the Commission has examined the integration of these additional rights, and the international conventions that establish these rights, to generate discussion in the community in anticipation of the Four-Year Review. The reports on these consultations provide a resource for the Four-Year Review (see **Appendices B, C, D, F, G and H**), and have informed the Commission’s recommendations.

The international human rights system is based on State sovereignty, and only State Parties (i.e. countries) have the capacity to enter into treaties, and are consequently bound by these obligations. Even though state governments such as Victoria's are not direct signatories to these conventions, Victoria can help Australia as a whole implement its obligations under international law through its laws and actions. It is therefore appropriate that they be considered as part of our domestic human rights framework.

Human rights in Victorian law

Victoria has already incorporated many of Australia's international human rights obligations into state law in addition to the Charter. Some examples include:

- the *Information Privacy Act 2000* protects the right to privacy, giving effect to the obligations under Article 17 of the ICCPR
- the *Children, Youth and Families Act 2005* enshrines the 'best interests' of children principle required by the Convention on the Rights of the Child²⁰
- the purpose of the *Disability Act 2006* is 'to enact a new legislative scheme for persons with a disability which reaffirms and strengthens their rights and responsibilities and which is based on the recognition that this requires support across the government sector and within the community'
- Part IVA of the *Adoption Act 1984* deals with adoptions under the Hague Convention and schedules the Hague Convention to the Act
- the *Education and Training Reform Act 2006* provides for free education for students under the age of 20²¹
- the objectives of the *Health Services Act 1988* include ensuring that 'an adequate range of essential health services is available to all persons resident in Victoria irrespective of where they live or whatever their social or economic status'²²
- a number of Victorian Acts protect housing rights, including the *Residential Tenancies Act 1997*, which defines the rights and duties of tenants and owners. But people have to deal with all of this different legislation to work out what their rights are.

²⁰ Children, Youth and Families Act 2005, Division 2, section 10 - Best interests principles.

²¹ Education and Training Reform Act 2006, Division 2, section 2.2.4.

²² Health Services Act 1988, section 9 (b).

There are a number of ways of approaching the task of bringing international human rights law into a domestic law context. For example:

- **Include specific rights by scheduling international instruments to the Charter:**
The approach taken by the Commonwealth in the *Australian Human Rights Commission Act 1986* (Cth) to make specific reference to the international treaty in the legislation and then include text of the international instrument in the statute or in a schedule is a simple way of ensuring that all human rights are protected and being clear to users of the legislation what rights are protected and their origin. It is also possible to schedule an international treaty to Victorian legislation. The *Adoption Act 1984* schedules the *Hague Convention on Protection of Children and Co-Operation In Respect Of Intercountry Adoption* to regulate inter-country adoption to, and from, Victoria.
- **Reference the international human rights instruments by legislative provision:**
Section 9 of the *Racial Discrimination Act 1975* (Cth) makes racial discrimination unlawful if an act has the effect of nullifying or impairing the enjoyment of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. Section 9(2) then states: *A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.*
- **Include specific rights from international instruments in the Charter:**
This may involve both: (a) enhancing objects of the Charter in section 1, and; (b) inserting specific rights into Part 2 of the Charter.

Example – influence of objects clauses when interpreting legislation

In *Tickner v Bropho* (1993) 114 ALR 409, the Full Federal Court considered whether the Minister was obliged to consider applications for declarations under sections 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). Those sections provided that the Minister ‘may’ make declarations in relation to areas if applications are received. The Act includes an objects clause:

4. Purposes of Act

The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

The Court unanimously held that the Minister had an obligation to consider applications. The objects clause was cited as part of the reasoning:

It would be surprising if an Act that has as its stated purpose the preservation from injury of areas that are of particular significance to Aboriginals did not require the Minister to consider, on receipt of a valid application for a declaration, whether the subject of the application was in fact a significant Aboriginal area. In my view, to interpret the Act in such a way as to impose no such requirement would frustrate its purpose and an interpretation that has such an effect should be rejected (per Black CJ at page 418).

Ultimately, the best combination of these options will depend on what the Parliament seeks to include in the Charter. The Commission has set out the latter option as being the simplest and clearest way of including additional rights without: (a) significantly restructuring the existing Act, and; (b) maintaining the approach to the Charter that aims to set out the rights of Victorians in a clear and simple manner. This approach in relation to each of the international instruments under consideration is addressed in more detail below.

International Covenant on Economic, Social and Cultural Rights

Economic, social and cultural rights (ESC) as they are generally understood come from the International Covenant on Economic, Social and Cultural Rights (ICESCR).²³ The Covenant was ratified by Australia in 1975.

Key points and recommendations

The Commission supports amending the Charter to incorporate key economic, social and cultural rights contained in the ICESCR. In consultations over the past four years, people have told the Commission that economic, social and cultural rights are very important and should be protected equally with civil and political rights.

ICESCR requires that steps be taken ‘to the maximum of ... available resources, with a view to achieving progressively the full realisation of the rights recognised’. This recognises that fully achieving these rights will take time and will be dependent on the resources that government has available.

Victorian laws already provide protection for most ESC rights such as health, education, work and housing in variety of ways. Some are already included in the Charter, such as the protection of families and children in section 17 and cultural rights in section 19. Including other relevant ESC rights in the Charter would consolidate existing protections.

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,²⁴ the right to housing,²⁵ and the right to education.²⁶ 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.

²³ *International Covenant on Economic, Social and Cultural Rights* (ICESCR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 3 January 1976).

²⁴ Article 12 of the ICESCR provides for the right to the enjoyment of the highest attainable standard of physical and mental health (article 12).

²⁵ 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.

²⁶ 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.

What are economic, social and cultural rights?

The rights in ICESCR are:

- The right of self-determination. Peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development (article 1). This is also article 1 in the ICCPR.
- Rights will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (article 2). This is also article 2 of the ICCPR.
- The equal right of men and women to enjoy ESC rights (article 3). This is also article 3 of the ICCPR.
- The right to work, including the right to gain a living by work which freely chosen (article 6); just and favourable conditions of work; equal pay for work of equal value; Safe and healthy working conditions (article 7).
- The right to form and join trade unions (article 8).
- The right to social security (article 9).
- Protection of the family as the natural and fundamental group unit of society; special protection for mothers during a reasonable period before and after childbirth; special protection of children and young persons without any discrimination, particularly from economic and social exploitation or harmful employment (article 10).
- The right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions (article 11).
- The right to the enjoyment of the highest attainable standard of physical and mental health (article 12).
- 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 (article 13).
- The right to take part in cultural life; to enjoy the benefits of scientific progress and its applications; and to benefit from the protection of the moral and material interests resulting from a person's own scientific, literary or artistic production (article 15).

Discussion

The practical application of Economic, social and cultural rights

General Comments issued by the Committee on Economic, Social and Cultural Rights require ESC rights to be available, accessible, acceptable and of sufficient quality.²⁷ John Tobin provides a practical example of the impact of these normative requirements with respect to the right to health.²⁸

Obligation	Right to health
Available	Reasonable measures must be taken to ensure the provision of a functioning public health system and health care facilities, goods and services that are available in sufficient quantity.
Accessible	Reasonable measures must be taken to ensure that health facilities, goods and services are accessible without discrimination. They must be physically accessible; economically accessible (or affordable); and be accompanied by access to appropriate information.
Acceptable	Reasonable measures must be taken to ensure that all health facilities, goods and services are respectful of medical ethics and appropriate from a gender, cultural and age perspective.
Quality	Reasonable measures must be taken to ensure that all health facilities, goods and services are scientifically and medically appropriate and of good quality.

The Commission's work on economic, social and cultural rights

There is significant interest and debate about ESC rights and whether they should receive statutory protection.

After the original consultations for the Charter, the Victorian Consultation Committee recommended the Charter should not initially include protection of ESC rights. Nevertheless, the Committee recommended revisiting this decision at the Four-Year Review stage in acknowledgement of 'the level of community support for these latter rights'.²⁹ In fact, 41% of submissions to the consultation called specifically for the inclusion of ESC rights, despite the clear wording of the Government's Statement of Intent asking the Committee to 'focus on the rights in the ICCPR' and not focus on the rights contained in other covenants.³⁰

²⁷ See for example GC 14 *The right to the highest attainable standard of health*. 11/08/2000 E/C.12/2000/4. (General Comments), GC 13, *The right to education (Art.13)*: 08/12/1999 E/C.12/1999/10. (General Comments).

²⁸ Dr John Tobin, 'Occasional Paper – Economic, Social and Cultural Rights and the Charter of Human Rights and Responsibilities, 2010, p.10. The Paper is available at: www.humanrightscommission.vic.gov.au, p. 6.

²⁹ Note 3, p. 26.

³⁰ 'Human Rights Statement of Intent, May 2005' in *Rights, Responsibilities, Respect: the Report of the Human Rights Consultation Committee*, Department of Justice 2005, Appendix B.

In 2009, the Commission engaged an independent consultant to help develop an understanding of what ESC rights mean and how they might be included within a human rights law like the Charter. The paper, *Economic, social and cultural rights and the Charter of Human and Rights and Responsibilities – A framework for discussion*,³¹ addressed some of the most contentious aspects of the debate, including the role of the courts in adjudicating ESC rights, economic resource concerns and the democratic deficit debate. A copy of the paper is at **Appendix B**.

Community consultations on economic, social and cultural rights

To further build the dialogue in the community in the lead-up to the Four-Year Review, in 2010 the Commission engaged independent consultants to gauge attitudes within the general community towards ESC rights, and towards their protection in the Charter. The consultations culminated in the report *Talking Rights – Consulting with Victorians about ESC rights and the Charter*³² were based upon a discussion of the issues raised in the 2009 Options Paper, and the possible models for the protection of ESC rights outlined in that paper. A copy of this report is at **Appendix C**.

The majority of participants (about 66%) were in favour of including ESC rights in the Charter. The overwhelming majority considered these rights to be very important; even those who did not favour including them in a statutory human rights act.

General attitudes of participants to ESC rights fell roughly into three evenly divided categories:

1. those who thought overall that protection seems adequate, but we could and should do better (generally in favour of inclusion)
2. those who thought ESC rights are not sufficiently protected (generally in favour of inclusion)
3. those who thought ESC rights are already sufficiently protected (generally against inclusion).

The first group felt that Australia, as a reasonably affluent nation, had an obligation to try to improve rights protections, and that doing so is consistent with our commitment to equality and a fair go.

Housing, healthcare and income were the rights that this group felt most likely were not adequately protected.

This cohort raised a number of questions, including: What would be the minimum standard? What are the likely costs? How would these rights be enforced? How would inclusion of these rights make a difference?

³¹ Victorian Equal Opportunity and Human Rights Commission, *Economic, social and cultural rights and the Charter of Human and Rights and Responsibilities – A framework for discussion*. The Commission attaches the full report at Appendix B.

³² Prepared by Colmar Brunton Social Research, March 2011. A copy of the report is available at: www.humanrightscommission.vic.gov.au

Some also expressed confusion over the division of responsibility between federal and state governments.

The second group was most likely to have personal experience of rights violations, either themselves or through somebody they knew or had heard about.

Reasons cited for supporting inclusion of ESC rights included: the increase in personal dignity; that it would improve interaction with welfare services or government agencies; it could reduce the feeling of 'us' and 'them', and; provide a general sense of security and equality.

[It] would provide a basic standard that would apply to everyone, people would feel respected and not like they had to compromise themselves.³³

Those with first hand experience strongly support inclusion of ESC rights to improve their interaction with service providers and be treated with dignity:

In order to get access to housing, you have to be the most desperate of desperate... you have to keep saying 'I'm this homeless person', but it makes you feel so bad about yourself... in the end you believe it.³⁴

People who were against inclusion of ESC rights in the Charter had a number of concerns, including: perceived cost; fears of a larger government role or increased bureaucracy; dangers of people abusing the system, and; the risk of undermining personal motivation.

Some thought that legislative protection was not necessary:

We already believe that everyone has a right to those things no matter what, and the government's worked towards that anyway. No government is ever going to back down to those things, it would be suicide to be elected and say they're going to take away health, education.³⁵

Just about any town's got a St Vincent so people with very little money can get clothing and food.³⁶

Others could not see any benefit to including them in the Charter:

[It is] not clear what difference including them [in the Charter] would make.³⁷

I'm against, not because I don't think they're important, they're all a 10 on what's important, but I don't think it's going to change anything putting them into it.³⁸

³³ Talking Rights – Consulting with Victorians about ESC rights and the Charter, Colmar Brunton Social Research, 2010, p. 27.

³⁴ Ibid p. 27.

³⁵ Ibid p. 21.

³⁶ Ibid p. 21.

³⁷ Ibid p. 21.

³⁸ Ibid p. 21.

The consultants also spoke with a small group of organisations with experience in using the Charter to help frame the focus groups with the members of the general community. The stakeholders consulted wanted all ESC rights included on an equal basis with civil and political rights. If this was not considered feasible, the preference was to include all ESC rights on the basis of progressive realisation rather than including only some ESC rights on an equal basis with civil and political rights and excluding others.

Economic, social and cultural rights in Victoria

A small number of rights that are common between the ICCPR and ICSECR are included in the Charter. These are: section 8 – recognition and equality before the law, section 17 – protection of families and children and section 19 – cultural rights of the Charter.

Despite the fact that ESC rights are otherwise absent from the Charter, advocates use existing civil and political rights to address claims which are principally about ESC rights issues. This is usually through the right to privacy (which prohibits arbitrary interference with a person's home, among other things), protection of families and children, or fair hearing.

As the chart at page 162 shows, the courts and VCAT are already dealing with economic, social and cultural issues in a human rights framework.

Examples of cases raising economic, social and cultural rights issues

Housing:

In *Director of Housing v Sudi*,³⁹ the Director of Housing sought to evict Mr Sudi and his three-year-old child from public housing after Mr Sudi's mother who was the official tenant of the property, died. Mr Sudi successfully argued that this decision breached his human rights under section 13 (right to privacy, family and the home) and section 17 (protection of families and children).

In *Homeground Services v Mohamed (Residential Tenancies)*,⁴⁰ Homeground Services issued Mr Mohamed with a 120-day notice to vacate in accordance with their youth tenancy policy. Mr Mohamed successfully argued that the order for possession breached his right not to have his 'privacy, family, home or correspondence unlawfully or arbitrarily interfered with' under section 13 of the Charter.

Access to health care services:

11-033 2010 VMHRC (17 September 2010), in this matter, the Mental Health Review Board delivered a substantial judgment on the impact of the Charter on its work. In particular, the relevance of the Charter when considering involuntary medical treatment.

Castles v Secretary to the Department of Justice & Ors [2010] VSC 310 (9 July 2010), in this matter the courts considered the applicant's request to access to IVF treatment whilst in a minimum security prison. The privacy right and the requirement of humane treatment when deprived of liberty were relevant in this case.

The courts and tribunals considered these matters by reference to the Charter rights. The claims were characterised as civil and political rights, but the subject matter of these claims touched upon ESC rights. The Commission notes that these cases highlight two important issues.

First, that there is not a bright line dividing civil and political rights on one side and ESC rights on the other. While the Charter rights were relied on, these claims could also have been considered by reference to ESC rights.

Secondly, the absence of specific reference to the ESC rights issues meant that the courts and tribunals were not able to consider all the features of ESC rights, such as the 'progressive realisation' of ESC rights and the particular limitations which are relevant to ESC rights. In some of these matters, it might have assisted the parties and the courts/tribunal to have regard to relevant ESC rights analysis, standards and jurisprudence.

³⁹ [2010] VCAT 328 (31 March 2010).

⁴⁰ [2009] VCAT 1131 (6 July 2009).

If ESC rights are being raised in Charter cases either directly or indirectly, then it would make sense to have those rights provided in clear terms in the Charter. The inclusion of ESC rights would then provide some certainty to the parties and better overall decision-making because all considerations relevant to the operation of ESC rights could be taken into account.

Including additional economic, social and cultural rights in the Charter

Ideally, the Commission considers that all the ESC rights in ICESCR should be recognised in the Charter. However, it considers that at a *minimum*, the following ESC rights should be included in the Charter:

- **The right to housing:** Article 11 of the ICESCR recognises a right to an adequate standard of living, including adequate food, clothing and housing. This does not mean that everybody must be given a house or a new coat. There are elements of this right that will need immediate protection and other elements that will be dependent on resources. For example, the South African Constitution protects the right *to have access to* adequate housing. The government must take ‘reasonable measures’ to achieve this. There is a ban, however, on arbitrarily evicting somebody from their home.
- **The right to health:** Article 12 of the ICESCR protects the right to enjoy *the highest attainable* standard of physical and mental health. The South African Constitution, again, defines this as the right *to have access to* health care services, and the government must take reasonable measures to achieve this. No one may be refused emergency medical treatment.
- **The right to education:** Article 13 of the ICESCR includes a right to free, compulsory, primary education, generally available and accessible secondary education and higher education that is equally accessible to all, on the basis of capacity. These rights are already enjoyed in Victoria and protected through state and federal legislation.

School fees for international students – different perspectives under the Charter

A 1993 amendment to the *Education Act 1958* gave the Minister power to direct that government schools charge international students a fee to study in Victoria. The fee for prep to Grade 6 is currently \$7,370 for dependents of overseas students studying in Victoria and \$9,210 for prep to Grade 6 for other overseas students. In some cases this is prohibitive and means that there are children in Victoria who cannot afford to go to primary school. If the amendment were passed now and the right to education applied, Parliament would be asked to directly consider the right to free primary education and whether any restriction on this right was necessary, reasonable and proportionate.⁴¹ This may have helped Parliament tailor this legislation to address the policy goal in the least rights restrictive way.

The right to housing, health and education are uncontroversial and generally accepted as human rights which all Victorians should enjoy. Most are already protected in Victorian or Australian laws to some degree. Including them in the Charter would be an incremental development in the Charter and would centralise these rights in one place. They are not a radical development and should be viewed in the context of the legal system as a whole.

⁴¹ In accordance with section 7(2) of the Charter.

Economic, social and cultural rights in practice and before the courts - South Africa

There is a track record of ESC rights being applied by the courts in other jurisdictions. For example, the decisions of the South African Constitutional Court illustrate that the judiciary has an important role in interpreting ESC rights and securing the protection of these rights, without unduly interfering in matters that are properly the domain of the Parliament and the Executive. The Court's decisions demonstrate the judiciary's concern to leave questions of resource allocation and budgeting to appropriate authorities. The decisions include:

- *Sobramoney v Minister of Health (Kwazulu-Natal)*⁴² - a case concerning access to medical treatment, where the Court said that it would be “*slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.*”⁴³

- *Government of the Republic of South Africa v Grootboom*⁴⁴ - a case concerning the right to have access to adequate housing, where the Court accepted that the Government was not required to secure the human rights in issue by going beyond the available resources.

- *Minister of Health v Treatment Action Campaign*⁴⁵ - a case concerning access to HIV medication to prevent mother-child transmission of HIV, where the Court acknowledged that the judiciary is not “*institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for ... should be, nor for deciding how public revenues should most effectively be spent*”.⁴⁶

Economic, social and cultural rights should be placed in a new Division of Part 2 of the Charter and would then be looked at through the additional lens of progressive realisation – in all other respects, the same obligations, procedures and mechanisms would apply to these rights.

⁴² (1997) 12 BCLR 1696 (CC). See discussion in H Steiner, ‘Social Rights and Economic Development; Converging Discourses, (1998), p. 4, *Buffalo Human Rights Law Review* 25, pp. 30-34.

⁴³ (1997) 12 BCLR 1696 (CC), p. 29.

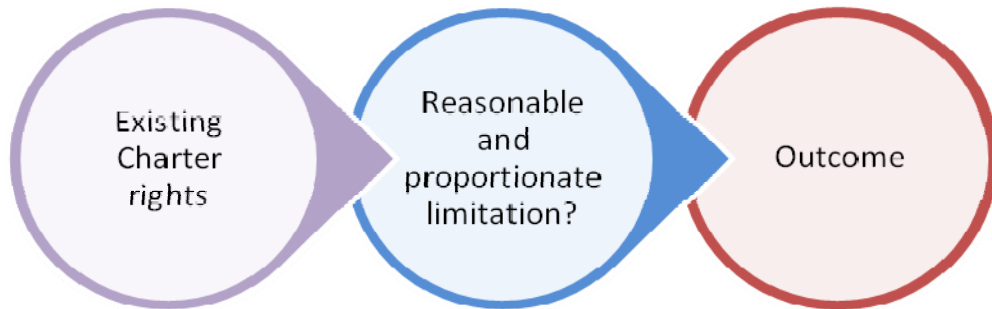
⁴⁴ (2001) (1) SA 46 (CC).

⁴⁵ (2002) 10 BCLR 1033 (CC).

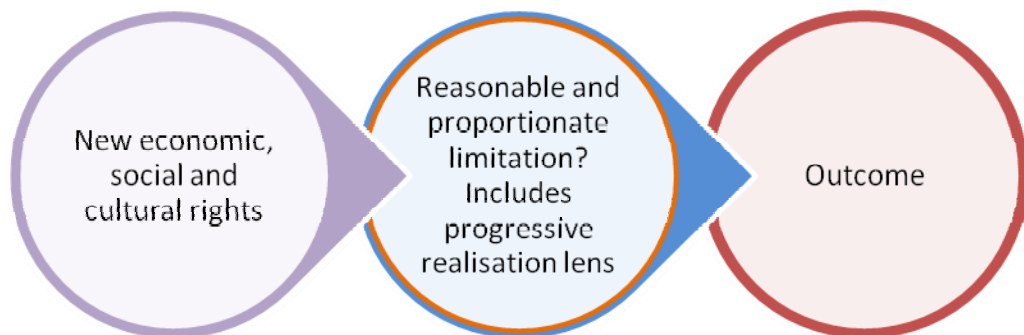
⁴⁶ [2002] 5 SA 721, p. 37.

Progressive realisation of economic, social and cultural rights

1. *Current Charter rights*



2. *Proposed economic, social and cultural rights - an additional lens*



Other protections for economic, social and cultural rights

The Commission makes the recommendation to focus at a minimum on the rights to housing, health and education, noting that federal and Victorian legislation and common law also play a role in protecting ESC rights (as well as other human rights) in Victoria.

For example, **the right to work**. Article 7 of ICESCR recognises the right to the enjoyment of just and favourable conditions of work. In particular, it guarantees: fair wages; equal pay for equal work; safe and healthy working conditions; and rest, leisure and reasonable limitation of working hours. Article 8 recognises the right to form and join trade unions and the right to strike, subject to lawful restrictions. Most of these protections are already covered in employment, or occupational health and safety legislation at the state or federal level.

The right to equal remuneration or equal pay for work of equal value is recognised in Article 7(a)(i) of the ICESCR. This right is also expressly protected by the *Fair Work Act 2009* (Cth). In the *Equal Remuneration Case*⁴⁷ currently being heard by Fair Work Australia, the Victorian Government has made a submission stating that it is '*committed to pay equity generally, including in the community sector. It therefore supports the making of equal remuneration orders so far as is necessary in order to address disparities in wage rates which are demonstrated as attributable to a worker's gender*'.⁴⁸

Some legislative protection is afforded to ESC rights through the *Equal Opportunity Act 1995*, which protects against discrimination in education, service delivery and other areas of public life.

Other Acts dealing with specific subject matter offer some protection to ESC rights, such as the *Education and Training Reform Act 2006*, which provides free education for all students under the age of 20,⁴⁹ tenancy legislation which protects elements of housing rights and various schemes and rebates that maintain healthcare standards.

Importantly, some ESC rights fall within the ambit of the exclusive power of the Commonwealth. For example, laws concerning forming and joining trade unions and social security. This is why they are not on the list of minimum requirements for the Victorian Charter.

However, it is important to note that these rights are still relevant to Victoria and Victorian agencies. Although the Commonwealth has exclusive power to *legislate*, Victorian agencies will often have responsibilities to implement federal laws, or develop related policies. For example, migration is a federal matter but the Victorian Office of Multicultural Affairs and Citizenship manages a number of programs and policies relating to refugees in Victoria and settlement of newly-arrived migrants. The actions taken and decisions made in these instances may well justify protection by the Charter from breaches of rights. Any protection of ESC rights in the Victorian Charter, however, must be mindful of the areas where the Commonwealth has exclusive power to legislate.

Economic, social and cultural rights in other Australian jurisdictions

Economic, social and cultural rights are applied in a number of federal contexts already. These laws apply in all states and territories, including Victoria and provide examples of ESC

⁴⁷ www.fwa.gov.au/index.cfm?pagename=remuneration&page=application .

⁴⁸ www.fwa.gov.au/sites/remuneration/submissions/Vic_Government_submission.pdf .

⁴⁹ *Education and Training Reform Act 2006*, Division 2, section 2.2.4.

rights being used by public authorities, the community and the courts. Two examples are given below.

Section 9 of the *Racial Discrimination Act 1975* (Cth) makes racial discrimination unlawful if an act has the effect of nullifying or impairing the enjoyment of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.⁵⁰

Since 1975, the Racial Discrimination Act has made it unlawful for any person to racially discriminate against another person in his or her enjoyment of the following economic, social and cultural rights:

- the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration
- the right to form and join trade unions
- the right to housing
- the right to public health, medical care, social security and social services
- the right to education and training
- the right to equal participation in cultural activities, and
- the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

These rights are provided by Article 5(e) and (f) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). These rights are included alongside civil and political rights.

The expression 'human rights and fundamental freedoms' in section 9 of the *Racial Discrimination Act* has been broadly interpreted by the High Court of Australia to refer to the '*claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society*'.⁵¹ In the same case, Justice Brennan made specific reference to the Universal Declaration of Human Rights as a source of human rights relevant to the Racial Discrimination Act.⁵²

In practical terms, it means that a person may point to any international human rights treaty or declaration as a source of 'human rights' for the purpose of section 9 of the Racial Discrimination Act.

⁵⁰ *Racial Discrimination Act 1975* (Cth).

⁵¹ *Gerhardy v Brown* (1985) 159 CLR 70, pp. 101-102.

⁵² The CERD Committee's General Recommendation 20: Non-Discriminatory Implementation of Rights and Freedoms of the Office of the High Commissioner for Human Rights, 48th session, 1996, also confirmed that Article 5 was a 'non exhaustive' list of human rights.

Claims have been brought under the Racial Discrimination Act alleging breaches of social and cultural human rights because of race discrimination. The following human rights have been considered by courts and tribunals:

- the right to manage and exercise other ownership rights in relation to property
- the right not to be arbitrarily deprived of one's property
- the right to work
- the right to equal participation in cultural activities
- the right of access to a service intended for use by the general public, such as hotels
- the right to education.

There are many examples of these cases.⁵³ The courts and tribunals have considered the relevant international human rights treaties and international jurisprudence directed to the ESC right in question. While the parties in the various cases had differing views about the nature of the rights and how they applied in the cases, the process of considering human rights by reference to the international treaties and declarations was not controversial or unduly difficult.

The *Fair Work Act 2009* (Cth) is another example of a law applying in Victoria that expressly refers to international labour organisation conventions which concern human rights in the workplace, and reflect some of the economic and social rights found in the ICESCR. For example, the objects of the Fair Work Act include and take into account Australia's obligations under International Labour Organization (ILO) agreements (section 3(a)) and Parts 6-4 of the Fair Work Act contains provisions to give effect, or further effect, to certain international agreements relating to termination of employment, namely:

- the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation ([1974] ATS 12)
- the ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities ([1991] ATS 7)
- the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer ([1994] ATS 4), and
- the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

The Fair Work Act provides a range of protections to employees who experience discrimination in the workplace or have been denied equal pay for work of equal value. These human rights protections reflect the obligations which arise under the ILO conventions.

⁵³ *Gerhardy v Brown* [(1985) 159 CLR 70, *Carson v Minister of Education (Qld)* [1989] HREOCA 4, *Aboriginal Students Support & Parents Awareness Committee Traeger Park Primary School v Minister for Education, Northern Territory of Australia* [1992] HREOCA 4, *Macedonian Teachers Association of Victoria Inc v Human Rights & Equal Opportunity Commission & Anor* [1998] FCA 1650, *Siddiqui v Australian Medical Council* [2000] HREOCA 2, *Penrith v Monash University* [2000] HREOCA 44, *Bropho v State of Western Australia* [2008] FCAFC 100.

As Justices Gray and Bromberg acknowledged in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 at [15] – [18] the right to freedom of association is recognised in international law. They made specific reference to Article 8 of the ICESCR in finding that an employee’s rights had been breached.

Tasmania – actively considering economic, social and cultural rights

The Tasmanian Law Reform Institute conducted an investigation in 2006 into whether human rights could be better protected in Tasmania. The project involved a four-month consultation process and received 407 submissions.⁵⁴ The report recommended that a Tasmanian Human Rights Charter should protect ESC rights as well as civil and political rights (recommendation 15). It concluded that arguments limiting these rights were ‘not compelling’ and ‘speak of timidity rather than rationality.’⁵⁵ The specific ESC rights that the report recommended including are (recommendation 16):

- the right to self-determination⁵⁶
- the right to work and just conditions of work
- the right of children not to be exploited economically or socially
- the right to adequate food, clothing and housing
- the right to the highest attainable standard of physical and mental health
- the right to education.

The Tasmanian Government’s consultation process is currently underway and the directions paper released by the Department of Justice included recommendations about ESC rights.⁵⁷

⁵⁴ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10, October 2007, at 1.1.2 and 1.1.3, p. 15.

⁵⁵ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10, October 2007, at 4.15.13, p. 122.

⁵⁶ *International Covenant on Economic, Social and Cultural Rights* (ICESCR), opened for signature a 16 December 1966, 999 UNTS 171 (entered into force 3 January 1976), Article 1. The right to self determination is also Article 1 of the ICCPR and Article 3 of the United Nations *Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007.

⁵⁷ For the latest information on the process in Tasmania see: www.justice.tas.gov.au/corporateinfo/projects/human_rights_charter (last viewed 1 June 2011).

Answering arguments against inclusion of economic, social and cultural rights in the Charter

A number of arguments are commonly made against including ESC rights in the Charter.

It hands too much power to the courts and therefore is undemocratic – It is Parliament’s role to make legislation and the courts’ role to interpret legislation. This separation of powers is fundamental to our Westminster system and to responsible government. The Charter specifically provides for parliamentary supremacy by not giving courts the power to ‘strike down’ legislation. Courts can issue a Declaration of Inconsistent Interpretation if they believe a law is incompatible with human rights, but Parliament then has the final say.

It involves the courts in making decisions about resources and priority setting that they are ill-equipped to take – Courts regularly deal with complex legislation, including taxation and intellectual property, that has policy and resource implications. Experience in other jurisdictions has shown that courts have taken a cautious approach to adjudicating ESC rights, and have favoured a ‘reasonableness’ test. This means courts have not told the government what they must do, but rather considered whether the decision they made was one that was reasonably open to them.

The rights themselves are too vaguely expressed and will only raise expectations and encourage time-consuming and expensive litigation against public bodies - As illustrated above, it is possible to describe the scope of rights in some detail when applying ESC rights in practice. So long as rights are framed as to give them specific content, and the court’s role was limited to a consideration of whether the government’s action was reasonable within the available resources (as under the South African constitution), social and economic rights are capable of being protected and promoted in Australian law.

Countries where ESC rights are included in statutory or constitutional bills of rights have demonstrated that courts are able to consider these rights and develop a sensible jurisprudence around their implementation.

Convention on the Rights of the Child

Young people are a particularly vulnerable group within society. Not all of us are old enough to vote to determine our future, the status of young people in the community is generally low and older people don't always ask us for our opinions. Human rights are so important to young people in Victoria.

Cassandra Devine, Human Rights Youth Ambassador⁵⁸

Key points and recommendations

The Commission supports amending the Charter to more fully incorporate children's rights contained in the Convention on the Rights of the Child (CRC).

The Charter already contains some protections for children's rights, including the right to protection without discrimination as is in his or her best interests and is needed by reason of being a child (section 17(2)). However, an expanded section 17 should recognise the right of children and young people to participate in decisions that affect them directly as children, or indirectly as members of society and future adults. Such a provision could be modelled on Article 12 of the CRC:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

There are significant benefits to ensuring that children and young people participate in decision making, including: better policies and services, improved protection for children, better democratic processes and enhancing children's growth.

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 17⁵⁹ of the Charter which addresses the best interests of the child.

⁵⁸ 2008 Charter Report, p. 105.

⁵⁹ 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'.

Discussion

Under section 44 of the Charter, the Four-Year Review must consider whether human rights under the Convention on the Rights of the Child (CRC) should be included as human rights protected under the Charter.

The Four-Year Review comes at a time of particular attention in Victoria on the protection of children. The review of the *Mental Health Act 1986* and the *Guardianship and Administration Act 1986*, Victoria's child protection system and criminal justice reforms,⁶⁰ are all important and historic developments in Victorian law that have spurred discussion about the protection of the rights of children. These reforms will also impact significantly on the level of protection for the human rights of children in Victoria, presently and well into the future.

This submission treats the term 'child' to be a person under 18 years of age, consistent with the definition of child in section 3 of the Charter.

Current protection of the rights of the child in the Charter

Charter rights apply to all people, including children. In addition though, the Charter sets out specific protection for some of the most basic and important human rights protections for children.

Subsection 17(2) of the Charter is based on Article 24(1) of the ICCPR and provides that:

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.

Subsection 25(3) of the Charter is based on Article 10(2) of the ICCPR and provides that:

A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

⁶⁰ Reforms to the criminal justice system impact on the rights of children in many ways. For example, it is commonly noted that children may be subject to discriminatory treatment and practice by police or authorised officers in public spaces: See Rob White, 'Hanging out: Negotiating young people's use of public space' (Report, Attorney-General's Department, p. 19, at: [www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/\(E24C1D4325451B61DE7F4F2B1E155715\)~no7_summary.pdf/\\$file/no7_summary.pdf](http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/(E24C1D4325451B61DE7F4F2B1E155715)~no7_summary.pdf/$file/no7_summary.pdf) and Francis, S. and Cornfoot, S., 'Multicultural Youth in Australia: Settlement and Transition' (Report, Centre for Multicultural Youth Issues, 2007) at: www.cmy.net.au/Assets/213/1/youth_in_australia_settlement_and_transition_october_2007.pdf .

Inclusion of the best interest principle in the Charter has expanded the scope of the protection of the rights of the child in Victoria. It has done this by creating a framework where all public authorities must ensure that they consider the 'best interests' principle. Parliament must also consider the extent to which legislation allows for specific consideration of what is in the best interest of the child. For example, protection of the best interest of the child in the Charter has played an important role in building positive behaviours in Victorian schools,⁶¹ and has been used to advocate against the sexualisation of children in advertising.⁶²

City of Darebin

After the introduction of the Charter, the City of Darebin facilitated a youth summit to ascertain key priorities for young people regarding their economic, social and cultural rights and to discuss the Convention on the Rights of the Child. Future actions were identified for raising awareness and providing education about these issues in schools.

Charter informing what must be considered when looking at the best interests of the child

In *Department of Human Services v Sanding*,⁶³ the Supreme Court used the Charter to help clarify what it meant to make a decision in accordance with the 'best interests' of the child, a requirement under section 10 of the *Children's, Youth and Families Act 2005*. Four children had been living with their mother in their maternal grandmother's home. The children were removed by the Department of Human Services as a consequence of their mother's drug addiction. The mother moved out of the grandmother's home and applied for the children to be placed in their grandmother's care. The Court said that in determining what protection was in the best interests of the children, the Children's Court must consider protection of the family as the fundamental group unit in society (section 17(1)), the right to such protection as was in their best interests and was needed by them as children (section 17(2)) and their cultural rights as Aboriginal children, (section 19(1) and (2)). The children were returned to the care of their grandmother.

However, the evidence before the Commission is that an approach to children's rights based on the Convention on the Rights of the Child, which is broader than the 'best interests' principle would help to provide stronger, clearer and more directed protection of children in Victoria.

⁶¹ For example, the *Student Engagement Policy Guidelines* for government schools, available at: www.education.vic.gov.au/healthwellbeing/wellbeing/engagement/, DEECD Student Dress Code, available at: www.education.vic.gov.au/management/governance/referenceguide/enviro/4_8.htm.

⁶² Submission from Victoria's Child Safety Commissioner, Senate Inquiry into the Sexualisation of Children in the Contemporary Media Environment, Conducted by the Commonwealth in Australia, 2008, at: www.ocsc.vic.gov.au/downloads/submission_senateinquiry_media_sexn_of_kids.pdf.

⁶³ *Department of Human Services v Sanding* [2011] VSC, p. 43.

The Convention on the Rights of the Child

The Convention identifies three kinds of rights that are owed to all children: the provision of services, protective rights and participation rights.

- The protective rights in the Convention ensure the right for children to be protected from harm, in accordance with what is in the best interest of a particular child (ensuring that the State supports the role of the parents and the family, protection from exploitation and abuse, and the provision of welfare services when in the best interest of the child).
- Rights that relate to the survival and development of children include rights for children to possess, receive or have access to an identity and services (e.g. education, health services, a nationality and a name).
- Participation rights identify the right for children to participate in decisions, requiring that relative to their age and level and maturity the views of children and young people be given due consideration in matters that affect them.

How some areas of government already build listening to children into their work

Legislation governing some of the Department of Human Services' functions relating to children and young people enshrines the right of children to participate in decision-making. For example, under the *Children Youth and Families Act 2005* the Court must ensure the legal representation of a child who is mature enough to give instructions and that legal practitioner must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable having regards to the maturity of the child.⁶⁴ This approach enables the widest possible and most protective assistance to be given to a child, drawing on an understanding of the full impact of what has happened to a child so far, to determine what needs to happen in the future.⁶⁵

⁶⁴ See for example, section 10(3)(d) and section 254 of the *Children's, Youth and Families Act 2005*.

⁶⁵ State Government of Victoria, Department of Human Services, Children Youth and Families, *Every Child, Every Chance* Learning Development Strategy, available at: www.cyf.vic.gov.au/every-child-every-chance/learning-and-development/learning-and-development-strategy

The benefits of including children’s rights in the Charter

As the Commission stated in the original Victorian Human Rights Consultations, the notion of children’s rights needs to move beyond simple protection to encompass a notion of participation and involvement that is commensurate with their age and maturity.⁶⁶ The Commission said then that the Charter should at some point incorporate this broader notion of children’s rights contained in the international Convention on the Rights of the Child.⁶⁷ It maintains this position.

Some real and key benefits of providing full and particular human rights protections for children in the Charter are as follows:

- All government decisions and policies have a strong impact on children and affect children to some degree (for example, housing, education and public health) and many have a disproportionate impact on children. The Charter builds consideration of children into work across all areas of government.
- Upholding children’s right to participate in decisions that affect them is a ‘key signal of valuing and supporting children’.⁶⁸ The United Nations Committee on the Rights of the Child has commented with respect to Article 12(1) of the CRC that:

*The emphasis on “matters that affect them” in article 12(1) implies the ascertainment of the views of particular groups of children on particular issues - for example children who have experience of the juvenile justice system on proposals for law reform in that area, or adopted children and children in adoptive families on adoption law and policy. It is important that Governments develop a direct relationship with children, not simply one mediated through non-governmental organizations (NGOs) or human rights institutions.*⁶⁹

- Healthy development of children is critical to the future well-being of Victoria, and of any society. The costs to society of failing to adequately support the well-being of children and young people is well supported, with research findings showing that children’s earliest experiences significantly influence their future development and the cost to society associated with their future lives.⁷⁰

⁶⁶ Submission by the Equal Opportunity Commission Victoria in response to the Human Rights Consultation Discussion Paper *Have Your Say About Human Rights*, p. 40. The submission is available at: www.humanrightscommission.vic.gov.au

⁶⁷ *Ibid.*

⁶⁸ Council of Australian Governments, above n 29, p. 15.

⁶⁹ General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, November 2004, Committee on the Rights of the Child, CRC/GC/2003/5, Thirty-fourth session, 19 September – 3 October 2003.

⁷⁰ For example see DEECD, Victorian Early Years Learning and Development Framework, 2009, available at <http://www.eduweb.vic.gov.au/edulibrary/public/earlychildhood/learning/veyldframework.pdf> and FAHCSIA, *Growing up in Australia: The Longitudinal Study of Australian Children: 2009-10 Annual Report*, 2010, available at: www.fahcsia.gov.au/sa/families/pubs/Pages/lsac_annual_rpt_200910.aspx

Consultation with children and young people

In the Commission's 2008 Charter Report *Emerging Change*, we examined the human rights of children and young people, with a particular focus on their right to participate in decision-making in community and government.

Young people surveyed as part of the report said that they felt as though they only sometimes had a chance to have a say or be involved in things that happen in the local community, and hardly ever had a chance at state government level.

The Commission also consulted with state and local government authorities on the issue of increasing participation of children in decision-making.

Based on these consultations, the report concluded that there are significant benefits to ensuring that children and young people are able to participate meaningfully in decision-making. These benefits include: improvement in the effectiveness of policies and services, promoting children's protection, improving democratic processes and enhancing children's skills, growth, development and self-esteem.⁷¹

The report also concluded that explicit recognition of the right of children and young people to participate in decision-making had the potential to:

- normalise and standardise participation by children and young people, moving it beyond participation regarding 'youth issues' to a more widespread and integrated involvement in issues of interest and importance to children and young people
- make participatory strategies more routine, leading to greater expertise and knowledge in the skills and approaches that will facilitate meaningful engagement with children and young people
- encourage increased attention to the notion of participation, vis-à-vis children who are currently the target of far fewer participatory interventions
- reinforce the scope of existing rights and protections already contained in the Charter, including the dynamic and participatory aspect of the best interest principle, as well as the practical contemporary meaning of children and young people's broader participatory rights.

⁷¹ Ibid p. 128. See also Covell, K., et al, *If there's a dead rat don't leave it. Young children's understanding of their citizenship rights and responsibilities*, Cambridge Journal of Education, Vol 38, No 3, September 2008, p. 323, citing Howe, R.B., & Covell, K. (2007), *Empowering children: Children's rights education as a pathway to citizenship*, Toronto, Canada, University of Toronto Press.

The important role of parents and caregivers

In protecting the rights of the child contained in the convention, it is also critical that the primary role of parents, family and primary care givers in the care and protection of children is acknowledged in the Charter. Section 17(1) of the Charter recognises that:

Families are the fundamental group unit of society and are entitled to be protected by society and the State.

Incorporating the protections that the convention provides for the human rights of children in the Charter will not infringe on the rights of parents to decide what the best is for their children, or place children's rights in conflict with the authority that is the right of their parents. Rather, the convention specifically requires that government make every effort to keep families together, including supporting parents in fulfilling their responsibilities with regard to the upbringing of their children. Article 5 of CRC states that:

State parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

Convention on the Elimination of All Forms of Discrimination against Women

Key points and recommendations

The Commission supports amending the Charter to incorporate women's rights contained in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In its consultations over the past four years, people have told the Commission that women's rights are very important and should be protected equally with civil and political rights.

Women still have not achieved equality in many areas of public and private life. Gender stereotyping and systemic discrimination underlie many issues facing women. CEDAW acknowledges that women experience particular forms of discrimination because of their gender and prioritises equality of outcomes over equality of opportunity.

In preparing for the Four-Year Review, the Commission looked specifically at experiences of Aboriginal women in Victoria. Being a woman and being Aboriginal brings an intersectional dimension to Indigenous women's experiences of disability, of violence, of the corrections system, of discrimination, and as carers.

The compound effect of multiple-discrimination factors needs to be recognised.

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.

Discussion

Women comprise more than half the population in Victoria, but have still not achieved equality. Women are not represented equally in leadership positions in politics and business, still experience systemic discrimination, pay inequity, gender stereotyping and unacceptable levels of harassment and violence in the workplace and general community.

Protection of women's rights internationally

Many of the United Nations conventions and treaties prohibit discrimination, but CEDAW is significant because: it requires the elimination of *all forms of* discrimination against women; it acknowledges that women experience particular forms of discrimination because of their gender, and; requires the elimination of compounded forms of discrimination. Australia ratified CEDAW on 28 July 1983.

CEDAW promotes equality and non-discrimination against women by specifically identifying how a number of ESC rights, as well as civil and political rights, apply to women:

Equality and non-discrimination: promote equality and non-discrimination in law and policy (Articles 2, 3, 4, 5 and 16).

Sex role stereotyping: change prejudicial social and cultural patterns of conduct that are based on gender stereotyping or customary gender roles (Article 5).

Exploitation and trafficking: end trafficking against women and exploitation of prostitution of women (Article 6).

Politics and public life: ensure that women have the right to vote and stand for election, are involved in formulating government policy and can actively participate in public life (Articles 7 and 8).

Nationality: ensure women have the same rights as men to acquire, change or retain their nationality and that of their children (Article 9).

Education: ensure that women have equal access to education and training opportunities as men (Article 10).

Employment: protect women's right to work, and ensure women have access to the same employment opportunities as men, receive equal pay for work of equal value, and have equal access to social security benefits (Article 11).

Health: ensure equal access to health care for women and men. Women should be provided with appropriate services in relation to pregnancy and post-natal care (Article 12).

Economic and social benefits: eliminate discrimination against women in areas of social and economic life, including: family benefits, the right to financial credit including loans and mortgages, and the same rights as men to participate in recreational and cultural activities. (Article 13).

Rural women: take into account the particular problems faced by rural women and ensure equal access to health care, social security, adequate living conditions, and participation in all community activities (Article 14).

Civil matters: women and men should have equality before the law including in civil matters such as contractual agreements and property matters, and enjoy the same opportunities to exercise that capability (Article 15).

Marriage and family relations: eliminate discrimination against women in all matters relating to marriage and family relations, particularly the right to choose a spouse and enter a marriage with their free and full consent; divorce rights; rights in relation to property; and to their children (Article 16).

Violence against women was not originally included in CEDAW, but General Recommendations by the CEDAW Committee have since made clear that all forms of violence against women are prohibited.

Protection of the rights of women in Victoria

The Charter does not specifically recognise, promote or protect the rights of women, however all rights in the Charter apply equally to women and men.

Section 8 of the Charter provides for equality before the law, and the right to enjoy human rights without discrimination.

The *Sex Discrimination Act* (Cth) and the *Equal Opportunity Act* (Victoria) give effect to some of the provisions in CEDAW in Australia.

The Commission's work on women's rights in the lead-up to the Four-Year Review

In 2009, the Commission hosted a symposium on women's rights to discuss how the Charter might be strengthened to better promote and protect the rights of women in Victoria. Over 80 women representing women's organisations in Victoria attended the symposium, which discussed the state of women's rights in Victoria across thematic areas.⁷² A copy of the paper is at **Appendix D**.

Political participation and legal protection

Participants felt that women are not equally represented in public life or decision-making. Economic barriers to participation, gender stereotyping, male-dominated cultures in the workplace and in politics, cultural and geographic factors, and violence against women all contribute to women not having equal representation in public life. These barriers are more acute for women experiencing compound or intersectional discrimination. The Charter was seen as having had little impact on reducing these barriers or on improving women's political participation.

Health

Achieving and maintaining good health is crucial to enjoying other rights. A holistic approach to health is needed, which recognises the impact of social determinants of health such as violence against women, pay inequity, discrimination and harassment. A major obstacle to improving women's health is the lack of protection for economic, social and cultural rights. Intersectional issues can compound poor health – women with disability and women in rural areas experience particular hardship in accessing appropriate health services.

Economic security

Economic security – including housing, employment, education and an adequate standard of living – is a precondition to the exercise of human rights. Failure to protect these, results in lifelong discrimination with negative consequences for women. Economic rights are inseparable from civil and political rights.

⁷² The outcomes of the Symposium are recorded in the Commission's 2010 Occasional Paper titled 'Advancing Women's Rights - exploring the relationship between the Charter of Human Rights and Responsibilities and the Convention on the Elimination of All Forms of Discrimination Against Women'. A copy of the Occasional Paper is available at: www.humanrightscmission.vic.gov.au.

Social and cultural environment

Gender stereotyping is pervasive, and the social and cultural expectations on women affect all areas of women's life, often negatively.

Violence against women

Violence against women occurs in the home, in the workplace, in public places and in cyberspace. It can include physical, verbal, sexual, and psychological violence. A key challenge is to help the community understand the role that ongoing power inequality and continued gender stereotyping play in such violence.

Although there was not consensus at the forum on whether CEDAW should be formally incorporated into the Charter, there was agreement that consideration should be given to ensuring that the Charter either directly includes some of the social and cultural rights contained within CEDAW (such as sex role stereotyping) or reflects the intentions of CEDAW in some other form.⁷³

Indigenous women

An Indigenous women's gathering supplemented the symposium, in acknowledgement that Indigenous women are often underrepresented at general events, and that Indigenous women in Victoria face unique human rights challenges.

Participants expressed frustration at the lack of progress by well-meaning policies to deliver meaningful change for Indigenous women. Indigenous women raised many similar issues to those raised in the symposium: violence against women; access to health care, education and child care; the ability to participate in decision making and exercise leadership; and lack of knowledge of human rights or the Charter.

The women spoke of the difficulty that a deep connection with community brings in distinguishing their rights as women from those of their community. They also spoke about the issues particular to women in native title and cultural heritage decisions, which often overlook their specific significance to women.

The consultation suggests that while some advances have been made, four years of the Charter has not resulted in a significant gender lens being applied to government policy and practice. Without specific provisions protecting women's rights and requiring government to consider substantive equality, this is unlikely to change. Inclusion of women's rights in some form in the Charter will encourage government to specifically consider the impact of laws and policies on women, rather than assuming a gender neutral environment.

⁷³ Victorian Equal Opportunity and Human Rights Commission, *Advancing Women's Rights - exploring the relationship between the Charter of Human Rights and Responsibilities and the Convention on the Elimination of All Forms of Discrimination Against Women* (March 2010), p. 6.

This could be most simply achieved through inclusion in the objects of the Charter. This could be based on CEDAW Article 2(a), where States undertake:

*To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.*⁷⁴

Although this provision reflects Article 3 of the ICCPR, which calls on States to ‘ensure the equal right of men and women’ to the enjoyment of rights, the requirement in CEDAW to ensure the *practical realisation* of this principle focuses attention on equality of results.

⁷⁴ CEDAW Article 2(a).

Differences and gaps between the Charter and the International Covenant on Civil and Political Rights

Key points and recommendations

The rights in the Charter are primarily drawn from the International Covenant on Civil and Political Rights (ICCPR). However, not all of the rights in the ICCPR have been imported into the Charter, and of those that have, some have been only partially imported or modified. In the Explanatory Memorandum accompanying the Charter, the explanation provided was that:

*there are some ICCPR rights which have been modified by the bill to ensure consistency with existing Victorian laws ... Where there is a lack of consensus within Australia and internationally on what a right comprises, or where rights cover matters of commonwealth jurisdiction and are consequently inappropriate in state legislation, the rights have not been included in this bill.*⁷⁵

The Four-Year Review provides an opportunity to revisit where some of these lines have been drawn. For example, the right to indigenous self-determination has been significantly clarified internationally since the adoption of the Charter. This is dealt with below under Terms of Reference 2. It has also become clear that some matters previously excluded because they fell under federal jurisdiction are relevant to the activities of state authorities. The right to found a family (Article 23(2) of the ICCPR) and the right to birth registration (Article 24(2) of the ICCPR) are two rights that should be included in the Charter.

Further, the full extent of religious freedoms in the ICCPR should also be reflected in the Charter. This means adding the liberty for parents to ensure the religious and moral education of their children in conformity with their own conviction (Article 18(4)).

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.

⁷⁵ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic), pp. 2-3.

Discussion

The rights in the ICCPR that are missing, or partially missing, from the Charter are:

- The right to **self-determination** (Article 1): The Charter contains acknowledgment of the special importance that human rights have for the Aboriginal people of Victoria, and section 19(2) acknowledges Aboriginal cultural rights. Although these provisions contain some elements of the right, they fall short of self-determination.⁷⁶ This is addressed under Term of Reference 2.
- Elements of the **non-discrimination** right (Article 2): The right to enjoy rights without discrimination in the Charter is limited to the attributes in the *Equal Opportunity Act* 1995.⁷⁷ Neither 'property' nor 'other status' are protected attributes in the EOA, which effectively narrows the scope of the right in the Charter.⁷⁸ Article 2(2) exhorts States to take steps to give effect to the rights in the ICCPR, and Article 2(3) requires an 'effective remedy' for violations of this right, determined by a competent judicial, administrative, legislative or other competent authority. Remedies must be enforceable (Article 2(3)(c)). The Charter does not contain the equivalent of Articles 2(2) or 2(3). This is dealt with under Term of Reference 4 (remedies) and 7 (gap between equality and anti-discrimination).
- **Equal right of men and women** to enjoy the rights in the ICCPR (Article 3): Although section 8(2) of the Charter ensures that every person has the right to enjoy his or her rights without discrimination, Article 3 specifically prohibits sex discrimination. While Article 3 is partially subsumed by Article 2, the notion of equality is more expansive than non-discrimination.

*article 3...requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights.*⁷⁹

*The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.*⁸⁰

- **Derogations** in time of public emergency (Article 4): Article 4 is not a right as such, but provides some parameters on when rights cannot be limited. There is no equivalent in the Charter, although section 7 does address permissible limitations on rights, and section 31 provides a procedure for making an override declaration when an Act is incompatible with human rights. Neither of these provisions is strictly commensurate with Article 4.

⁷⁶ See also the discussion on self determination, p.88.

⁷⁷ As of 1 August 2011, this will be the Equal Opportunity Act 2011. The attributes are unchanged.

⁷⁸ See also the discussion elsewhere in this submission on equality and discrimination, p. 230.

⁷⁹ *General Comment No. 04: Equality between the sexes (Art. 3): 30/07/1981 CCPR General Comment No. 4. (General Comments), Article 2.*

⁸⁰ *General Comment No. 28: Equality of rights between men and women (article 3): 29/03/2000. CCPR/C/21/Rev.1/Add.10, General Comment No. 28. (General Comments), article 3.* See also the discussion of women's rights in the additional rights section.

- **Right to life** (Article 6): Article 6(2) and (4) – (6) specifically concern the death penalty and Article 6(3) concerns the crime of genocide. None of these provisions have been included in the Charter but they are addressed under Commonwealth law.
- **Right to liberty and security of person** (Article 9): Section 21 of the Charter mirrors Article 9, with the exception of Article 9(5), which provides an enforceable right to compensation for victims of unlawful arrest or detention.
- **Freedom of movement** (Article 12): Section 12 of the Charter replicates Article 12(1). Articles 12(2) and 12(4) have been excluded, and deal with movement in and out of a country. Article 12(2) contains an internal limitation on the right, which was also excluded from the Charter, although it is partially covered by the general limitations clause in section 7.⁸¹ Migration matters are dealt with under Commonwealth law.
- **Lawful aliens** (Article 13): Relates to expulsion of aliens lawfully in the territory of a State. This has not been included in the Charter and is dealt with under Commonwealth law,
- **Freedom of religion** (Article 18): Section 14 of the Charter imports part of this right, but does not include either Article 18(3) or 18(4). Article 18(3) specifically distinguishes the right to hold a belief from the right to manifest that belief and imposes specific limitations on the manifestation of belief. Article 18(4) respects a parent or guardian's liberty to ensure the religious and moral education of their children in conformity with their own convictions.
- **Prohibition on hate speech** (Article 20): Article 20 is associated with freedom of expression, and provides a *mandatory* limitation on some forms of speech.⁸² It prohibits propaganda for war, and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. There is no equivalent in the Charter presumably because Parliament decided that these matters fell within the federal jurisdiction.
- **Peaceful assembly** (Article 21): Article 21 specifies that 'no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.' This express limitation in Article 21 has not been imported into the Charter. The Commission address limitations under Term of Reference 7 (page 212).
- **Freedom of association** (Article 22): The Charter has not imported Article 22(2) and (3). Article 22(2) contains a similar express limitation as Article 21. Article 22(3) protects the guarantees in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize.

⁸¹ See the discussion on derogations and limitations elsewhere in this submission, p. 221.

⁸² Joseph, Shultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd edition, 2005, [18.47].

- **Protection of families** (Article 23): Both Article 23 and section 17 of the Charter recognise families as the fundamental group unit of society that is entitled to protection. Article 23 contains additional rights: the right to marry and found a family (Article 23(2)), requirement of free and full consent to marry (Article 23(3)), and equality of rights and responsibilities regarding marriage and its dissolution. Marriage is addressed under Commonwealth law but the right to found a family can be relevant to state activities, such as the regulation of adoption and assisted reproductive technology.
- **Protection of children** (Article 24): Section 17 of the Charter entitles children to protection ‘without discrimination’, whereas Article 24(1) lists the grounds of prohibited discrimination. Discrimination in the Charter has the same meaning as discrimination in the Equal Opportunity Act, and does not include ‘other status’.⁸³ Article 24(2) guarantees birth registration and a name, and Article 24(3) gives a child the right to a nationality. Neither of these provisions have been incorporated into the Charter. Nationality is addressed in Commonwealth law, but birth registration is a state matter.
- **Equality before the law** (Article 26): Section 8 of the Charter guarantees equality before the law ‘without discrimination’, whereas Article 26 lists the grounds of prohibited discrimination. Discrimination in the Charter has the same meaning as discrimination in the Equal Opportunity Act, and does not include ‘other status’.⁸⁴

A full list of the rights in the ICCPR and their correspondence with the Charter is included in **Appendix E**.

⁸³ See also the discussion elsewhere in this submission on equality and discrimination, p. 230.

⁸⁴ Ibid.

Federal matters

Some of the rights in the ICCPR that were not incorporated into the Charter were excluded on the grounds that they were largely federal matters. The exclusions that could fall into this category include:

- Genocide (Article 6)
- The right to enter and leave your own country (Article 12)
- Unlawful aliens (Article 13)
- Marriage (Article 23)
- Birth registration and nationality of children (Article 24).

Section 51 of the Australian Constitution gives federal Parliament the power to make laws for the peace, order, and good government of the Commonwealth with respect to a number of areas, including: citizenship,⁸⁵ marriage and divorce (including custody of children),⁸⁶ race,⁸⁷ immigration⁸⁸ and external affairs.⁸⁹

While excluding ‘federal’ matters is a sensible approach on the face of it, there are a number of instances where a right thought to be an area of federal jurisdiction has been a live issue in Victoria. Clearly, these issues have relevance in Victoria despite the governing legislation being primarily federal. The following examples from Victoria illustrate where these rights are relevant and in need of protection, or were unable to be considered in an otherwise appropriate context because they had not been included in the Charter. These issues should be addressed in the Charter.

Right to birth registration

The Charter does not include the right of every child to be registered immediately after birth and to have a name (Article 24(2) ICCPR). In recommending not including this right, the Consultation Committee noted that these rights were more relevant in the post-World War II context and ‘less relevant for inclusion in a modern Victorian Charter’.⁹⁰

⁸⁵ Australian Constitution, Section 51, (xix).

⁸⁶ Australian Constitution, Section 51, (xxi), (xxii).

⁸⁷ Australian Constitution, Section 51, (xxvi).

⁸⁸ Australian Constitution, Section 51, (xxvii).

⁸⁹ Australian Constitution, Section 51, (xxix).

⁹⁰ *Rights, Responsibilities, Respect: the Report of the Human Rights Consultation Committee*, Department of Justice 2005, p. 45.

However, Indigenous people in Victoria currently face difficulties with birth registration and obtaining copies of their birth certificate. In Victoria in 2008, 1,841 births – or 2.5% of all births in Victoria – were not registered.⁹¹ No information is available on how many of these children are Aboriginal, but the Castan Centre for Human Rights Law notes that the highest number of these seem to be from areas with a large Indigenous population such as Mildura, Shepparton and Traralgon West.⁹² A birth certificate is essential for official identification and affects most areas of life, such as obtaining a tax file number for employment, enrolling children in school or obtaining a driver's license.

Examples

Two examples of the effects of being without a birth certificate, include:

- two 15-year-old girls were taxed at the highest rate on traineeships (and therefore withdrew from the program) because they were unable to apply for tax file numbers, and
- a woman could not enrol her children in school because she did not have the money to pay the application fee for their birth certificates even though their births had been registered.⁹³

Right to found a family

In the case of *Kimberley Castles v Secretary of the Department of Justice*,⁹⁴ Ms Castles could not rely on the right to found a family because it had not been included in the Charter. The right to found a family is coupled with the right to marry in the ICCPR.⁹⁵ Marriage is one area where the federal government has power to make laws, but the ICCPR right is broader than this.

These rights were also excluded from the Charter because the Victorian Law Reform Commission was undertaking a reference on Assisted Reproductive Technology and Abortion at the time the Charter was introduced. The Human Rights Consultative Committee did 'not wish to pre-empt the results of this comprehensive process' and therefore recommended that the right to found a family not be included, but reconsidered at the time of the Four-Year Review.⁹⁶ While this was a reasonable recommendation in

⁹¹ Registrar of Births, Deaths and Marriages Victoria, Indigenous Access Project Update, March 2009, cited in Gerber, Paula, 'Making Indigenous Australians 'Disappear': Problems arising from our birth registration system' in *Alternative Law Journal* Vol 34:3 (2009), p. 157.

⁹² Registrar of Births, Deaths and Marriages Victoria, Indigenous Access Project Update, March 2009, cited in Gerber, Paula, 'Making Indigenous Australians 'Disappear': Problems arising from our birth registration system' in *Alternative Law Journal* Vol 34:3 (2009);, p. 157.

⁹³ Joel Orenstein, 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (2008), 7(8) *Indigenous Law Bulletin*, p. 14.

⁹⁴ *Castles v Secretary to the Department of Justice & Ors* [2010] VSC, p. 310.

⁹⁵ ICCPR Article 23 (2), The right of men and women of marriageable age to marry and to found a family shall be recognised.

⁹⁶ *Rights, Responsibilities, Respect: the Report of the Human Rights Consultation Committee*, Department of Justice 2005, p. 42.

2005, the review has since concluded, changes have been made to the legislation, and there is no compelling reason why these rights should not be included in the Charter now. In the *Castles* decision, Emerton J found that the absence of the right to found a family meant that the other rights relied upon must be construed as *not* encompassing this right:

I consider that the statement in the explanatory memorandum that it was not Parliament's intention to create a right to found a family in the Charter has considerable bearing on the way in which the rights in the Charter that concern the protection of families, privacy, personal autonomy, self-realisation and so on are to be construed. It provides sufficient basis, in my view, not to construe the rights that have been specifically selected for protection and promotion in the Charter as including a right to found a family. In my view, when the legislature expressed its intention not to create a right to found a family in the Charter, it did so because it did not want the Charter to intrude upon questions of access to ART, recognition of legal parentage and rights to adoption. Accordingly, the Charter rights which might otherwise have encompassed rights to ART, recognition of legal parentage and adoption should be construed as not encompassing such rights.⁹⁷

An example of how this might be done can be found in the UK Human Rights Act:

Article 12: Right to Marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Liberty to ensure the religious and moral education of children

Respect for a parent's liberty to ensure the religious and moral education of their children in conformity with their own convictions (Article 18(4)) has also been left out of the Charter. This gap should be addressed. There was no explanation about the exclusion of this right at the time the Charter was introduced, but it may have been out of concern that it would create a claim on state funding for religious education. International jurisprudence supports the view that this right does not create funding obligations.⁹⁸ The Parliament could address these concerns in a similar way to other rights. For example, the Explanatory Memorandum to the *Charter of Human Rights and Responsibilities Bill 2006* states that 'the right does not require the provision of positive steps by a public transport operator to promote free movement'.⁹⁹

⁹⁷ *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310 at 72.

⁹⁸ See for example comments from the UN Human Rights Committee in *Arieh Hollis Waldman v Canada*, Communication No 694/1996, 3 November 1999.

⁹⁹ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), p. 13.

Common misconceptions about religious freedom and human rights

1. Concerns that the Charter does not protect religious rights

The Charter contains protections for religious rights. Section 14 of the Charter protects every person's right to have or adopt a religion or belief and to demonstrate this individually or as part of a community, in public or private. No-one can be coerced or restrained in a way that limits the freedom to have or adopt a religion. This is based on Article 18 (1) and (2) of the ICCPR, but does not incorporate the whole of Article 18. In particular, Article 18(4) addressing respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions has not been included in the Charter. The Commission supports extending section 14 of the Charter to address the right in Article 18(4) of the ICCPR.

2. Concerns that the Charter forces religious bodies to act against their principles

Charter obligations apply to public authorities not the community at large. For example, the *Cobaw* case (discussed at page 170) was about the application of the exemption provisions in the *Equal Opportunity Act 1995*, not whether Christian Youth Camps had any obligations under the Charter. Section 38 makes it unlawful for a public authority to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right in making a decision (s 38(1)). Even when religious bodies are performing the functions of a public authority, they are exempt from this requirement when acting compatibly with human rights would have the effect of impeding or preventing the religious body from acting in conformity with the religious doctrines, beliefs or principles in accordance with which it operates (s 38(4)).

3. Concerns that the Charter raises concerns with conscientious objection to abortion

Areas of particular sensitivity have been carved out of the Charter. For example, section 48 of the Charter provides that nothing in the Charter 'affects any law applicable to abortion or child destruction'. The debate over the *Abortion Law Reform Bill 2008* (Vic) demonstrates that the resolution of this issue rests with Parliament.

4. Concerns that the Charter creates conflict between freedom of religion and other rights

The Charter maintains the traditional balance between religious freedoms and equality found in the *Equal Opportunity Act 1995*. The equality right in the Charter is tied to the definition of discrimination in the *Equal Opportunity Act 1995*. The Judge in *Cobaw* considered that the rights to freedom of thought, conscience, religion and belief in section 14 of the *Charter* had to be interpreted in a manner compatible with the rights to equality and freedom from discrimination (section 8). Her Honour held that this interpretation should not privilege one right over another, but rather recognise their coexistence and the need to balance the rights. The *Racial and Religious Tolerance Act 2001* provides another example of a framework where rights are balanced, often the freedom of expression and freedom of religion. It can protect religious activities. All rights in the Charter, including religious freedom, are subject to reasonable limitations and must be balanced against each other if there is a conflict. The Charter does not create these conflicts, but provides an agreed framework set by Parliament within which to consider them.

The rights of persons with a disability

Key points and recommendations

The Commission supports amending the Charter to incorporate the rights of persons with disabilities contained in the Convention on the Rights of Persons with Disabilities (CRPD). In its consultations with the community, people have told the Commission that the rights of people with disability need greater recognition and support in Victoria. This could be most readily achieved by including the general principles from the Convention in the objects of the Charter.

The CRPD was not originally included in the list of treaties that must be considered at the Four-Year Review, as it was not in force at the time the Charter was introduced. The Commission believes it now has the same status as CEDAW and CRC, and should be considered in the same light.

The CRPD is a comprehensive treaty that clarifies the application of civil, political, economic, social and cultural rights to people with disability. People with disability were heavily involved in the development of the Convention. Importantly, the CRPD shifts the approach towards disability from a 'medical' or 'welfare based' approach to disability, to a 'social model' and 'rights-based' approach.

Victoria's approach to disability-related legislation has taken a rights-based approach for many years, and including rights of people with a disability in the Charter would be consistent with existing Victorian legislation and policy frameworks.

Recommendation 5: In our consultations with the community, people have 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.

Discussion

Around 650 million people, or 10 per cent of the world's population, live with a disability. According to the World Health Organization, persons with disabilities form the largest minority in the world and the figure is increasing.¹⁰⁰ According to the Australian Bureau of Statistics, four million Australians (18.5 per cent) had a reported disability in 2009.¹⁰¹ In Victoria, nearly one million people live with a disability.¹⁰² Disability can include mobility, sensory, neurological, intellectual, and psychiatric conditions, among others.

Protection of the rights of persons with disabilities under international law

Australia's ratification of the CRPD on 17 July 2008 marked the most significant development in international human rights law for Australia since the introduction of the Charter.

The CRPD is the first legally binding international instrument that specifically promotes and protects the rights of persons with disabilities. It includes civil, political, economic, social and cultural rights without distinction and protects them all equally.

The CRPD represents a paradigm shift from the outdated 'medical model' and 'welfare based' approach to disability, to a 'social model' and 'rights-based' approach to the advancement and protection of the rights of persons with disabilities. The social model shifts the emphasis from the 'disability' to the barriers and prejudices inherent in societies that prevent persons with disabilities from fully enjoying their rights. The CRPD takes into account not only physical challenges, such as accessibility, but also the various social obstacles and stereotypes that lead to the exclusion of persons with disabilities and the denial of their rights. Removing these obstacles is necessary in order for persons with disabilities to exercise their rights on an equal basis with others.

The CRPD contains measures that are vital to ensure that people with disability can fully exercise their human rights.

- Accessibility is important so persons with disabilities can live independently and participate in all aspects of life. Governments must identify and eliminate obstacles and barriers and ensure that people with disabilities can access their environment, transportation, information and communication technologies, and public services (Article 9).
- Countries must try to raise public awareness of persons with disabilities and their capabilities, and strive to change negative perceptions by combating stereotypes and prejudices in society (Article 8).

¹⁰⁰ UN Enable Fact sheet on Persons with Disabilities available at: www.un.org/disabilities/ (last viewed 26 November 2010).

¹⁰¹ 2009 Australian Bureau of Statistics Survey of Disability, Ageing and Carers (SDAC). For the purposes of SDAC, disability is defined as any limitation, restriction or impairment, which restricts everyday activities and has lasted or is likely to last for at least six months.

¹⁰² 2003 Australian Bureau of Statistics Survey of Disability, Ageing and Carers (SDAC). The 2009 SADC does not include State tables at present. These will become available in 2011.

- Countries must provide habilitation and rehabilitation services to enable persons with disabilities to achieve maximum independence and ability, particularly in the areas of health, employment, education and social services. (Article 26)
- Countries have an obligation to ensure personal mobility and independence for persons with disabilities (Article 20). They should facilitate access to quality and affordable mobility aids and devices.

The CRPD enforces the equal rights of all persons under the law.

- People with disabilities have a right to equality before and under the law (Article 5), and recognition before the law (Article 12). People with disabilities have a right to equal legal capacity, and the government must provide access to any support required to exercise this, including preventing abuse of this right. Additionally, persons with disabilities have the right to own their own property, and to manage their own finances. (Article 12)
- Additionally people with disabilities must have access to justice on an equal basis with all others (Article 13).
- All people, including people with disabilities, have a right to equal legal protection without discrimination (Article 5).

The CRPD declares rights that apply to all people, but interprets these specifically for persons with disabilities.

- All people have a right to life. People with disabilities must be able to enjoy this right on an equal basis with all other people (Article 10).
- People with disabilities must be able to exercise their right to freedom of expression and right to information. To ensure this, governments must provide information intended for the general public in accessible formats, such as in alternative modes of communication (Article 21).
- All people have a right to privacy (Article 22). People with disabilities have a right to freedom from unreasonable interference with their privacy, family, home, and communication. Particularly, the privacy of personal, health and rehabilitation information is to be protected on an equal basis with others.
- People with disabilities have the right to liberty of movement, such as to choose their residence and nationality on an equal basis with others (Article 18).

Economic, cultural and social rights afforded to all people are also protected in the CRPD.

- Everyone has a right to access all levels of education. For people with disabilities, this is achieved by providing an inclusive, non-discriminatory education system. Governments must support effective education, including providing alternative formats of communication (Article 24).
- Persons with disabilities have an equal right to the highest attainable standard of health, without discrimination. This includes equal access to the same range, quality and standard of free or affordable health services (Article 25).
- Persons with disabilities have the right to an adequate standard of living and social protection, including adequate food, clothing, public housing, and services for disability-related needs. Countries must take steps to protect these rights, as well as provide assistance with disability-related expenses in the case of poverty (Article 28).

The CRPD contains rights that enable people with disabilities to participate in everyday life on an equal basis with others.

- Persons with disabilities have the right to live independently, where and with whom they want, and to be included in the community (Article 19).
- People with disabilities have the right to work and gain a living on an equal basis with others. Countries should safeguard and promote the right to work, prohibit discrimination in work-related matters, promote self-employment and entrepreneurship, and employ persons with disabilities in the public sector (Article 27).
- Persons with disabilities have the right to participate fully in political and public life (Article 29). This includes the right to vote, stand for elections and to hold office.
- Persons with disabilities have a right to participate on an equal basis as others in cultural life. Cultural activities such as film and sport, and cultural establishments such as theatres and museums, must be accessible for persons with disabilities (Article 30).

The CRPD also recognises that some people with disabilities are more likely to be discriminated against than others.

- Countries must protect and advance the rights of women and girls with disabilities, recognising their vulnerability to multiple discrimination (Article 6).
- Countries must act in the best interests of children with disabilities, and ensure they enjoy rights and freedoms on an equal basis as other children (Article 7).
- All people with disabilities are to be free from discrimination relating to marriage, family, and personal relationships. Persons with disabilities have the right to experience parenthood and retain their fertility, to have access to reproductive education and services, and to marry and found a family just as any other person (Article 23).

There are rights within the CRPD that seek to protect the physical and mental integrity of persons with disabilities.

- People with disabilities should have their physical and mental integrity protected on an equal basis with others (Article 17).
- People with disabilities have a right to liberty and security on an equal basis with others, and shall not be arbitrarily or unlawfully deprived of their liberty (Article 14).
- No-one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. Specifically, persons with disabilities will not be subjected to scientific or medical experimentation without their free consent (Article 15).
- Countries must implement the necessary legislative, administrative, and educational measures to protect persons with disabilities from exploitation, violence and abuse. Facilities for persons with disabilities should be effectively monitored, and in the event of abuse, there should be investigation and promotion of the victim's recovery, rehabilitation, and reintegration (Article 16).

Protection of the rights of persons with disability in Victoria

While the Charter does not specifically identify or protect the rights of persons with a disability, it does provide protection for their rights in the same way it protects the rights of all Victorians.

Alongside the Charter, the rights of persons with disabilities in Victoria are protected through Victorian legislation such as the *Equal Opportunity Act 1995* (Vic)¹⁰³ and the *Disability Act 2006* (Vic). The rights of persons with disabilities are also protected by relevant Commonwealth legislation such, as the *Disability Discrimination Act 1992* (Cth) (DDA) and *Disability Services Act 1986* (Cth).

¹⁰³ In August 2011, this will be replaced by the *Equal Opportunity Act 2010* (Vic).

A number of existing Victorian laws limit and regulate the rights of persons with disabilities, including the *Guardianship and Administration Act 1986* (Vic) (for example, under guardianship orders), the Disability Act (for example, through restrictive interventions and compulsory treatment) and the *Mental Health Act 1986* (Vic) (for example, through involuntary psychiatric treatment).

Consideration of the rights of people with a disability in the lead-up to the Four-Year Review

The Commission has undertaken work in the lead up to the Four-Year Review to consult people in the community on the human rights and people with disability. The main theme coming out of these consultations is that the Charter needs strengthening in the light of Australia's ratification of the CRPD to ensure the rights of persons with disabilities are properly protected in Victoria.

In July 2010, the Commission held a forum to consider the current state of rights protection for persons with disabilities in Victoria. The forum brought together approximately 120 people with disability, advocates, service providers, support workers and people from government to discuss the key human rights issues facing persons with disabilities in Victoria. The forum focused on the extent to which persons with disabilities were using the Charter, whether it was making disability issues more prominent in the development of laws and policy, and how it could be strengthened to better promote and protect the rights of persons with disabilities in Victoria, particularly in the light of Australia's ratification of the CRPD

What forum participants said

In 2010, forum participants stressed that while certain rights of persons with disabilities are protected in Victoria, significant improvements are needed to ensure 'the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities' (Article 1 CRPD). These improvements include strengthening the Charter to better protect such rights. Participants were keen to make the point that the absence of economic, social, and cultural rights in the Charter is a significant gap in rights protection for persons with disabilities. Participants stressed that economic, social and cultural rights are crucial to ensuring persons with disabilities can participate fully in society and lead equal lives to everyone else.

The results of these consultations are set out in an Occasional Paper titled, '*Talking rights: Consulting with Victorians about the rights of people with disabilities and the Charter*' produced to accompany the Commission's 2010 Report on the Operation of the Charter.¹⁰⁴ This paper is at **Appendix F**.

¹⁰⁴ This paper and annual report, along with all the other papers and annual reports prepared by the Commission and relevant to the Four-Year Review, are available on the Commission's website at: www.humanrightscommission.vic.gov.au/.

Including the rights of persons with disabilities in the Charter

There a number of options for strengthening the protections of persons with disabilities under the Charter, such as including economic, social and cultural rights in the Charter. The Charter should reflect the general principles of the CRPD by incorporating into the objects of the Act:

- respect for inherent dignity, individual autonomy, including the freedom to make one's own choices, and independence of persons
- non-discrimination
- full and effective participation and inclusion in society
- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- equality of opportunity
- accessibility
- equality between men and women, and
- respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Term of Reference 2 - Self-determination

Term of Reference 2: Whether the right to self-determination should be included in the Charter?

Key points and recommendations

- The Commission supports stronger and clearer recognition of the rights of Victorian Aboriginal people in the Charter. The acknowledgement of a right to self-determination is the appropriate way to achieve that recognition.
- Recognition of the right to self-determination in Victoria should be directed to:
 - dialogue about the protection of indigenous rights, and
 - awareness of the right in policy and legislative action.
- While the consultations the Commission conducted with the Victorian Aboriginal community in 2010 indicated a lack of awareness specifically about the Charter and self-determination in a rights framework, the community was strongly supportive of an enhanced recognition of the rights of Victorian Aboriginal people.
- Recognition of the right to self-determination in Victoria will not affect national policy or legislative initiatives.
- Recognition of the right to self-determination in Victoria will not affect land or property rights of individuals in Victoria.

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.

Discussion

The Charter does not fully recognise of the rights of Indigenous people

The preamble of the Charter recognises that human rights have a particular significance for Aboriginal Victorians, 'as descendants of Australia's first people, with their diverse, spiritual, special, cultural and economic relationship with their land and waters'.¹⁰⁵ The protection of cultural rights in the Charter also specifically applies to Aboriginal people, and recognises that Aboriginal Victorians have a right to maintain their language, kinship ties and spiritual and material relationship with the land, waters and other resources under their traditional law and custom (section 19(2) of the Charter).

The right to self-determination was not included in the Charter in 2006. The Human Rights Consultation Committee said in 2006 that its decision not to recommend inclusion of the right to self-determination was based on the absence of an established precedent on the content of the right. The Committee was also concerned that its recognition may lead to unintended consequences. The Committee considered that recognition of self-determination could not be included in a Charter framed in general terms, for general application across Victoria, because any provision establishing a right to self-determination must contain detail about its intended scope and reflect Indigenous communities' understanding of the term.

The inclusion of the right to self-determination must be specifically considered as part of the four-year review under section 44(2)(b) of the Charter.

These concerns have now been predominately addressed through the adoption of the United Nations Declaration on the Rights of Indigenous People (the Declaration) in 2007. Australia politically endorsed the Declaration in 2010. The clarity of this Declaration about the content of the right under international law and its acceptance after almost a decade of negotiations by states like Australia, Canada and New Zealand demonstrates that there should no longer be a barrier to its inclusion in the Charter.

Recognition in the law is important. At a national level, the Australian Government has established an expert panel to consult with Australians and provide the Government with options about how to progress Constitutional Recognition of Indigenous Australians.¹⁰⁶ Among other things, the consultation will consider whether constitutional recognition should address issues such as sovereignty, self-determination, political representation, recognition of customary law and issues relating to land and resources.¹⁰⁷

¹⁰⁵ The Explanatory Memorandum for the Charter of Human Rights and Responsibilities states that the purpose of the preamble is to explain the objectives of the Charter and the context in which the Charter is to be interpreted.

¹⁰⁶ The expert panel will provide a report to the federal Government by December 2011.

¹⁰⁷ Law Council of Australia, *Constitutional Recognition of Indigenous Australians Discussion Paper*, 2011. Available at: www.lawcouncil.asn.au.

What does self-determination mean?

Historically, the term self-determination described the sovereignty and territorial integrity of the State, and was not viewed as a right that was held by individuals. Specifically, there was debate over whether self-determination was a right that could be taken to be held by Indigenous people. Modern international law now recognises the right to self-determination, as provided for under Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), as the most basic and fundamental human right that is held by all people and has special meaning and significance to indigenous people.¹⁰⁸

The United Nations Declaration on the Rights of Indigenous People has now provided clarity about the right to self-determination for indigenous people worldwide. Articles 3, 4 and 5 of the Declaration set out what self-determination means and what rights they bestow on indigenous people. They include:

- a right to freely determine their political status and freely pursue their economic, social and cultural development (Article 3)
- a 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 (Article 4), and
- a right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they choose, in the political, economic, social and cultural life of the State (Article 5).

Importantly, Article 46 of the Declaration makes it clear that self-determination should not be equated with the right for indigenous people to form an independent State, and that nothing in the Declaration may be construed as encouraging any action which would ‘dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States’. This section clarifies a previous misconception which some post-colonial states had about the consequences of the right.

The establishment and widespread adoption of the Declaration provides evidence that it is possible to protect and promote the right to self-determination, despite the different meanings that self-determination has to indigenous people world-wide, and despite differing views amongst the international indigenous community on the importance of the right to self-determination.

Australians know well the power of making principled commitments in the law and how this can shape change through the experience of the 1967 Referendum on the recognition of Aboriginal Australians.

¹⁰⁸ Victorian Equal Opportunity and Human Rights Commission, *Occasional Paper: Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion*, prepared by Larissa Behrendt and Alison Vivian, Jumbunna Indigenous House of Learning, University of Technology, Sydney, March 2010, p. 7.

What would recognising self-determination in Victoria mean?

There are a range of principles used by treaty-monitoring bodies to define and assess self-determination in practice,¹⁰⁹ including:

- the essential requirement for Indigenous people to participate in decisions that affect them (a requirement set out in Article 19 of the Declaration and by the *International Convention on the Elimination of All Forms of Racial Discrimination*)
- the strength of self-governance programs
- the protection of cultural identity
- the role of Indigenous peoples in decision making on issues affecting their traditional lands and resources, and economic activities, and
- the adoption of measures to safeguard Indigenous communities' rights and freedoms to which they are entitled individually and as a group.

¹⁰⁹ Victorian Equal Opportunity and Human Rights Commission, *Occasional Paper: Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion*, prepared by Larissa Behrendt and Alison Vivian, Jumbunna Indigenous House of Learning, University of Technology, Sydney, March 2010, p. 8.

Example: What might including self-determination in the Charter achieve?

- Legal recognition of this right that is already recognised under international law is an important step. Legal recognition can lead the way to more practical changes.
- It would make self-determination a formal part of the human rights dialogue between the government and the community.
- It would also provide government with a tool to help it to formally consider whether policies and activities infringe, or alternatively advance, the self-determination rights and aspirations of Victorian Aboriginal people. For example, this might mean ensuring that Aboriginal communities have a say in the provision of services in their communities and involving Aboriginal Victorians in projects and decisions that affect their country.

In Victoria, elements of self-determination are already reflected in the institutional and legal make-up of the State. The Charter would help to integrate this across all relevant areas of government activity.

For example the *Aboriginal Land Act 1970* (Vic), the *Native Title Act 1993* (Cth) and the *Traditional Owner Settlement Bill 2010* (Vic) all acknowledge the rights that Victorian Aboriginal Traditional Owners have over their land. This legal framework helps Aboriginal groups in Victoria to make agreements with government based on what is important and specific to them. Elements of land rights agreements that promote self-determination include the transfer of freehold title to Aboriginal land corporations, cooperative management agreements over national parks and funding for Traditional Owners Corporations to manage their native title interest and other aspects of settlement under land agreements.

This example shows that recognition of self-determination in the Charter is a means to an end. The extent to which the rights of self-determination are pursued in Victoria will depend upon:

- the objectives of the Indigenous community, which themselves are diverse, and
- the agreements that the Indigenous community are able to reach with government.

It is critical that the Charter guarantees Victoria's Aboriginal community, or groups from within the community, the capacity to meet their distinct goals and aspirations, as members of the Aboriginal, and the broader Victorian community.

Broader consideration and action in accordance with the right of Indigenous people to self-determination can have a positive impact on the Victorian population, and assist to ameliorate the socio-economic gap between Indigenous and non-Indigenous Victorians. For example:

- In 2008, the World Health Organisation reported that any serious effort to reduce health inequalities will involve political empowerment, because people that are already disenfranchised are further disadvantaged with respect to their health.¹¹⁰
- The Harvard Project on American Indian Economic Development has found that self-determination and fostering the ability of Indigenous people to make their own decisions about what development approaches to take (on matters as diverse as governance, natural resources management, economic development, health care and social service provision) has a significant impact on improving chances for Indigenous economic development.¹¹¹
- Recent research in Australia suggests that more than one quarter of Australians express anti-Aboriginal sentiments, and that one in five Aboriginal people polled said they were often treated with disrespect and mistrust. The research shows that racism can affect mental and physical health and reduce people's ability to take advantage of opportunity. Recognition of the right to self-determination in the Charter can help to boost public perception and engagement with the Indigenous community.¹¹²

¹¹⁰ World Health Organisation, *Health Equity at the Country Level: Building Capacities and Momentum for Action*, A Report on the Country Stream of Work in the Commission on Social Determinants of Health, 2008. Available at: www.who.int/social_determinants/media/sdhe_csw_final_report.pdf

¹¹¹ The Harvard Project on American Indian Development can be located at <http://hpaied.org/>. See specifically Cornell, S and Kalt, JP, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, American Indian Studies Center.

¹¹² University of Western Sydney, *Challenging Racism: The Anti-Racism Research Project*, 2010. Findings from the project are available at: www.uws.edu.au/social_sciences/soss/research/challenging_racism.

What community members told the Commission

In collaboration, the Commission has prepared two reports on self-determination in preparation for the Four-Year Review, these include:

- *Occasional Paper: Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion*, prepared for the Commission by Professor Larissa Behrendt and Alison Vivian, Jumbunna Indigenous House of Learning, University of Technology, 2010 (the 2010 Occasional Paper) at **Appendix G**, and
- *Talking rights: Consulting with Victoria's Indigenous community about self-determination and the Charter*, prepared for the Commission by Ingenuity – SED Consulting, 2011 (*Talking Rights*) at **Appendix H**.

The 2010 Occasional Paper explored the concept of self-determination and provided a starting point for considering how to approach inclusion of self-determination in the Charter and what it might mean if it is included. It also created a framework for consultation with the community.

The *Talking Rights* report used the discussion in the 2010 Occasional Paper and sought the views of individual and communities on self-determination. It involved a limited consultation with around 90 Aboriginal Victorians from around the state. The Commission's recommendations in this submission are based on what Aboriginal community representatives have told us.

The consultations broadly sought to ask the following questions of the Aboriginal community:

- What does self-determination mean to you and is it important?
- Should the right for self-determination be included in the Charter, and if so
- How might it be achieved?

Key findings

- The Victorian Charter is not yet being used to its fullest potential by Aboriginal people, or advocates, to help communities overcome discrimination and achieve their own aspirations. This is concerning for the Commission because, as the experience of other groups such as the disability sector demonstrates, the Charter can be a powerful tool in community efforts to engage government and remove barriers to services and participation in public life.
- The consultation clarified that the content of self-determination will be defined by the activities of Aboriginal people in Victoria. Any definition of self-determination in Victoria must allow flexibility to accommodate a broad range of perspectives.

- The needs, goals and aspirations of Victorian Aboriginal people are diverse. These include very immediate, fundamental social and economic needs – access to good health care and education, better training and employment, housing and supports for families and individuals. They also include a strong desire for Aboriginal culture to be recognised and valued, and for Aboriginal people to be acknowledged as First Peoples who have unique, inherent rights.
- Although there was not unanimous agreement, the people that the Commission spoke to generally support the inclusion of the right to self-determination in the Charter. There was also clear expression for the right to self-determination to be recognised as the foundation on which other social, economic and cultural rights for Aboriginal people should rest.

Misconceptions about the right to self-determination

The Commission recognises there are a broad range of views within the Aboriginal community and the wider Victorian community about the rights to self-determination. Guidance can be taken from the UN Declaration about the meaning of self-determination and its particular application, and meaning for Aboriginal Australians given their experience of displacement and high levels of engagement with government service providers.

There are a number of misconceptions about the right to self-determination that have been resolved through international debate and recognition of the right in the Declaration. This includes a view that recognition of the right to self-determination in the Charter could result in intrusion on personal property rights and an increase in Aboriginal land claims. This is not correct. Recognition of the right of Aboriginal people to self-determination in the Charter will not change the limited rights that Aboriginal Victorians currently have to make land agreements and claim native title rights and interests under state and Commonwealth legislation.

It should also be noted that the right to self-determination can be recognised in Victoria in the absence of constitutional recognition of self-determination at a national level. Inclusion of the right to self-determination as set out in the United Nations Declaration on the Rights of Indigenous Peoples in the Charter is consistent with Australia's international obligations.

The Commission encourages the Government to consider the very positive impact that the results of the 1967 Referendum had on the Australian people and reflect on the platform for positive engagement with the Aboriginal community that it provided. The Commission recommends the Government commit to a comprehensive community engagement program to support the inclusion of self-determination in the Charter.

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

Term of Reference 3: Should there be mandatory regular auditing of public authorities to assess compliance with human rights?

Key points and recommendations

Mandatory auditing is one tool that can be used to assess and enhance compliance with human rights.

The Commission's approach to this issue is informed by the principles of transparency and accountability in government. Auditing and reporting support this framework.

Human rights are relevant to all areas of a public authority's operation so they provide a critical underpinning for other regulatory frameworks, including: privacy, multiculturalism, occupational health and safety, and risk management.

Audits are a way to enhance public authorities' understanding of and compliance with human rights and so improve service delivery. They build internal capacity and compliance. After four years it is appropriate to provide for a mechanism for audit and review of public authorities' compliance with human rights.

Given the relevance of human rights to service delivery, public authorities should integrate compliance reporting in annual reports.

Independent oversight is also important and the existing Charter review function should be modified to enable the Commission to nominate policies, practices or programs of public authorities to be audited for compliance with human rights.

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.

Discussion

The current reporting framework

Government requires public authorities to report against a range of legislation considered critical to good governance, risk management and service delivery. Reporting requirements for public authorities are set out in various instruments¹¹³ that require periodic reporting on issues, such as occupational health and safety, freedom of information, privacy and adherence to public sector values.¹¹⁴ These are not onerous requirements and are part of the standard business practice of a broad range of public authorities.

The existing reporting frameworks are used to highlight issues of public importance that are fundamental to good governance and to ensure authorities are transparent and accountable to Parliament and to the community. While human rights compliance is not currently part of this framework, it would not be onerous to require authorities to include human rights compliance in their annual reports.

¹¹³ *Public Administration Act 2004* (VIC), s 74; *Financial Management Act 1994* (VIC), Part 7; Standing Direction 4.2 Reporting Requirements in terms of Part 7 of the *Financial Management Act 1994*; Standing Direction 30A, Standard Requirements for the design and print of Annual Reports; Model Report for Victorian Government Departments and Financial Reporting Directions. Note that in previous years the Premier's Circular 2009/2 also required public authorities to comply with the reporting requirements in the *Multicultural Victoria Act 2004* (VIC) and the *Disability Act 2006* (VIC). We note that the Premier's Circular 2009/2 has been withdrawn and has not yet been replaced.

¹¹⁴ *Public Administration Act 2004* (VIC), s 74. Human rights (as set out in the Charter) form part of the public sector values identified in section 7 of the Act.

The Commission must also report annually to the Attorney-General on the operation of the Charter.¹¹⁵ Public authorities are not required to provide information to the Commission or to report on their compliance activities themselves, although legislation such as the Multiculturalism Act now requires agencies to report on human rights initiatives.¹¹⁶

In practice, the Commission performs its reporting function by seeking information from a range of public authorities (including government departments, Victoria Police, local government and some statutory public authorities). This information is presented in the Commission’s annual Charter report. It would be more efficient and appropriate for self-reporting to be integrated into existing government reporting frameworks and the annual Charter report could consolidate and analyse that information to provide an overview and central reference point.

Reporting as part of existing mechanisms

Many public authorities in Victoria are already required to report on compliance with other Acts. These reporting requirements are underpinned by the public interest in holding authorities to account in key areas of their work, particularly those that impact on individuals.

Snapshot of other relevant annual reporting requirements

Annual reporting requirements for compliance with legislation	Source	Applies to
<i>Occupational health and Safety Act 2004</i>	Financial Reporting Directions 22B , Standard Disclosures in the Report of Operations	All public sector entities
<i>Information Privacy Act 2000</i>	Financial Reporting Direction 10	All public bodies and departments
<i>Disability Act 2006</i>	Disability Act 2006, section 38	All public sector bodies
<i>Whistleblowers Protection Act 2001</i>	Financial Reporting Direction 10 Whistleblowers Protection Act 2001, section 104	All public sector bodies
<i>Freedom of Information Act 1982</i>	Financial Reporting Directions 22B . Freedom of Information Act 1982, section 7	All departments and any prescribed authority
<i>Multicultural Victoria Act 2004</i>	Multicultural Victoria Act 2004, Part 4	All departments ¹¹⁷

¹¹⁵ *Charter of Rights and Responsibilities Act 2006* (VIC), s 42.

¹¹⁶ *Multicultural Victoria Act 2004* s 19.

¹¹⁷ Note that the Premier’s Circular 2009/2 has been withdrawn; however the statutory reporting requirements set out therein remain relevant annual reporting compliance obligations. The Premier’s Circular required both government departments and agencies to report under Part 4 of the *Multicultural Victoria Act 2004*. As this circular has been withdrawn and the reporting requirements under the *Multicultural Victoria Act 2004* apply only to government departments; the agencies are no longer required to report under Part 4 of the *Multicultural Victoria Act 2004*.

Reporting on Charter obligations should similarly be part of normal business practice. Embedding human rights within ordinary reporting activities would help to embed human rights within governance frameworks. There would also be efficiencies in including reports on Charter compliance within existing structures. The Municipal Association of Victoria, for example, has expressed support for a streamlined approach to reporting on the Charter to avoid the complex and piecemeal reporting process around local government activities.¹¹⁸

Integration of reporting requirements into existing practices would bring with it the benefits of standardised reporting. This would help Parliament and the community to understand the progress of the Charter's integration and implementation, and consequently better assess the impact of the Charter over time.

The Commission supports a review of current reporting requirements to consolidate and streamline that process.

The Commission's independent annual report to the Attorney-General should be maintained to ensure transparency, oversight and a consistent vehicle by which issues can be highlighted to the Government and Parliament. These reports would focus on systemic issues, identifying problems and offering examples of good practice, rather than gathering and reproducing reporting from public authorities.

¹¹⁸ Municipal Association of Victoria, *Submission to the Scrutiny of Acts and Regulations Committee on the Review of the Charter of Human Rights and Responsibilities Act 2006*, 2011, p. 3.

The Australian Capital Territory (ACT) experience

The ACT has introduced a requirement into its *Annual Reports (Government Agencies) Act 2004* that requires the chief executive to include in his or her annual report 'a statement describing the measures taken by the administrative unit during the financial year to respect, protect and promote human rights'.

The ACT has introduced guidelines for government agencies when reporting on the measures that they have taken under the *Human Rights Act 2004* in their Annual Reports.¹¹⁹

The Report must include:

- the number of staff who have attended human rights training sessions
- internal dissemination of human rights information
- the level and frequency of liaison with the Human Rights Unit
- reviews of existing legislation, and
- litigation involving the Human Rights Act.

The ACT Human Rights Commission's *Submission into the Five Year Review of the ACT Human Rights Act* recommended improvements to the qualitative and quantitative indicators of human rights engagement to enhance the quality of reporting.¹²⁰ These suggestions included coverage of:

- reviews of procedures and policies for compliance
- whether and how they have managed their Human Rights Act obligations when outsourcing services (for example, whether contracts and tenders including a requirement for Human Rights Act compliance)
- whether they have developed guidelines and checklists for incorporating the Human Rights Act in decision-making
- whether they have disseminated information about their human rights obligations to their client groups, and
- whether they have developed a rights framework for complaint handling.

¹¹⁹ Section 5(2)(a) of the *Annual Reports (Government Agencies) Act 2004* (ACT) requires that an annual report must include a statement describing the measures taken by the administrative unit during the financial year to protect, respect and promote human rights.

¹²⁰ ACT Human Rights Commission, *Submission to the ACT Government's Five Year Review of the ACT Human Rights Act*, p. 42. Available at: www.hrc.act.gov.au/res/HRCommission%205yrReview%20Submission.doc?PHPSESSID=b0bf525dfc057e16fe0e75c944a4009f.

Human rights reviews and audits

Independent oversight and scrutiny of human rights compliance is an important element of government transparency and accountability. This can be provided in a number of ways and again, existing mechanisms should be utilised where they are available and effective. For example, the Office of Police Integrity looks at the compliance of Victoria Police with the Charter as one of the Director's key objectives. The Commission also strongly endorses the suggestion from the Municipal Association of Victoria that it would be useful to include Charter compliance on the agenda of mandated audit committees.¹²¹ These are independent committees that all local councils have to advise them on risk, compliance and finance.

The Charter should provide the Commission with the power to initiate an audit or review of a public authority's policies, programs or practices for compliance with human rights. This power would build on the Commission's existing review function (under section 41(c) of the Charter) and provide authorities with support and assistance in reviewing and improving their practices to ensure human rights compliance, and thereby deliver better outcomes for Victorians.

The Commission's current review function can only be used on request from a public authority. This is a limited mechanism and is not making a significant impact. The Commission has only had a small number of requests for reviews and has conducted two – one for the County Court and one for Greater Shepparton City Council. This reflects the relatively new nature of the Charter, but after four years it is appropriate to formalise the mechanisms by which compliance with human rights by public authorities can be assessed.

Review of Charter Compliance Policy – Greater Shepparton City Council

In 2010, the Commission undertook a review under section 41(c) of Greater Shepparton City Council's Charter Compliance Policy, entitled 'Human Rights Guidance'. The purpose of the review was to assess the policy's Charter compatibility and make recommendations to Council on how to enhance compliance with the Charter. The Commission provided Council with an evaluation report, providing comments about the policy and making recommendations.

A more flexible review function would assist human rights compliance by providing the Commission with a mechanism to strategically consider policies and programs that raise significant human rights issues. The Commission could then undertake tailored reviews or audits to build the capacity and compliance in public authorities of strategic importance. This would be in the same way as the Ombudsman reports on a particular issue or practices of concern, or the Auditor-General reports on particular programs or priority areas. This would allow attention and resources to be focused where they are most needed, and would be most beneficial in enhancing human rights compliance and improved outcomes.

¹²¹ Municipal Association of Victoria, *Submission to the Scrutiny of Acts and Regulations Committee on the Review of the Charter of Human Rights and Responsibilities Act 2006* (2011), p. 3.

Example: transport for children with a disability – more focused attention is needed

Concerns have been raised with the Commission about the transportation of children with disabilities to and from school in special settings. Many participants in the Commission's Disability Forum in 2010 were alarmed by the standard of care for children with disabilities on buses; which often consisted of several hours of travel per day and minimal stimulation. One participant spoke of her child being physically restrained in a school bus for four hours every day, despite the school being located within a 20-minute radius.¹²²

This is one example of a human rights issue that is important for individual Victorians, but has not been given attention through more general oversight bodies.

The Ombudsman Victoria, the Auditor-General and the Victorian Privacy Commissioner all have own-motion review functions. These functions vary in scope and breadth, and operate in different legislative frameworks. A range of regulatory bodies are provided with this function to assist organisations with compliance through an external scrutiny of performance against agreed measures. The ACT has conducted a small number of human rights reviews. These have been found to benefit the organisation through developing internal capacity and improving performance and compliance.

In Victoria, the Ombudsman has the power to investigate the administrative actions of statutory bodies.¹²³ The Auditor-General has the power to look into legislative compliance issues.¹²⁴ The activities of these organisations may include Charter compliance, however these bodies do not specifically report on human rights compliance, the Charter is not the primary driver of their work-program and does not form the basis of their compliance assessment framework.

As an example, the Privacy Commissioner has a specific role to play in addition to generalist oversight bodies like the Ombudsman. There should similarly be specific oversight of human rights compliance. While a number of regulators conduct audits or reviews there is limited overlap because of the different jurisdictions and the relatively low number of audits, investigations or reviews undertaken each year.

¹²² See also *The Age*, 'Anger as disabled pupils spend up to four hours a day on bus', 15 August 2010. Available at: www.theage.com.au/victoria/anger-as-disabled-pupils-spend-up-to-four-hours-a-day-on-bus-20100814-1248a.html (visited 3 December 2010).

¹²³ *Ombudsman Act 1973* (VIC), s13(1)(A).

¹²⁴ *Audit Act 1994* (VIC), s15.

Benefit of audits and reviews

Own-motion human rights reviews or audits are well accepted in other jurisdictions and have proven to be highly beneficial in achieving improvements in government activity.

The ACT Human Rights Commission reported that its own-motion human rights review function has been the most powerful tool in achieving systemic change in legislation and practice. Commenting on the impact of the Commission's audit of Quamby Juvenile Detention Centre at the fourth Human Rights Community Forum on 1 May 2006, the Chief Minister, John Stanhope, said:

*The human-rights audit of the Quamby Juvenile Detention Centre by the Commissioner last year was a perfect, practical example of a dialogue system at work. The process was conducted in such a collaborative way that by the time the final report was written, most of its recommendations had already been acted upon. This, surely, is a result worth any number of front-page Supreme Court judgments exposing rights abuses against juvenile offenders.*¹²⁵

The Australian Human Rights Commission also has the power to inquire into any act or practice that may be inconsistent with or contrary to human rights (s 11(1)(f) of the *Australian Human Rights Act 1986*). The definition of 'act' or 'practice' includes those acts or practices done by or on behalf of the Commonwealth or under an enactment. These powers have been used to prepare broad ranging reports on systemic human rights issues such as the report on the National Inquiry into Children in Detention in 2004.

The outcomes available following a human rights review should be broad and flexible, providing the Victorian Equal Opportunity and Human Rights Commission with discretion to publicise outcomes of a review without consent of the public authority where there is a public interest in doing so. Outcomes should include the discretion to make recommendations to agency heads and where appropriate to the responsible Minister and/or Attorney-General, table a report in Parliament, or make a report publicly available.

These discretionary outcomes would recognise that transparency and accountability are important in encouraging human rights engagement, and reflect the powers that are available to other regulators. They also facilitate capacity-building. State government agencies look to bodies like the Ombudsman, the Auditor-General and Privacy Commissioner for guidance and expertise, and reviews and audits are an important way of delivering this in a practical setting.

¹²⁵ ACT Human Rights Commission, *Submission to the Five Year Review of the Human Rights Act*, 2009, p.12.

Available at:

www.hrc.act.gov.au/res/HRCommission%205yrReview%20Submission.doc?PHPSESSID=b0bf525dfc057e16fe0e75c944a4009f.

Term of Reference 4 - Remedies when the government acts unlawfully

Term of Reference 4: Should the Charter include further provisions with respect to legal proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by the Charter?

Key points and recommendations

This Term of Reference raises two issues: (a) What types of 'legal proceeding' should be provided in the Charter? (b) What should be the range of remedies available where a breach of human rights has occurred?

This Term of Reference is only concerned with legal proceedings and remedies for acts, practices and decisions of public authorities. It is not concerned with remedies related to the passage of legislation through Parliament or remedies related to an act of Parliament. This part is directed to executive action; that is an act by a public authority, rather than legislative action.

The Commission believes that Victorians should be able to seek redress from government when a public authority breaches their human rights in the same way they can if it discriminates against them in the provision of services or unfairly evicts them from housing.

This will involve the Charter providing:

- Accessible, fair and efficient complaint handling procedures for a person who claims their human rights have been breached by acts, practices or decisions of public authorities.
- The ability for the courts and tribunals to order a range of remedies to provide appropriate redress for breaches of human rights.
- Courts and tribunals to be able to award damages only where it is assessed that administrative action does not adequately address the harm the person has experienced.
- Stand-alone cause of action and administrative complaint processes would not be available for matters related to criminal law or criminal matters or alleged breaches of human rights arising from the content of/terms of legislation.

As with other areas of law, it is important that a range of mechanisms exist by which people can seek redress for breaches of human rights. There must also be a range of remedies available appropriate to the type of breach of rights that has occurred.

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.

Discussion

The Commission draws its conclusions in relation to legal remedies from the well-established practices within other human rights jurisdictions, in addition to our own Victorian experience in relation to complaints of discrimination.

The International Covenant on Civil and Political Rights (ICCPR) requires that 'effective remedies' are provided for breaches of human rights.¹²⁶ An 'effective remedy' is an 'accessible, affordable, timely and effective' remedy.¹²⁷

The UN Human Rights Committee's General Comment 31,¹²⁸ states:

In addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person ... The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable

¹²⁶ Art. 2(3) of the ICCPR.

¹²⁷ *Faure v Australia Communication No. 1036/2001 : Australia, 23/11/2005 at [7.2]* and CESCR, General Comment No 9 on domestic implementation of the ICESCR para [2].

¹²⁸ UN Doc CCPR/C/21/Re.1/Add.13 (2004) at [15].

constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.

The Committee acknowledges that an effective remedy for some human rights contraventions include ‘compensation, restitution, rehabilitation and measures of satisfaction, such as public apologies . . .’¹²⁹

Human rights complaints mechanism at the federal level

The *Australian Human Rights Commission Act 1986* (AHRC Act) allows for complaints to be brought against the Commonwealth for acts or practices that breach human rights included in the international instruments scheduled to or declared under the AHRC Act:

- [International Covenant on Civil and Political Rights](#)
- [Convention on the Rights of Persons with Disabilities](#)
- [Convention on the Rights of the Child](#)
- [Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief](#)
- [Declaration on the Rights of Mentally Retarded Persons](#) and
- [Declaration on the Rights of Disabled Persons](#).

Complaints cannot be made about legislation or the Acts of Parliament. Complaints are directed to acts or practices or decisions made by Commonwealth agencies but complaints cannot be considered about Acts that are in direct compliance with Commonwealth law. In this respect, the focus is on the exercise of executive discretion.¹³⁰

Complaints lodged under the AHRC Act can be investigated and, if appropriate, resolved through conciliation. If conciliation is unsuccessful – and if the AHRC finds that a person’s human rights have been breached – then the AHRC can prepare a report of the complaint, including recommendations for action and compensation, for the federal Attorney-General. The report must be tabled in Parliament.

The AHRC receives about 200 complaints per year alleging breaches of human rights against the Commonwealth and reports on average about four matters per year.¹³¹ These reports relate generally to treatment of detainees in immigration detention. In many cases the AHRC recommends compensation be paid.

¹²⁹ At [16].

¹³⁰ *Gerhardy v Brown* (1985) 159 CLR 70, p. 81; *Mabo v Queensland (No.1)* (1988) 166 CLR 86, pp. 196-197, and; *Secretary, Department of Defence v Human Rights and Equal Opportunity Commission & Ors* (1997) 149 ALR, p. 309.

¹³¹ Australian Human Rights Commission Annual Report 2009/2010.

It should be noted that the Commonwealth Ombudsman also has jurisdiction to investigate and report on matters related to detainees in immigration detention. The difference in jurisdiction is not considered to be an overlap. The human rights jurisdiction is focused on whether the Commonwealth has breached the human rights of an individual while the Ombudsman's jurisdiction relates to administrative decision-making and compliance.

The following are examples where complaints of human rights breaches have been dealt with by the AHRC. These are cases where the remedy was a damages claim, although other administrative remedies are also utilised.

Australian Human Rights Commission examples

Due care in detention

In 2009, the AHRC reported on a number of complaints made by a group of detainees in immigration detention centres. These people alleged their rights had been breached in the conduct of interviews by officials from their country of national origin, the Peoples Republic of China. They said that the Commonwealth had not provided adequate safeguards in the conduct of the interviews to protect the detainee from being asked and disclosing information that could place them and their families at risk. The President of the AHRC found their human rights had been breached and recommended a payment of \$5,000 to each complainant, and an additional payment of \$4,000 to those who had been placed in separate detention following the interviews.¹³²

¹³² Complaints by immigration detainees against the Commonwealth of Australia (Department of Immigration and Citizenship, formerly the Department of Immigration and Multicultural and Indigenous Affairs) and GSL (Australia) Pty Ltd REPORT NO. 40 (2008).

Arbitrary detention

In 2010, the AHRC reported on the complaint of Mr El Masri against the Commonwealth regarding his claim he had been arbitrarily detained because the Commonwealth had held him in immigration detention for 90 days after it should have released him, thus depriving him of his freedom for this period. Mr El Masri was held in the Management Support Unit, a highly restricted isolated environment, for over a year, although he had significant mental health issues. This treatment was found to have breached his right to be treated with humanity and dignity. Mr El Masri was released from detention in October 2005, but detained again in November 2006 because of record keeping errors on his file. The President of the AHRC recommended \$105,000 compensation be paid.¹³³

Conditions in detention

The AHRC's *Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention*, found that officers acting on behalf of the Commonwealth who had held Mr AV against a wall by his throat and conducted an unauthorised strip search, had used excessive and unreasonable force and had engaged in intimidating behaviour. The AHRC decided that those acts constituted inhuman and degrading treatment, and breached Mr AV's right to be treated with humanity and inherent dignity. The acts were therefore inconsistent with Articles 7 and 10 of the ICCPR. The Commonwealth accepted the AHRC's recommendation to pay Mr AV \$4,000 by way of compensation.

The current Victorian context

Complaints to the Ombudsman

In Victoria, the Ombudsman can handle complaints alleging a breach of the human rights that are contained in the Charter. However, the Ombudsman's jurisdiction in its current form does not provide an adequate complaint handling model for human rights breaches given:

- The Ombudsman has jurisdiction over administrative matters so the jurisdiction is limited to poor administration by agencies within the Ombudsman's jurisdiction – it is not designed to consider whether a matter is a breach of an individual's human rights.

¹³³ El Masri v Commonwealth (Department of Immigration and Citizenship) *Report into unlawful and arbitrary detention and the right of people in detention to humane treatment* (2009), Australian Human Rights Commission Report No. 41.

- There are a range of public authorities covered by the Charter which are not within the Ombudsman’s jurisdiction which covers Public Statutory Bodies. Therefore organisations such as Victoria Police and the Mental Health Review Board, where human rights issues may be relevant, are not included.
- The Ombudsman’s jurisdiction does not provide legally enforceable rights and can only make recommendations; it is therefore not comparable with a jurisdiction with a cause of action such as that recommended for the Charter.
- The Ombudsman does not have formal dispute resolution powers because the nature of the jurisdiction deals with administrative issues. The Ombudsman is therefore unable to offer the same service to complainants and respondents where it is appropriate to resolve a matter by negotiation with the parties – such as where their human rights may have been breached by a public authority.

Example:

The different nature of the jurisdiction is reflected in the Charter case law – in a number of matters such as *Director of Housing and Sudi*¹³⁴; which led to a man and his two year old child being evicted from public housing. The department acted according to policy and practice – there were no issues of poor administrative practice. The issue that became apparent at Court was the Department had not considered the broader issues under the Charter, including arbitrary interference with family and the impact of the policy on individual circumstances. This matter is one where it may have been appropriate to try to resolve through a complaint handling process and conciliation model like the model offered under equal opportunity law.

In proposing that there should be the ability to take action if an individual’s human rights are breached, it is important to note that this does not impact on law making or parliamentary sovereignty. The courts cannot order a law be changed under the provisions of the Charter. A court can only make a declaration that a law is inconsistent with the Charter. This does not change with the proposed model. The court could not order a law be changed and could not consider a claim about legislation that is inconsistent with the Charter. Acts done by public authorities in direct compliance with other legislation would still be protected from action under the Charter.

¹³⁴ *Director of Housing v Warfa Sudi* [2010] VCAT 328.

Current remedies before the courts

The Charter currently provides limited redress before the courts for a person who claims their human rights have been breached. The Charter does not provide a comprehensive complaint handling mechanism or a cause of action. A person taking a matter to court can 'add on' a Charter allegation to another claim - so if they want to pursue an alleged breach of human rights they bring a court case about the issue in a different jurisdiction (e.g. tenancy law) and then build in the alleged human rights breach.

Under the current system, a court or tribunal may find that a public authority has acted incompatibly with human rights and this may contribute to the success or failure of a particular claim. However, the court or tribunal cannot order a remedy purely for the breach of the person's human rights.

Proceedings for unlawful administrative decision-making (Section 39)

Remedies currently available under the Charter are also in need of clarification. The 'remedies' clause in the Charter is drafted in a way that can be given a number of different meanings; Section 39 of the Charter relevantly provides:

- (1) 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 the ground of unlawfulness arising because of this Charter.*
- (2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right –
 - (a) to seek judicial review under the Administrative Law Act 1978 or under Order 56 of Chapter 1 of the Rules of the Supreme Court . . .**

The meaning of section 39(1) has been much debated. The debate turns on the fact that section 39(1) confers a rights to 'seek . . . relief . . . on a ground of unlawfulness arising because of this Charter' that is preconditioned upon a person being able to '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 precondition is open to at least three constructions:

- first, it may be concerned only with standing to ‘seek’ a remedy in respect of a particular act or decision, in the sense that it requires a person to establish that he or she would have a sufficient interest to apply for judicial review of that decision
- second, it may import a requirement that a person has a arguable claim for the relief sought, in the sense that the claim for relief is not susceptible to summary dismissal, or
- third, it may import a requirement that the person be entitled to obtain the relief claimed.

The first construction fits best with the language and apparent purpose of the provision. This means that the section operates to prevent new causes of action being created by the Charter (including, in particular, a right to damages). This view is supported by both the Explanatory Memorandum and the Second Reading Speech for the Charter.¹³⁵ As the Attorney-General said in the Second Reading Speech:

Public authorities will still be bound by the charter, and existing causes of action that are available to address unlawful actions by public sector bodies are still available in respect of breaches of the charter in the same way that they are available for breaches of other laws.

Section 39(1) was not intended to prevent challenges to decisions of public authorities seeking traditional judicial review remedies on the basis that those decisions were unlawful by reason of the Charter.

The Charter requires public authorities to comply with human rights and to take relevant human rights into account when making a decision. When this obligation is not complied with, the person affected by the decision should be able to seek a review of that decision relying only on the Charter. For example, if the Department of Human Services makes a decision about child protection arrangements without taking into account the best interests of the child (section 17) and where relevant, the cultural rights of the child (section 19), an administrative law action that sends the matter back to the decision-making to remake the decision taking these factors into account would be appropriate.

The Commission recommends that section 39 be redrafted to make this clear.

¹³⁵ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic), p. 28.

The need for appropriate redress for breaches of human rights

While the Charter has generally helped the community engage with government, if asked how it could be better, many people tell us they need a stronger mechanism to respond to breaches of human rights.

Many organisations and community members have expressed support for a freestanding cause of action and entitlement for a range of remedies through submissions to the Victorian Human Rights Consultation, National Human Rights Consultation, and Review of the Victorian Charter. Underpinning this support is the recognition that numbers of complaints and claims about breaches of human rights in other jurisdictions are low and a separate cause of action for human rights breaches provides a strong incentive for compliance.¹³⁶

For example, the Public Interest Law Clearing House (PILCH) and the Homeless Persons Legal Clinic (HPLC) have noted:

The current limitation on a person's ability to commence legal proceedings for non-compliance with the Charter (under s39) creates confusion and unnecessary complexity. In some ways this detracts from the ability of the Charter to provide just and timely remedies for infringements of rights. The provision that a person may seek relief or remedy on a ground of unlawfulness under the Charter only if "otherwise than because of [the] Charter, a person may seek relief or remedy in respect of an action or decision of a public authority on the ground that the act or decision was unlawful" has created confusion around the Charter's application in practice . . .

*The HPLC therefore strongly recommends that section 39 should be clarified to identify those actions in which Charter arguments may be made.*¹³⁷

On the question of effective remedies, the Public Interest Advocacy Centre has noted that:

*for human rights to be protected under Australian law, it is necessary to ensure that courts are able to make orders in respect of the full range of remedies usually available in other proceedings. These include but are not limited to orders for damages.*¹³⁸

¹³⁶ Law Council of Australia, Submission to the National Human Rights Consultation 2009, pp. 129-130.

¹³⁷ Public Interest Law Clearing House (PILCH) and the Homeless Persons legal Service, Submission to the Victorian Charter Review, p. 59, pp. 60-61.

¹³⁸ Public Interest Advocacy Centre, Submission to the National Human Rights Consultation 2009, p. 22.

Table: Examples of organisations calling for better tools to address breaches of human rights

Organisation	Support for a separate cause of action	Support for damages
Amnesty International Australia ¹³⁹	Not commented on	Yes
Australian Human Rights Group ¹⁴⁰	Yes	Yes
Australian Lawyers Alliance ¹⁴¹	Yes	Yes
Castan Centre for Human Rights ¹⁴²	Yes	Yes
Community Child Care ¹⁴³	Yes	Not commented on
Eastern Community Legal Centre ¹⁴⁴	Not commented on	Yes
Gilbert + Tobin Centre of Public Law ¹⁴⁵	Not commented on	Yes
Homeless Persons Legal Clinic ¹⁴⁶	Yes	Yes
Human Rights Law Centre ¹⁴⁷	Yes	Yes
Justice Kevin Bell ¹⁴⁸	Yes	Yes
Law Council of Australia ¹⁴⁹	Yes	No
Law Institute of Victoria ¹⁵⁰	Yes	Yes
Mallesons Stephen Jaques ¹⁵¹	Yes	Yes
Municipal Association of Victoria ¹⁵²	Yes	Not commented on
Office of the Public Advocate ¹⁵³	Not commented on	Yes
PILCH ¹⁵⁴	Yes	Yes
Public Interest Advocacy Centre ¹⁵⁵	Not commented on	Yes
Victorian Council of Social Service ¹⁵⁶	Not commented on	Yes
Victorian Federation of Community Legal Centres ¹⁵⁷	Yes	Yes
Victorian Local Governance Association ¹⁵⁸	Yes	Not commented on

¹³⁹ Amnesty International Australia, *Submission to the National Human Rights Consultation* (2009), p. 12.

¹⁴⁰ Australian Human Rights Group, *Submission to the National Human Rights Consultation* (2009), p. 63.

¹⁴¹ Australian Lawyers Alliance, *Submission to the National Human Rights Consultation* (2009), p. 6.

¹⁴² Castan Centre for Human Rights, *Submission to the National Human Rights Consultation* (2009), [6.39].

¹⁴³ Community Child Care, *Response to the Review of the Charter of Human Rights and Responsibilities Act (2006)*, 31 May 2011.

¹⁴⁴ Eastern Community Legal Centre, *Human Rights: Making fair play our goal – Submission to the Inquiry into the Charter of Human Rights & Responsibilities*, June 2011, p. 24.

¹⁴⁵ Gilbert + Tobin Centre of Public Law, *Submission to the National Human Rights Consultation* (2009), pp. 68-69.

¹⁴⁶ PILCH Homeless Persons Legal Clinic, *Charting the Right Course: Submission to the Inquiry into the Charter of Human Rights and Responsibilities*, 6 June 2011, p. 57.

¹⁴⁷ Human Rights Law Centre, *Submission to the National Human Rights Consultation* (2009), pp. 442-443.

¹⁴⁸ Justice Kevin Bell, *Review of the Charter of Human Rights and Responsibilities Act 2006: Submission*, 31 May 2011, p. 5.

¹⁴⁹ Law Council of Australia, *Submission to the National Human Rights Consultation* (2009), p.129, p. 130, p. 148.

¹⁵⁰ Law Institute of Victoria, *Submission to the National Human Rights Consultation* (2009), p. 4, p. 141.

¹⁵¹ Mallesons Stephen Jaques, *Submission to the National Human Rights Consultation* (2009), [9.11].

¹⁵² Municipal Association of Victoria, *Submission to the Four-Year Review of the Charter*, 2011, p. 4.

¹⁵³ Office of the Public Advocate, *Submission to the Four-Year Review of the Charter*, 2011, p. 8.

¹⁵⁴ PILCH, *Submission to the National Human Rights Consultation* (2009), pp. 155-156.

¹⁵⁵ Public Interest Advocacy Centre, *Submission to the National Human Rights Consultation* (2009), p. 22.

¹⁵⁶ Victorian Council of Social Service, *Submission to the National Human Rights Consultation* (2009), p. 9.

¹⁵⁷ Victorian Federation of Community Legal Centres, *Submission to the review of the Victorian Charter* (2011).

A comprehensive complaint handling process for human rights

Access to court should not be the only mechanism for people to pursue a breach of their Charter rights. Court is often a last resort for people because of cost, time and the risk associated with an unsuccessful claim.

A simple and effective model that allows for the resolution of alleged breaches through conciliation by an independent statutory body would allow the community to better engage with government, and resolve many issues without the cost and complexity of court proceedings. It would also provide greater transparency about the range of human rights issues in the community and would improve the accountability of government.

A clear and enforceable cause of action

Rights are better protected when they are legally protected and there is an independent arbiter to decide whether the government has breached a person's human rights. Legal protection and the adjudication of rights also clarify expectations for government and ensure a clear understanding of the legal framework in which the Charter operates in Victoria.

The possibility of legal action and a legal consequence is a highly effective motivator for change, precautionary action and taking legal obligations seriously.

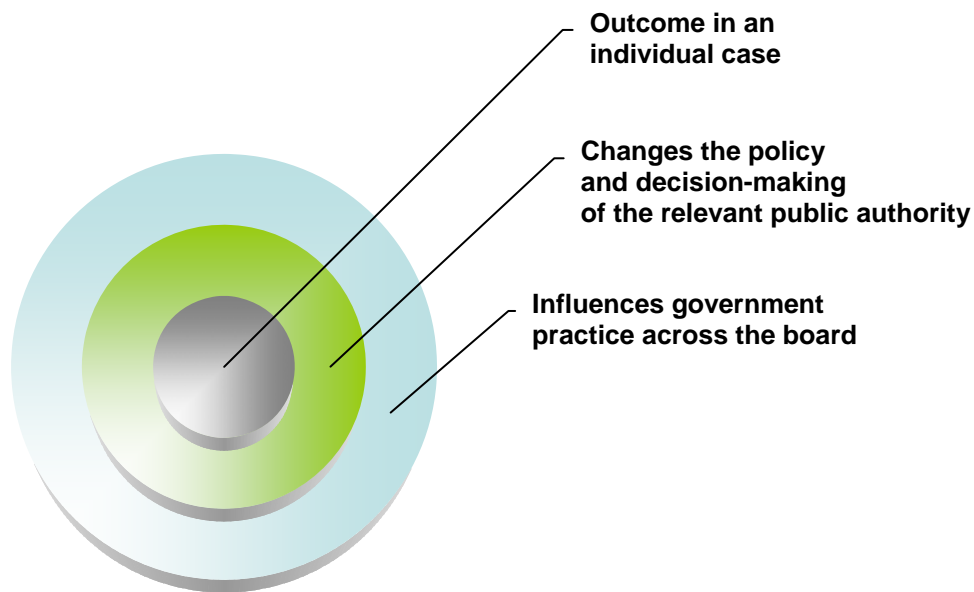
Victorians already have a right of action where the government has not met other duties, such as in contract, discrimination law, negligence or occupational health and safety. As with these other areas of law, judicial remedies provide a mechanism for clarity and consistency in policy implementation because the courts provide direction about what is, and is not, required to comply with the law. Judicial decisions may deal with an individual matter but also provide the basis for a systemic response by government. They also have an educative effect on government and the community.

A stand alone cause of action would facilitate better development of Charter jurisprudence by providing the ability for human rights matters to be determined in their own right. This would also simplify current litigation allowing alleged breaches of human rights to be identified clearly, rather than Charter issues being raised as an add on to another cause of action.

Legal protection of human rights does not require a legalistic approach to responding to alleged human rights breaches.

¹⁵⁸ Victorian Local Governance Association, *Submission to the Review of the Victorian Charter of Human Rights and Responsibilities Act 2006*, June 2011, p. 6.

Diagram: The flow-on effect of one Charter case



Responding to a complaint

After four years with the Charter, public authorities generally already have in place measures to respond to complaints which raise human rights issues.

Best practice, informed by the Ombudsman's *Complaint Handling Good Practice Guide*, requires a public authority to respond to complaints in a timely and appropriate manner. The Commission believes that many human rights issues may be resolved by the public authority responding to a complaint and taking corrective action if needed. If an individual believes that his or her human rights have been breached by a public authority, then it is appropriate that the public authority take steps to investigate and provide an appropriate remedy if there has been a breach. This approach is consistent with a dialogue model and focuses on practical and speedy redress where the issue involves decisions or practices of a public authority.

It is important that complaints are addressed in a timely manner.

What type of proceeding is needed?

While public authorities should respond to any complaints about alleged human rights breaches through their internal complaint handling mechanisms, this way of resolving disputes will not always be appropriate. For example, the Department of Education and Early Childhood Development, Department of Human Services, Office of Housing and Victoria Police all have comprehensive internal complaint handling mechanisms. However, there are a range of matters that relate to these agencies where it is apparent that external scrutiny and an impartial complaint handling body are essential to the transparency and accountability of these agencies to the public, because of the complex and sensitive range of issues they deal with.

The Commission recommends that the Government consider providing a clear and definitive cause of action to deal adequately with human rights breaches.

If the Government were to consider a cause of action as an effective means of redress for human rights issues, the Commission recommends a system that integrates a statutory dispute resolution process as a pre-court option to optimise opportunity for resolution outside the court process.

The Commission recommends that it be given the responsibility for handling complaints about alleged breaches of the Charter to provide a consistent, informal, accessible and appropriate mechanism for handling complaints about alleged breaches of human rights.

The Commission is already responsible under the statute for information provision about the Charter, and for providing education and advice to the community and public authorities about the Charter. The Commission is contacted to provide assistance with matters because of the strong public perception it has a complaint handling role under the Charter. Currently we must refer complaints to the Ombudsman, who only has the capacity to undertake an administrative review, rather than address a specific human rights breach.

The Commission has:

- recognised technical expertise with the Charter it has developed to meet its statutory obligations
- currently handles complaints about alleged discrimination, and has expertise in providing an efficient and effective dispute resolution service, including extensive expertise in statutory conciliation
- currently handles complaints about alleged discrimination by public authorities and could integrate the management of Charter complaints into its existing statutory dispute resolution service delivery process.

As with discrimination claims lodged with the Commission under the Equal Opportunity Act, a complaint handling framework for human rights would allow for a third party to assess the merits of the claim, offer assistance to resolve a matter and ensure both parties have access to an effective, informal and timely mechanism for dealing with human rights issues. Alternative dispute resolution deflects matters from the Courts and has an educative effect on all parties involved in the process. This enables broader systemic change to occur as a result of a conciliated outcome without requiring a party to pursue a matter to Court.

While the Ombudsman currently handles complaints about breaches of the Charter there are some limitations on this model due to:

- the different jurisdictions covered by the Ombudsman and the Charter legislation
- the focus of the Ombudsman on administrative actions
- confusion given the Commission's responsibilities under the Charter, as people come to the Commission for information about equal opportunity and human rights, but can only make complaints about equal opportunity matters, and
- the Ombudsman's jurisdiction does not lead to justifiable outcomes, therefore different models of complaint handling and dispute resolution are required.

These issues are discussed further under Term of Reference 5(e) at page 178.

(a) alleged breaches of human rights by acts, practices and decisions of a public authority

The Commission considers that an appropriate approach would be a model that reflects Part 8 of the *Equal Opportunity Act 2010*. In summary:

- a stand alone human rights cause of action, which permits a person to lodge a complaint with the Commission or directly with VCAT. The complaint must allege a contravention of the Charter by a public authority;
- a complaint handling mechanism which provides the parties the opportunity to provide information informally to try to resolve the complaint or, where that is not possible, to try to resolve the claim through conciliation to achieve appropriate agreed outcomes between the parties;
- if a complaint cannot be resolved by the Commission then the complaint may be referred to VCAT;
- VCAT would hear and determine the complaint;
- VCAT would have a range of remedies that could be awarded as appropriate – including direction to cease action, to take steps to prevent the action happening again;
- where VCAT considered the available administrative remedies did not provide adequate redress VCAT could award damages.

The Commission recommends VCAT as the appropriate body to hear and determine complaints (other than the matters set out in (b) below). VCAT is the appeal body for administrative decision making in Victoria and is the appropriate body to seek determination from. VCAT provides an informal, fast, flexible and accessible mechanism in keeping with the objects of the Charter to ensure access to justice for all Victorians.

VCAT has extensive experience in handling Charter related matters and currently has a Human Rights list as well as handling matters in some of the areas most commonly raised under the Charter – housing and accommodation, health and guardianship.

The Commission puts forward this model based on feedback from community, organisations and stakeholders. It reflects a range of mechanisms in other human rights jurisdictions, but also reflects the avenues available to people for redress of other types of harm, including: work-related injuries, discrimination law, consumer affairs issues and tenancy rights.

(b) breaches of procedural human rights in the Charter

The Commission acknowledges that the model discussed above is not appropriate for the human rights directed to the conduct of trials and decisions made by judges and tribunal members in the course of hearing and determining civil and criminal proceedings.

With respect to the following human rights:

- fair hearing (section 24)
- rights in criminal proceedings (section 25)
- right not be tried or punished more than once (section 26)
- no conviction based on retrospective criminal laws (section 27).

These rights impact upon the conduct of the trial and the decisions made by judicial officers. The appropriate remedy for alleged contraventions of these rights is not a dispute resolution model discussed above, but rather these rights should operate in conjunction with the relevant court's rules and procedures. If there has been an alleged breach which impacts on the fairness of a trial, then the appropriate remedy is an appeal in accordance with the general provisions for appeals in criminal and civil law claims.

(c) alleged breaches of human rights arising from the terms of legislation

The Charter already provides for appropriate procedures to address complaints about the terms of legislation and the actions of Parliament. See for example the role of the courts in interpreting legislation under section 32 and issuing declarations of inconsistent interpretation described in more detail at pages 166 and 172 under Term of Reference 5(d).

Role of litigation

The Commission's observation of Charter litigation over the past four years has confirmed that:

- Because of the ambiguity in section 39, practitioners are constructing strained non-Charter grounds to run alongside Charter grounds. In some cases this has involved a waste of court time and unnecessarily high legal fees spent arguing non-Charter grounds.
- The absence of a clearly stated cause of action or remedies provision reduces the effectiveness of the Charter and human rights as a tool for achieving good human rights outcomes in the pre-trial settlement phase or before litigation is commenced. This is because even public authorities that may not have complied with section 38 (the obligations of public authorities under the Charter to act compatibly with human rights), are prepared to go to trial to argue the ambiguities of section 39 where they might otherwise settle a matter.
- Greater clarity in the form of a separate cause of action provision would encourage the pre-trial or non-litigation resolution of matters where there are clear Charter breaches, providing positive human rights outcomes and significant savings in legal fees and court time.

Feedback through the Commission's education function and from stakeholders and community confirms:

- It is difficult for the community to understand the direct benefits and utility of the Charter in the absence of a clearly stated cause of action and remedies provision.
- The lack of a clear remedies provision creates cynicism about the commitment of government to human rights.

There is some concern that a freestanding cause of action could 'open the floodgates' of litigation and could be unmanageable for the government. This did not happen in Victoria with the introduction of the Charter and its use in association with other causes of action. It has not happened in other jurisdictions, such as the Australian Capital Territory (ACT), the United Kingdom (UK) or New Zealand, with legislative rights protection like the Victorian model.

The Charter is not like the US Bill of Rights

When we talk about a legal cause of action under a human rights instrument, it is easy to bring to mind the experience of extensive civil rights litigation in the US. However, it is important to remember that the US Bill of Rights is not the model of human rights law that has been adopted in Victoria (nor the ACT, New Zealand or the United Kingdom).

Firstly, the US Bill of Rights is constitutionally entrenched and the US Supreme Court is given power under the Constitution to invalidate any law that is inconsistent with the Bill of Rights. The Victorian Charter on the other hand, is an ordinary Act of State Parliament and it is Parliament, rather than the Courts, that maintains the ultimate say about human right in Victoria.

Secondly, the US Bill of Rights is over 200 years old and while it has been amended over time, the rights were drafted in a particular political context and some of them are dated. The rights in the Victorian Charter were based on modern human rights instruments and were tailored for the Victorian context.

Thirdly, the rights in the US Bill of Rights are expressed in absolute terms and are not subject to built-in reasonable and proportionate limitations such as those that apply in Victoria, the ACT, Canada, New Zealand and South Africa.

As noted above, the Australian Human Rights Commission receives about 200 complaints nationally alleging breaches of human rights against the Commonwealth. The Commonwealth Ombudsman receives over 38,000 contacts per year about Commonwealth agencies.

The community is clear about the distinction between administrative action and human rights breaches, which suggests there would be no floodgate of complaints or litigation if a stand-alone cause of action were introduced in to the Charter. As noted in Terms of Reference 5(d), around 200 reported matters raising Charter issues have been considered in four years, and only about half of those raised a substantial issue.

A cause of action and complaint handling mechanism would provide people with an effective mechanism to deal with their concerns, standardise human rights matters with discrimination law, privacy, tenancy and consumer related matters by providing an enforceable mechanism for people who felt their human rights had been breached, and ensure that public authorities were accountable to the community.

The Victorian Ombudsman does not publish statistics on the number of Charter related approaches it gets, suggesting the numbers are not significant. There are few matters that have been lodged under the ACT cause of action. Community feedback is that the cause of action would strengthen the Charter, and so strengthen the balance of power between government and Victorian citizens. But it does not appear based on evidence in this and other jurisdictions that providing a cause of action would lead to an increase in litigation.

The ability to have a claim of an alleged breach of human rights determined formally would provide incentive to resolve matters at the early stages by providing a more persuasive tool for community to engage government with.

Remedies for human rights matters

The community is also asking for the usual range of remedies to be available for a breach of human rights given the many different circumstances in which a Charter action may arise.

The Charter should provide for redress that matches the nature and the seriousness of the human rights breach. As with other areas of law, and other human rights jurisdictions, the public authorities should respond to human rights breaches by taking appropriate action and implementing measures to avoid repetition of human rights. In those matters which reach the courts and tribunals, there should a range of remedies available to redress the harm the person or group has experienced.

The range of remedies that could be adopted is the range of outcomes available under discrimination law through courts and tribunals including:

- an order declaring the public authority has breached human rights
- an order that the public authority not repeat or continue the behaviour (injunctive relief)
- an order requiring the public authority to perform any reasonable act or course of conduct to redress the damage or loss incurred by the applicant, such as remaking a decision
- an order for compensation only where the court or tribunal is satisfied the available administrative remedies do not provide adequate redress
- an apology or other statement to remedy the harm or loss.¹⁵⁹

Compensation only available where other remedies are not adequate

The Commission's view is that a court or tribunal should have the discretion to provide a range of remedies appropriate to the breach of human rights. However, given the Charter issues often relate to public authority policy, practice and exercise of discretion in administrative decision making, the Commission recommends that a court or tribunal should be required to consider the adequacy of the range of administrative remedies before considering whether an award of damages is an appropriate remedy.

¹⁵⁹ S46PO of the *Australian Human Rights Commission Act* (1986).

The current prohibition on any award of damages is inconsistent with other human rights jurisdictions and other common causes of action, such as discrimination law, tenancy and employment jurisdictions. The Commission considers that given the purpose of the Charter is to facilitate cultural change in public authorities and their dealings with the Victorian community, the range of administrative remedies should be the first consideration for courts and tribunals.

The Commission acknowledges that in some circumstances an award of damages may be an appropriate consideration, but these should be in significant cases only where it can be demonstrated that the harm is substantial and can not be adequately remedied by available administrative action.

This is comparable with the federal human rights reporting provisions, where the President can recommend the payment of compensation as well as the taking of any action to remedy or reduce the loss or damage.¹⁶⁰

It should be noted that the full range of remedies, including damages, are outcomes available for human rights breaches in other human rights jurisdictions, including: New Zealand, the United Kingdom, Europe, South Africa, Canada, and India (among others).¹⁶¹

When could damages be an appropriate remedy?

Factors that are considered relevant to whether an award of damages is made under the *European Convention on Human Rights*, for example, are:

- whether just satisfaction has been met by the finding of a violation
- the measures taken to address the violation
- any previous conduct by the State, and
- the degree of loss.

In that jurisdiction, the European Court of Human Rights regularly holds that the finding of a violation is sufficient satisfaction without any further monetary award.

In the United Kingdom, damages are also considered a remedy of last resort:

*The emphasis is not on enriching successful applicants but on the role of compensation in making public and binding findings of applicable human rights standards.*¹⁶²

The concern of the courts and tribunals has been to bring the infringement to an end and ‘any question of compensation will be of secondary, if any, importance’.¹⁶³

¹⁶⁰ S.29 of the *Australian Human Rights Commission Act* (1986).

¹⁶¹ Both the *Human Rights Act 2005* (ACT)¹⁶¹ and the *Human Rights Act 1998* (UK)¹⁶¹ give people the option of (1) bringing proceedings against public authorities who they claim have breached their human rights, or (2) relying on human rights in any legal proceedings.

¹⁶² *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 at [58].

¹⁶³ *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 at [53].

Examples of damages for human rights breaches in the UK

*R (Bernard) v Enfield London Borough Council*¹⁶⁴ – a severely disabled woman who was required to live in accommodation without wheelchair access unsuitable for her condition for 20 months was awarded £8,000.

*R (KB) v Mental Health Review Tribunal*¹⁶⁵ – seven psychiatric patients were awarded for £750 to £4,000 for extensive delays by the Mental Health Tribunal to their requests for reviews of their compulsory detention and treatment.

*Van Colle v Chief Constable of Hertfordshire*¹⁶⁶ – parents of a witness who was murdered due to inadequate police protection were awarded £50,000.

In New Zealand, the courts have found damages to be an appropriate remedy in some cases even though this is not specifically provided for in the New Zealand Act.

In *Taunoa v Attorney-General*, the Court considered that the awarding of damages may be unnecessary or inappropriate if the victim has been previously and adequately compensated under another cause of action or the breach was ‘relatively quite minor or the right is of a kind which is appropriately vindicated by non-monetary means’.¹⁶⁷ In the absence of a damages provision in the Bill of Rights, the New Zealand Court considered that a ‘restrained award of damages may be required if without them other Bill of Rights Act remedies will not provide an effective remedy’.¹⁶⁸

Mr Taunoa was awarded \$35,000 for being held in conditions described as ‘not fit for human beings, even those behaving badly in prison’ for a total of 32 months.¹⁶⁹

The case of *Small v Attorney-General*¹⁷⁰ provides another example.

This case concerned the execution of a search warrant at the plaintiff’s house by the police, which the Crown later conceded was unreasonably issued. The plaintiff was a university lecturer and a political activist. The warrant was issued on the suspicion that he had been involved in the planting of a hoax bomb at Christchurch City Council offices, although that suspicion was found to be unreasonable. ***The court found that a breach had occurred and awarded \$20,000.***

¹⁶⁴ [2003] HRLR 111.

¹⁶⁵ [2004] QB 936.

¹⁶⁶ [2006] EWHC 360.

¹⁶⁷ *Taunoa v Attorney-General* [2008] 1 NZLR 429 at [256].

¹⁶⁸ *Taunoa v Attorney-General* [2008] 1 NZLR 429 at [257].

¹⁶⁹ *Taunoa v Attorney-General* [2008] 1 NZLR 429 at [113].

¹⁷⁰ (2000) 6 HRNZ, p. 218.

The ACT introduced a direct cause of action for human rights breaches amendments to their Human Rights Act in 2009.

Under subsection 40C(4) of the ACT Human Rights Act, the Supreme Court is expressly prevented from awarding damages for a human rights breach. However, under subsection 40C(5), any pre-existing right to damages for the same conduct remains undisturbed. This includes the right to an award of compensation for unlawful detention and wrongful conviction; which are expressly provided for in sections 18(7) and 23 of the Human Rights Act.

Since the commencement of this provision in the ACT there have been very few cases where action has been brought against a public authority using the direct right in section 40C.¹⁷¹

The first, and arguably most significant case, is that of *Hakimi v Legal Aid Commission (ACT); The Australian Capital Territory (Intervener)* [2009] ACTSC 48. In this case, Mr Hakimi brought an application under section 40C of the Human Rights Act against the Legal Aid Commission. The applicant claimed that the Legal Aid Commission had failed to provide adequate funds by way of legal aid so that he could be legally represented by a representative chosen by him in accordance with sections 22(2)(b),(d),(e) and (f) of the Human Rights Act. The Legal Aid Commission denied that the Human Rights Act required the Commission to act in this way. The matter was dismissed on the basis the court concluded that there was no absolute right for a person legally aided to choose their lawyer.

The Commission is not aware of any cases in the ACT where damages have been awarded as a direct result of an action brought against a public authority under section 40C of the Human Rights Act. However, it is worth noting the case of *Morro, N & Ahadizad v Australian Capital Territory* [2009] ACTSC 118, where the ACT Supreme Court awarded compensation to the plaintiffs for wrongful conviction, contrary to section 18(7) of the Human Rights Act. In this case, the Court held that section 18(7) of the Human Rights Act confers a 'substantive statutory right to compensation' (at [42]).

¹⁷¹ *Eastman v Chief Executive of the Department of Justice and Community Safety* [2010] ACTSC 4; *Gupta v O'Leary and ors* [2011] ACTSC 39; *Blundell v Sentence Administration Board of the Australian Capital Territory, The Australian Capital Territory and The Chief Executive of the Department of Justice and Community Safety* [2010] ACTSC 151; *In the matter of an application for bail by Islam* [2010] ACTSC 147; *Jackson v The Chief Executive of the Dept. of Justice and Community Safety and the Sentence Administration Board of the Australian Capital Territory* [2009] ACTSC 102; *Canberra Fathers And Children Services Inc & Michael Watson (Residential Tenancies)* [2010] ACAT 74.

Charter's application to the calculation of damages in other claims

The Government should also address the limitation in section 39 to clarify that it allows breaches of Charter rights to influence the *calculation* of damages. For example, the existence of a Charter breach should be able to influence a court's discretion to award exemplary or aggravated damages in a case for which damages are sought on non-Charter grounds, in the same way as other conduct might influence that calculation. The fact that conduct is also a breach of a Charter right should not prevent it being considered in the calculation of damages, as it would ordinarily have been prior to the enactment of the Charter.

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

Term of Reference 5(a): What have been the effects of the Charter Act on the development and drafting of statutory provisions?

Key points and recommendations

The Charter has had a significant impact on the development and drafting of legislation.

Statements of compatibility help to ensure that human rights are appropriately considered early on in the legislative development process because a Minister will have to answer to Parliament when a Bill is introduced.

Just like the ACT Human Rights Act, the Charter's 'impact on policy-making and legislative processes has been more extensive and arguably more important than its impact in the courts'.¹⁷²

As the Department of Justice has stated:

*The changes to the legislative process have had an impact, often unseen by the general public, in bringing about numerous amendments to reduce adverse human rights impacts even before a policy or Bill is considered by Cabinet.*¹⁷³

The influence of the Charter on the preparation of laws could be strengthened through better consultation with the community during the drafting of Bills and more structured consideration by Government. In both of these areas Charter considerations could be integrated into existing processes.

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.

Discussion

Section 28 of the Charter requires a Member of Parliament who proposes to introduce a Bill into a House of Parliament to prepare a statement of compatibility on that Bill. The statement of compatibility must state:

¹⁷² The ACT Human Rights Act Research Project, The Australian National University, *The Human Rights Act 2004 (ACT): The First Five Years of Operation: A Report to the ACT Department of Justice and Community Safety*, 2009, p. 6.

¹⁷³ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: 2009 report on the operation of the Charter of Human Rights and Responsibilities*, 2010, p. 34.

- whether, in the Member’s opinion, the Bill is compatible with human rights and, if so, how it is compatible, and
- if, in the Member’s opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

Through the preparation of a statement of compatibility, public servants need to consider human rights during the preparation of legislation. As the Scrutiny of Acts and Regulations Committee has recognised:

*Charter s28’s requirement that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed.*¹⁷⁴

Identifying issues early and drafting better laws

The path towards Charter compatible legislation starts early – with the policy development process, rather than when a statement of compatibility is tabled in Parliament on Second Reading of a Bill. This early consideration means evaluating the human rights impact of a proposal during the policy development stage and through a legislative bid, providing instructions on any proposed limitations on human rights for drafting, and developing a final statement of compatibility.

In 2008, guidelines were published to assist legal and policy officers in Victoria ensure that their policy proposals, programs, legislation, and statutory rules are compatible with the human rights protected by the Charter. The guidelines provide a detailed discussion of the rights protected, a table to ensure that all rights implications are considered, and guidance on whether interference with those rights is reasonable and proportionately connected to the objective sought to be achieved. Comprehensive and easy-to-use, the guidelines encourage responsible policy development, recognising the powerful role that Parliament plays in governing its citizens and the caution needed to avoid any unreasonable limitations on their human rights.

¹⁷⁴ Scrutiny of Acts and Regulations Committee, *Alert Digest 11*, 14 September 2009, p. 3.

Example: Building a better public transport system

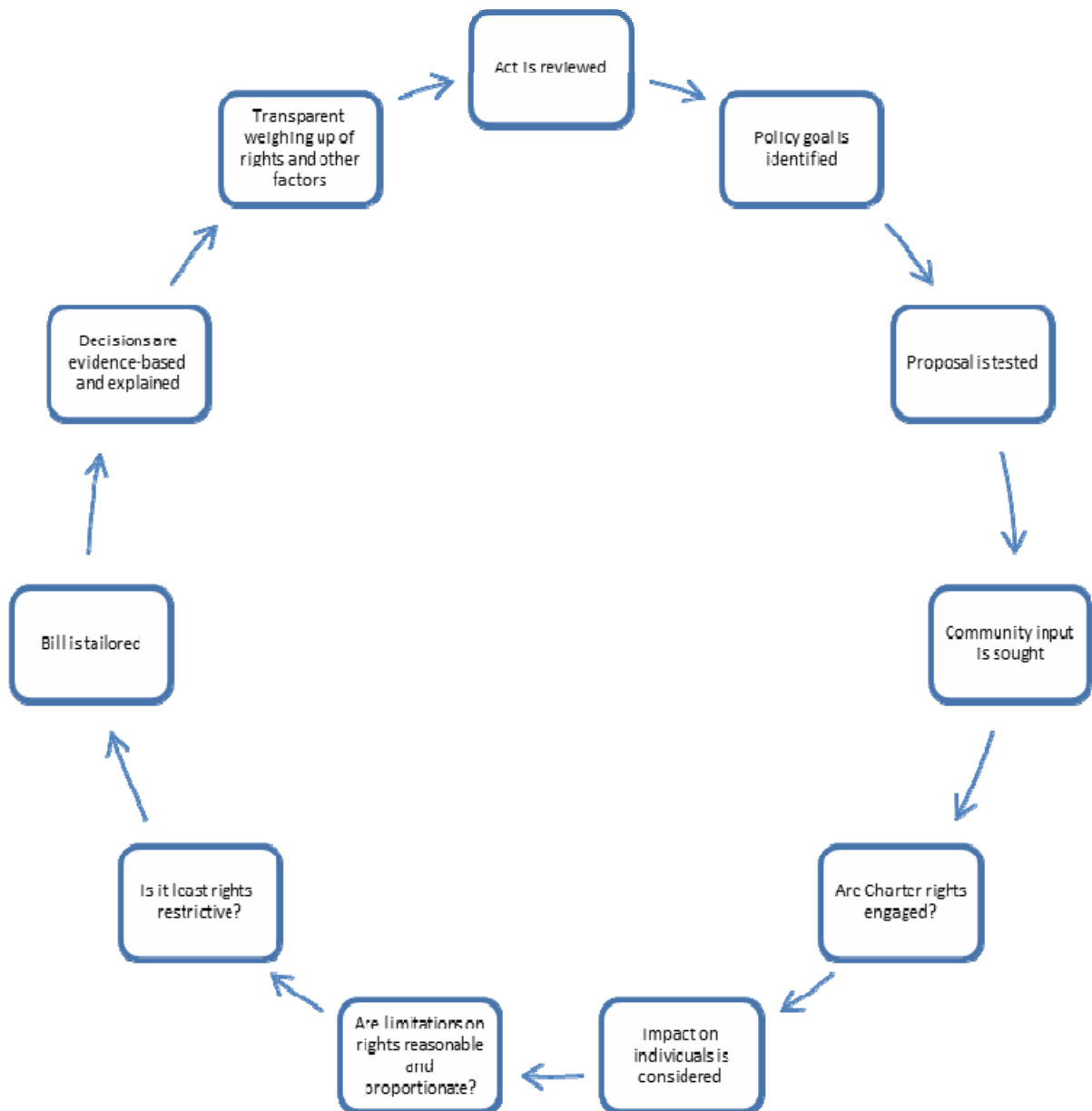
When developing the *Transport Integration Act 2010*, the Department of Transport met with different stakeholders, many of whom highlighted the link between transport and human rights; most notably the right to participate in public life (section 18 of the Charter). The Department reported that the Charter could usefully inform the operation of Victoria's public transport system and that 'the development of legislation that incorporates objectives of equity, access, affordability and social inclusion will assist in ensuring the protection of the rights outlined in the Charter'. As a result, the Transport Integration Act has a key objective to ensure a socially inclusive transport system.¹⁷⁵

The legislative requirement for a statement of compatibility to be tabled with the Bill in Parliament has ensured that legal and policy staff are not only assessing the compatibility of a new law with human rights, but are also developing their capacity to recognise, and minimise where possible, any potential infringements of individual rights. When this approach is used, it can help shape more rights-consistent legislation at the outset.

Many departments have advised the Commission that one of the major impacts of the Charter has been a more considered approach to the impact of new laws, which has resulted in better drafting. This approach has included greater community engagement and consultation during the legislative development process.

¹⁷⁵ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 30.

Charter analysis - helping to create good laws



What government departments and agencies are saying

As the early stages of legislative development are conducted in confidence within government, the impact of the Charter on the development and drafting of legislation is not often obvious to the rest of the community. In order to better understand the process, we need to look at what government bodies are observing themselves.

*Departmental progress in improving human rights protection through legislative development and review has been driven by the obligation on public authorities in section 38 of the Charter and, since the Charter's commencement, by the requirement to produce statements of compatibility (SOCs) for all legislation . . . The obligation in section 38 of the Charter has required all DOJ staff to 'Think Charter' in their approach to decision-making and policy development.*¹⁷⁶

Department of Justice

*The Charter's legislative presence and the requirement to produce a statement of compatibility for new legislation have resulted in a broader consideration of matters relevant to the right to privacy.*¹⁷⁷

Victorian Privacy Commissioner

*The introduction of the Charter has resulted in a greater awareness of the need to consider the potential impact of legislative change on individual's rights.*¹⁷⁸

The Office of Gaming and Racing

Example: Law Reform

The Victorian Law Reform Commission reported to the Commission in 2010 that the Charter and international human rights instruments play an important role in law reform debates 'because they provide an accessible framework within which to evaluate existing laws and upon which to develop law reform proposals'.¹⁷⁹

For example, in its report on child protection, the Law Reform Commission noted that at present a child who is the subject of a protection application under the *Children, Youth and Families Act 2005* is not automatically entitled to be a party in those proceedings. The Law Reform Commission argued that 'under the Charter, a child who is the subject of a protection application has the right to be recognised 'as a person before the law' and proposed that every child who is the subject of a protection application should be a party to the proceedings.¹⁸⁰

¹⁷⁶ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 177.

¹⁷⁷ Ibid p. 177.

¹⁷⁸ Ibid p. 187.

¹⁷⁹ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 36.

¹⁸⁰ Ibid p. 189.

Positive changes are evident

There is also evidence of human rights considerations having an impact when we look at the legislation that is put forward to Parliament for consideration. The following are some examples that illustrate the variety of areas in which the Charter is operating.¹⁸¹

- In 2009, the Department of Transport reported that a human rights analysis was significant in several Bills, including: the *Transport Legislation (Public Transport) Bill 2009*; the *Transport Legislation Miscellaneous Amendments Act 2009*, and; the *Statute Law Amendment (Charter of human Rights and Responsibilities) Act 2009*. Amendments designed to uphold Charter rights included: changing of legal onus provisions to evidential onus provisions to protect the right to fair hearing of people accused of transport offences, and providing direct use immunity from prosecution to individuals compelled to answer questions before the Chief Investigator of Transport and Marine Safety.
- A 2009 review of the *Education and Training Reform Act 2006* addressed the applicability of Charter rights. A proposal to give a regulator the power to disclose the names of directors of training provider entities whose accreditation is suspended was considered having regard to the right to privacy and reputation.
- Consideration of the Charter resulted in the *Public Health and Well Being Act 2008* 'being more explicit about the human rights principles underpinning the public health approach', particularly in striving to ensure that any actions that limit personal freedom are proportionate and reasonable.
- The *Sentencing Act 1991* was amended to ensure that the issue of whether an offence was motivated by hatred or prejudice against a particular group is considered in sentencing. The amendment promotes the right to equality and the right to life.
- Feedback was incorporated into amendment to the *Corrections Regulations 2009* relating to instruments of restraint to enhance compatibility with the Charter. This included improved human rights protections around the use of restraints, prison placement and strip searches.
- The Department of Planning and Community Development revised a provision of the *Major Sporting Events Act 2009* to be more compatible with the Charter. An individual could previously be directed to leave a major sporting event venue for 'causing annoyance'; the revised section provides that persons can be directed to leave for unsafe behaviour or unreasonably disruptive or interfering behaviour. This made the provision more objective and appropriately tailored to the issue of concern it sought to address.

¹⁸¹ These examples are taken from information provided to the Commission by agencies as part of the Commission's annual reporting process on the operation of the Charter. These and other examples are included in the Commission's annual reports on the Operation of the Charter of Human Rights and Responsibilities (2007, 2008, 2009, and 2010).

The 'quadruple bottom line'

Given the benefits of improved policy outcomes, the consideration of human rights should be integrated into the pre-Parliament process. The Commission supports for Victoria the proposal put forward by the Tasmanian Government for its jurisdiction that an assessment of human rights should be part of the policy and service delivery development process.¹⁸² This could be done for submissions going to Cabinet as part of the existing system of regulation impact statements.

Some departments already carry out human rights impact assessments. For example, the Department of Transport told the Commission in 2009 that the assessments carried out during the development of legislation have created a new 'quadruple bottom line', in which human rights impacts are evaluated alongside social, economic and environmental outcomes.¹⁸³ While working within existing structures and systems, including a human rights focus along the way, has helped Departments identify issues, tailor their approaches, and meet their own obligations as public authorities.

¹⁸² Tasmanian Department of Justice, *A charter of human rights and responsibilities for Tasmania: Human Rights Charter Legislative Project Directions Paper*, 2010, p. 33.

¹⁸³ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 Report on the operation of the Charter of Human Rights and Responsibilities*, 2010, p. 34.

Major legislative reviews prompted by the Charter

Review of the Mental Health Act

In 2008, the Department of Health announced a review of Victoria's mental health legislation, citing recent policy and human rights developments as the impetus for the review.

Consideration of the Charter as one of the primary elements and instigators of the review is directly linked to a need to ensure that a new Mental Health Act provides an effective legislative framework for the treatment and care of people with serious mental health illness in Victoria. The review has been conducted acknowledging from the outset that mental health laws have a significant impact on the human rights of vulnerable people.

A human rights based approach to legislative development requires consideration of human rights and community perspectives from the outset. The review has provided an opportunity for widespread comment, debate and input from carer, mental health practitioners, other stakeholder groups and the broader community.

The Charter and its guidance about when limitations may be placed on rights has been used to resolve divergent views on these complex issues and consider the impact that various proposals will have on the human rights of people with mental illness.

The result of the process to date has been the development of an Exposure Draft which has sought to promote a contemporary rights-based approach to the regulation of mental health treatment and care. The Government should continue taking human rights into account in this process and ensure that there is community consultation specifically on the human rights issues raised in a final draft of the Bill.

Review of the Guardianship and Administrative Act

Modern development of human rights law has also been instrumental in instigating the review of the *Guardianship and Administration Act 1986*. Traditionally, guardianship laws sought to protect people with impaired capacity from abuse. Developments in human rights have shifted attitudes towards guardianship laws that promote participation of people with impaired capacity in the community, in particular the principles of autonomy and dignity.

The Victorian Law Reform Commission is conducting the current review of the Victoria's guardianship legislation. Among the terms of reference for the review is: *The need to balance the protection of the interests of an adult with impaired capacity by a guardian or an administrator with the person's exercise and enjoyment of the human rights, such as the right of freedom of choice, association and movement, including consideration of whether the Act strikes the right balance ...*

Community engagement

The Charter has also had a positive impact on community engagement and consultation during the legislative development process. Since the Charter was first introduced, the Commission has noted a marked increase in statements of compatibility reporting on community consultation in the development of legislation. Stakeholder engagement ensures that people who are most likely to be affected by a law have the opportunity to contribute to its development and that legislative drafters have the opportunity to benefit from first-hand experience of how a law is working in practice. As one example, the Department of Education and Early Childhood Development has commented that stakeholders are involved in the early stages when it develops any new Bill.

Listening to the community and ensuring that human rights considerations are built into legislation before it reaches Parliament promotes transparency and minimises the need for individuals to be responsible for holding government accountable for respecting their rights. Government has considered and addressed many issues that have been raised in public consultations, before a law is enacted. It is appropriate that the Government take on this responsibility.

Going through this transparency process also allows the Government to demonstrate that human rights have been taken into account and how competing interests have been balanced.

More could be done in practice though to set out a human rights analysis when exposure drafts are released, rather than waiting for a final statement of compatibility. The public should not have to wait for information about human rights until all policy positions have been settled and a Bill is before Parliament.¹⁸⁴ For example, the *Mental Health Act 1986* engages a large number of Charter rights, including the right to liberty. It intersects with people's lives at sometimes very vulnerable points when they are not in a position to protect their own human rights.

The Review of this Act has involved several years of public consultation, resulting in an Exposure Draft of a proposed Bill. However, neither the current nor previous Government have indicated an intention to provide the community with information about how the proposed amendments are compatible with human rights, until a Bill is tabled in Parliament.

While the outcomes of these consultation processes have been mixed, the practices introduced by departments in the preparation of new laws indicate that government is increasingly holding itself to account for respecting the rights of Victorians.

¹⁸⁴ This was also a recommendation in the five-year review of the ACT Human Rights Act. See the ACT Human Rights Act Research Project, The Australian National University, *The Human Rights Act 2004 (ACT): The First Five Years of Operation: A Report to the ACT Department of Justice and Community Safety*, 2009, p. 34.

In some cases, greater consideration of human rights issues and broader community consultation could have been used to shape better legislation. These are missed opportunities for government.

Summary Offences and Control of Weapons Acts Amendment Act 2009

The *Summary Offences and Control of Weapons Acts Amendment Act 2009*, which commenced operation in January 2010, introduced new police stop and search powers.

It was the first law in Victoria that the State Government acknowledged to be partially incompatible with the Charter.

Six months after the commencement of the Act, the Victorian Government introduced the *Control of Weapons Amendment Bill 2010*, which became the *Control of Weapons Amendment Act 2010*. This Act further expanded police powers and was the subject of Victoria's second statement acknowledging incompatibility with the Charter.

The State Government justified these amendments as being necessary to address community perceptions about knife crime, as well as to remove certain operational difficulties experienced by Victoria Police. However, no evidence was provided to justify these changes.

These laws raise a number of clear human right issues, in particular the scope to use them arbitrarily or in a way that discriminates against certain groups, such as Indigenous people, young people and homeless people.

At the time the laws were introduced, the Commission expressed its concerns that the Victorian Government had not properly consulted with the community about the proposed amendments and their human rights implications before introducing it to Parliament.

The public debate that occurred while the legislation was before Parliament was a good example of the human rights dialogue encouraged by the Charter. The Charter should now be used to help assess whether the law has been administered in a manner that addresses these human rights breaches. Whether the outcomes achieved justified the limitations on rights is also an integral factor in identifying issues that needed to be addressed in implementing the legislation, including appropriate training, reporting and monitoring. The Department of Justice reports that since there are no 'reasonable suspicion' prerequisites to the exercise of these powers, police have been rigorous in ensuring that they are exercised in a strictly random way.

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

Term of Reference 5(b): What have been the effects of the Charter Act on the consideration of statutory provisions by Parliament?

Key points and recommendations

The Parliament plays a critical role in protecting and promoting human rights in Victoria. The Charter recognises this and respects parliamentary sovereignty by supporting the work of Parliament, rather than seeking to restrain it. The Charter does not prevent Parliament from making any laws and it does not allow the courts to find laws to be invalid if they conflict with Charter rights.

What the Charter does, is give Parliament an agreed human rights framework within which to consider the challenging issues that come before it. This can help Parliament to balance competing interests and to consider individual rights alongside the interests of the broader community.

The dialogue mechanisms in the Charter, such as statements of compatibility, declarations of inconsistent interpretation and reports from the Scrutiny of Acts and Regulations Committee (SARC), give Parliament information it needs to make informed decisions about human rights when it is enacting laws for our State. The Charter also asks Parliament to be clear about its intentions when it seeks to restrict these fundamental rights and freedoms. This supports the transparency and accountability of both government and the parliamentary process.

In the past four years, the Charter mechanisms have supported the work of Parliament, but they could be more effectively supported and utilised.

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.

Discussion

The parliamentary process

Under the dialogue model established by the Charter, the Minister introducing a Bill tables a statement of compatibility with it outlining whether the Bill is consistent with Charter rights. SARC will then independently consider the Bill and report on whether it is incompatible with human rights.

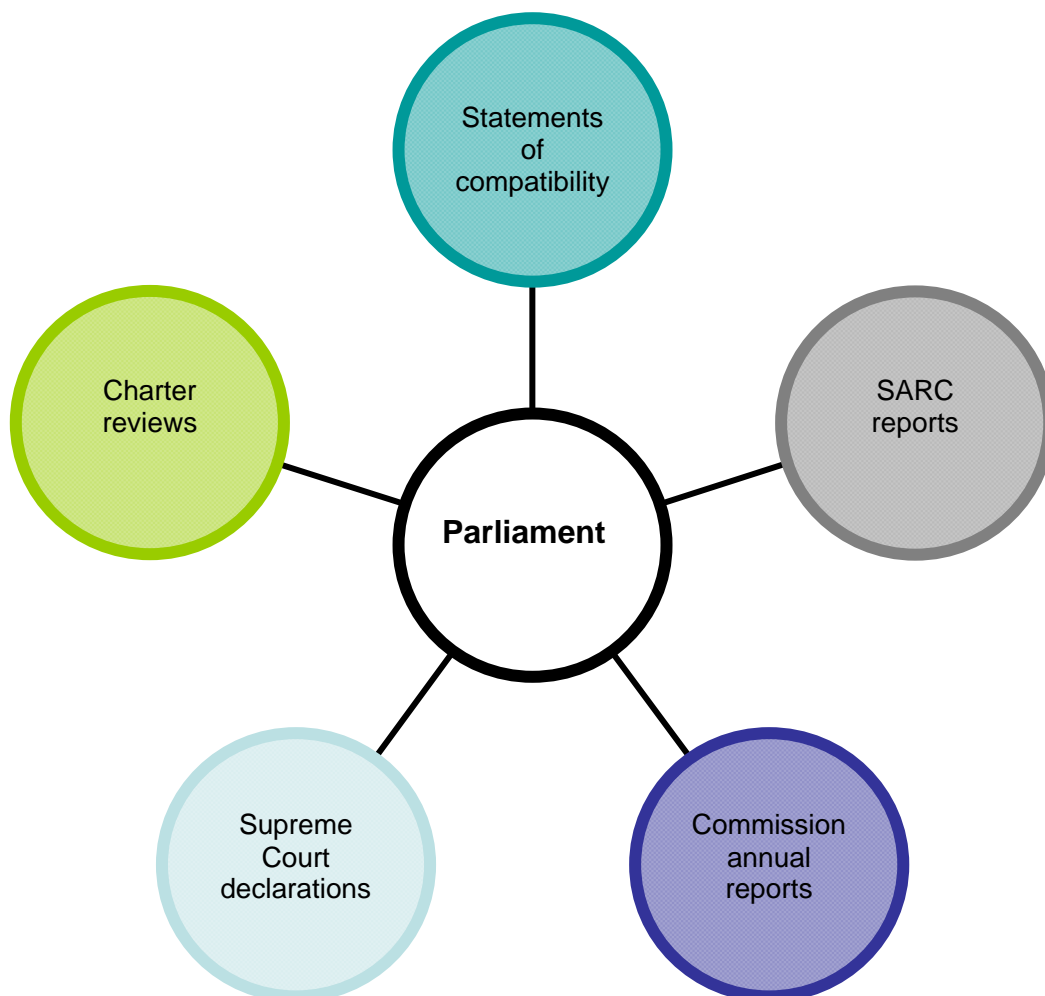
Statements of compatibility and the role SARC plays under the Charter support parliamentary supremacy by providing Parliament with the information and analysis it needs to make decisions. This is also an important part of the way the Charter protects and promotes human rights. Strengthening this process further will allow it to fulfil its potential.

The Charter also makes provision for Parliament to issue an override declaration to signal its intention to pass legislation that is inconsistent with the Charter. This mechanism has not been used in Victoria and does not, as it is currently framed, add anything to the work of Parliament or the Courts.

These elements of the parliamentary process are addressed in more detail below.

Other activities under the Charter provide Parliament with information and analysis about human rights. These include the Commission’s annual reports on the operation of the Charter, reports from reviews that may be made public, and declarations of inconsistency from the Supreme Court. These functions are discussed elsewhere under the relevant Terms of Reference, but all create tools to support the work of Parliament.

Charter functions supporting Parliament through information and analysis



Statements of compatibility

Section 28 of the Charter requires a member introducing a Bill to prepare a statement of compatibility. This is tabled with the Second Reading Speech when the content of the Bill is first made public.

The statement of compatibility indicates in the Member's opinion if and how the Bill is compatible with human rights, or if the Member considers the Bill is incompatible with human rights, the nature and extent of the incompatibility.

The analysis behind a statement of compatibility should already be undertaken by departments as they fulfil their obligations as public authorities under the Charter. The formality of a statement of compatibility, however, provides structure and a greater influence on the way government goes about developing laws in the first place.¹⁸⁵ Knowing that there will be a public scrutiny process before Parliament shapes the drafting of legislation.

Example: Shaping the creation of a Bill

In 2008, the *Assisted Reproductive Treatment Bill 2008* was introduced to remove the previous statutory requirement that women be married or in a de facto relationship with a male to access Assisted Reproductive Treatment in Victoria. Clause 5 of the Bill sets out the right to equality in stating that authorities cannot discriminate against persons seeking to undergo reproductive treatment because of their sexual orientation, marital status, race or religion.

Statements of compatibility can bring greater clarity and transparency to the policy goals that underlie legislation. This improves the law-making process by focussing discussion on how best to achieve the policy goals of government, while also ensuring that if human rights are limited, the government adopts the least restrictive approach.

The Scrutiny of Acts and Regulations Committee

Section 30 of the Charter requires SARC to consider any Bill introduced into Parliament and report to the Parliament on whether the Bill is incompatible with human rights. SARC, as an all-party committee, provides a sensible, balanced and transparent mechanism for assessing the human rights impacts of proposed laws and informing parliamentary debate.

¹⁸⁵ Scrutiny and the Charter of Rights and Responsibilities, Carlo Carli MP, Chair Victorian Scrutiny of Acts and Regulation Committee, July 2009.

The Charter also clarifies the role of SARC by giving it further guidance in its work. Prior to the Charter, SARC had to consider whether a provision unduly trespassed on rights and freedoms. There was no definition of what this involved. In practice, it meant the Committee was ‘guided primarily by a number of generic common law rights and freedoms’.¹⁸⁶

Since the introduction of the Charter four years ago, SARC has provided a valuable contribution to the Parliamentary process with its role of reporting on Bills that are inconsistent with the Charter. It has been involved in the detailed analysis of some complex laws and its attention to these Bills has helped unpack the human rights issues associated with them for both parliamentarians and the public.

Each year since the introduction of the Charter, the Commission has monitored the human rights debate on Bills and included them in its annual reports to the Attorney-General. Through this work, the Commission have direct evidence of SARC reports fuelling and informing debate in Parliament. Figures from the 2010 parliamentary year are below.

Table: Human rights dialogue in the 2010 Victorian Parliament

Total number of Bills debated in 2010	90
Number of Bills prioritised by the Victorian Government (resulting in SARC’s Charter Report being tabled after passage of the Bill)	2
Number of Bills generating active exchange or a difference of views between SARC and the Member of Parliament presenting the Bill	43
Number of SARC requests for ministerial responses on Charter issues and the number of ministerial responses provided	40 requests 31 responses
Number of Bills triggering parliamentary comment relating to human rights issues	42
Number of Bills that had not been reported on by SARC before Parliament rose for the year	5

¹⁸⁶ Scrutiny of Acts and Regulations Committee Submission to the Human Rights Consultation, cited in State of Victoria, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), p. 76.

Example: SARC processes informing debate

In May 2008, SARC advertised an inquiry and sought public submissions in relation to the *Public Health and Wellbeing Bill 2008*. The Bill established a new legislative scheme to protect and promote public health and wellbeing in Victoria. The statement of compatibility accompanying the Bill discussed human rights issues, including: the right not to be subjected to medical treatment without consent, the right to liberty and security, freedom of movement, equality rights, rights in criminal proceedings, the right to a fair hearing, the right to privacy and the freedom of expression. The statement of compatibility went on to say that, while the Bill limited a number of human rights under the Charter, these limitations were reasonable and proportionate to the measures necessary to uphold public health.

In its report, SARC queried whether provisions relating to the examination and testing order regime, public health orders, and clauses permitting autopsies without the consent of the next of kin were reasonable. It also referred many issues for parliamentary consideration.

SARC received submissions from the Victorian Privacy Commissioner and Victorian AIDS Council/Gay Men's Health Centre and held a public hearing in June 2008. SARC forwarded these submissions and a copy of the transcript to the responsible Minister for comment. The Minister responded shortly after explaining why the Bill needed to provide for the limitations of certain rights protected by the Charter to effectively promote and protect public health in Victoria.

The parliamentary debate referred to the public submissions and the issues raised by SARC. Parliamentarians drew on the work of SARC to voice their concerns about the potential human rights impacts, including: the Chief Health Officer's power to make compulsory testing orders, the detention of people believed to be a public risk, and the use of the police and the justice system to enforce orders.

Getting the detail right

SARC reports and statements of compatibility should address human rights issues in a meaningful way. They should provide sufficient detail to allow for an informed debate, focusing on limitations and possible infringements of Charter rights, while being informative and digestible by parliamentarians and members of the public. There has not been a consistent approach to this over the past four years.

This analysis also needs to keep up with a changing Bill. If a Minister seeks to amend a Bill while it is before Parliament, she or he should issue a supplement to a statement of compatibility. For example, in 2009 SARC commented that the amendments made to the *Crimes Legislation Amendment Bill 2009* contained two sections not put before SARC at the time of its initial report on the Bill.¹⁸⁷ SARC suggested the Minister give a supplementary statement where, as here, amendments are proposed that are unrelated to the purposes of the Bill as introduced. SARC felt that this practice would ensure that the Charter's requirement of parliamentary scrutiny of all new legislation is not significantly undermined in the future.¹⁸⁸ The Commission supports this position.

Better engagement with the Scrutiny of Acts and Regulations Committee

Parliament should give due regard to the reports of SARC and the ministerial responses to questions SARC raises before voting on a Bill. Parliament already follows this process when it refers a matter to other committees for consideration. The benefits of this process include amongst others 'the identification of technical deficiencies and unintended consequences' and 'facilitating direct public participation in the legislative processes' (in terms of informing and educating and influencing the legislators).¹⁸⁹

The *Serious Sex Offenders Monitoring Amendment Act 2009* and the *Sentencing Amendment Act 2010* are two examples of legislation passed through Parliament so quickly that SARC did not have time to report prior to the parliamentary vote. The scrutiny process is an essential part of the parliamentary process and provision needs to be made for SARC's input even where Bills are considered urgent. As observed in the course of debate on the *Serious Sex Offenders Monitoring Amendment Bill 2009*, Parliament should consider the issues a Bill raises that involves a deprivation of liberty no matter what class of person the deprivation relates.¹⁹⁰

The Commission appreciates the challenge of managing a full and complex legislative program each year. A human rights analysis, however, is a core component of that program. The arrangement of the program should ensure that members are fully apprised of the human rights implications of a Bill before voting.¹⁹¹

¹⁸⁷ Alert Digest 4 – 25/03/10.

¹⁸⁸ Alert Digest 4 – 25/03/10.

¹⁸⁹ Papers on Parliament, No 43 June 2005, Reference of Bills to Australian Senate Committee's with a particular reference to the role of the Selection of Bills Committee, John Vander Wyk and Angie Lilley, Department of the Senate, 2005, pp. 2-3.

¹⁹⁰ Serious Sex Offenders Monitoring Amendment Bill, Legislative Assembly, Second Reading, 4 February 2009, p. 119.

¹⁹¹ The 2008 report on the operation of the Charter of Human Rights and Responsibilities, Emerging Change, Victorian Equal Opportunity and Human Rights Commission, p. 72.

Ministers should also respond to SARC's questions. As SARC sets out in its Practice Note No 2, it will write to Ministers if it regards a statement of compatibility to be inadequate or unhelpful in describing provisions that may engage or infringe a Charter right.¹⁹² The Practice Note states that SARC 'considers that the provision to Parliament of reasonable explanatory material is critical to the Parliament's exercise of legislative power in an informed manner'.¹⁹³

For example, SARC wrote to the responsible Minister for the *Port Services Amendment (Public Disclosure) Bill 2008* on 28 February 2008 seeking further advice on whether certain clauses limited an individual's Charter right to privacy, reputation or a fair hearing.¹⁹⁴ The responsible Minister did not provide a response.

It is important for public confidence in the Parliamentary process that all parliamentarians engage with the human rights dialogue about legislation through active consideration of SARC's reports and strong bi-partisan support for the role of human rights in the legislative process. Whether this occurs in practice is up to the Parliament and the government of the day. This involves both responding to questions from SARC and being prepared to make changes to a Bill while it is before the Assembly or the Council.

Governments should be prepared to have another look at the laws it proposes based on feedback from the scrutiny process. The Canadian practice (where amendments to reports from their parliamentary human rights committee are more frequent) suggests that relatively minor amendments are often all that it takes to make the laws comply with human rights. Rarely are the objectives of the original legislation compromised by any amendment.¹⁹⁵

Community involvement

SARC also provides an important platform for the Victorian public and many organisations to engage with Parliament during its consideration of legislation. The Committee's Chairperson in 2007, Mr Carlo Carli MP, explained this role in the following terms:

*It is about everyone taking ownership of the Charter. While SARC is an important part of the dialogue, it is essential that the scrutiny it undertakes is informed by the expertise and direct human rights experiences of the non-government sector and broader Victorian community.*¹⁹⁶

¹⁹² SARC Practice Note No 2, 6 August 2007.

¹⁹³ SARC Practice Note No 2, 6 August 2007.

¹⁹⁴ Scrutiny of Acts and Regulations Committee, Alert Digest No 2 of 2008, 26 February 2008.

¹⁹⁵ Peter W Hogg and Alison A Bushell, *the Charter Dialogue Between the Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, Osgoode Hall Law Journal, Vol 35, No 1, 1997, pp. 75-107, p. 80.

¹⁹⁶ Interview with Carlo Carli MP, Chairperson, Scrutiny of Acts and Regulations Committee, 9 December 2008.

Being able to draw on evidence from a wide range of expert and interested parties, SARC can consider the broader and long-term implications of legislative proposals. It can shed light on issues which may not have been at the forefront of the minds of Ministers and their public service advisors in framing the legislation and which might be overlooked in the drive to have that legislation enacted.

Community input

By way of example, prior to tabling its report on the *Summary Offences and Control of Weapons Acts Amendment Bill 2009*, SARC accepted 34 submissions from a range of organisations in the government and non-government sectors.¹⁹⁷ In the course of the parliamentary debate, criticisms were aired of the legislation and references were made to SARC's report and the public submissions.¹⁹⁸

SARC is not always afforded the time to foster community involvement - it normally has less than two weeks to consider and report on a Bill. This is an incredibly short time for SARC to undertake detailed analysis and makes community involvement difficult. It is also unnecessary when a Bill may have been in development by the government for months or even years.

Except in rare circumstances (such as the call for consultation on the Assisted Reproductive Treatment Bill), SARC does not have time to alert the public to issues it is considering. Furthermore, members of the public do not know exactly when SARC will be meeting to consider the issues or when it will report. Although the process is familiar to repeat institutional players like the Commission, it can be entirely unclear for the public. This leaves members of the community with an unknown and usually short period of about a week to identify the Bill and make a submission.

The limited time for community input is often reflected in the lack of consideration of a section 7(2) analysis (the general limitations clause) in SARC reports. Whether limitations on rights are reasonable and proportionate means considering different perspectives, particularly the perspectives of those who are likely to feel the impacts of the legislation in the community. This requires input from beyond the walls of Parliament House.

SARC should explicitly prioritise meaningful opportunities for consultation where time permits, enabling human rights issues to be subject to broad scrutiny. This is particularly crucial when a Bill contains provisions acknowledged by the government to be incompatible with human rights.

SARC should be able to suggest an adjournment of further debate on a Bill to allow for consultation when it raises significant human rights issues.

¹⁹⁷ The 2009 report on the operation of the Charter of Human Rights and Responsibilities, *Making Change*, Victorian Equal Opportunity and Human Rights Commission, p. 97.

¹⁹⁸ Parliament of Victoria, *Parliamentary Debates (Hansard)*, Legislative Assembly, Fifty-Sixth Parliament, First Session, Wednesday, 25 November 2009 (Extract from book 15), pp. 4215-4222.

Reporting on key regulations is important

The mandate of SARC should extend to require the furnishing of a report where regulations infringe on Charter rights.

The implementation and detail of many laws are set out in regulations. These regulations can have very practical outcomes and often directly impact on the way public authorities go about their work.

Presently in Victoria, the responsible Minister must ensure that a human rights certificate is prepared for proposed statutory rules.¹⁹⁹ In drafting the human rights certificate, the Minister must certify whether the proposed statutory rule does or does not limit any human right set out in the Charter. Where the rule does limit a human right, it must 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 the limitation seeks to achieve.²⁰⁰

SARC must then consider whether it agrees with the assessment contained in the certificate. If it considers that the proposed regulations are inconsistent with the rights contained in the Charter, it has discretion in whether to furnish a report to each House of Parliament, but it rarely does so.²⁰¹ The current practice suggests that where SARC has concerns, it will write a letter to the Minister and seek a written response. It publishes this correspondence alongside the relevant human rights certificate in its Annual Review of Regulations Report.

If SARC were required to report to Parliament on human rights issues identified in regulations, the actions of the Executive would be subject to more appropriate scrutiny and Parliament would be better informed in their oversight of statutory rules.

Example: Regulations detailing search and confiscation powers in schools

The proposed regulations under the *Education and Training Reform Amendment (School Safety) Bill 2010* will set out guidance for how principals can exercise powers to search any part of the school premises or any bag or other article used by a student, and powers to confiscate and ban certain items. The regulations will also establish a framework for appropriate protocols between Victoria Police and the Department of Education and Early Childhood Development.²⁰² The Parliament should consider the human rights engaged by such regulations, including the rights of children with disabilities, whose disability aids may get caught up in this scheme.

¹⁹⁹ Section 12A, *Subordinate Legislation Act 1994 (Vic)*.

²⁰⁰ Section 12A *Subordinate Legislation Act 1994 (Vic)*.

²⁰¹ Section 21, *Subordinate Legislation Act 1994 (Vic)*.

²⁰² Alert Digest No 1 of 2011, 1 March 2011, p. 7.

Continuing to give the Scrutiny of Acts and Regulations Committee the support it needs

The Parliament must adequately resource SARC if it is to fulfil its mandate of providing robust, transparent and comprehensive human rights assessments.

SARC's role requires it to consider the Charter compatibility of detailed legislation. This requires the Committee to build up a degree of familiarity with the Charter, including training for new members and the support of legal expertise.

SARC also works under difficult timeframes and with limited resources. Consideration should be given to both expanding SARC and creating a specialist human rights sub-committee to facilitate the development of human rights expertise.

Override declarations

The final element of the parliamentary procedures set out in the Charter is the ability of Parliament to issue an override declaration in exceptional circumstances (section 31). In making an override declaration Parliament may expressly declare that it intends that part or all of a particular Act is to have effect despite being incompatible with the Charter, and that the Charter has no application to the provision or Act.

An override declaration has never been used in Victoria.

Two statements of compatibility have indicated their partial 'incompatibility' with the Charter.

- In 2010, a statement was tabled noting the incompatibility of the Control of Weapons Amendment Bill with the Charter.
- In 2009, a statement was tabled noting the incompatibility of the Summary Offences and Control of Weapons Act Amendment Bill with the Charter.

When commenting on the 2010 Bill, the Department of Justice observed that, while partially incompatible with human rights:

the Charter helped frame discussions within government in the development of the Bill and required that the Government publicly explain its reasons for departing from rights in this context. In this way, the Charter has had an impact in increasing government transparency and accountability.²⁰³

²⁰³ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 44.

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

Term of Reference 5(c): What have been the effects of the Charter Act on the provision of services and the performance of other functions by public authorities?

Key points and recommendations

Under section 38 of the Charter, public authorities have an obligation to comply with human rights and take relevant rights into account when making decisions. This obligation gives the Charter practical effect. As the Department of Primary Industries has told the Commission:

The greatest impact of the Charter is almost certainly in the subtle changes towards service delivery that are driven by having human rights as a fundamental in public sector employment.²⁰⁴

Four years in, the Commission is seeing increasing sophistication in the use and application of the Charter. Across the Victorian Government this is leading to human rights principles being recognised as key drivers of good corporate governance and high quality services. As a result, public authorities are achieving fairer, more inclusive and better services for all Victorians.

More work needs to be done to consistently apply the Charter across different areas of government with both policy and front-line staff.

Overall, public authorities have been positive about the impact the Charter has had on their service delivery outcomes and their accountability to the public. They are taking their obligation to respect human rights seriously and are increasingly integrating the Charter into their planning, delivery and review of their work - the Charter is now 'business as usual'.

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.

²⁰⁴ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 38

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.

Discussion

Since 1 January 2008, public authorities²⁰⁵ in Victoria have been obliged to carry out their responsibilities and make decisions in a way that is consistent with Charter rights. This obligation has been the most important practical benefit of the introduction of the Charter.

The values framework supported by the Charter is not new to the Victorian Public Service. However, the legal requirement to translate this framework into practice requires commitment and a move from the welfare-based approach of service delivery adopted in the past.

Public policy and decision-making are enhanced by the Charter. The value of such a framework to fair decision-making has been acknowledged internationally. For example, an independent evaluation of human rights protections in New Zealand, commissioned in 2000 by the Associate Minister for Justice, found that:

If taken into account early in the policy-making process, human rights tend to generate policies that ensure reasonable social objectives are realised by fair means. They contribute to social cohesion and, as the Treasury's Briefing to the Incoming Government (1999) observes: 'Achieving and maintaining a sense of social cohesion and inclusion is an important aspect of welfare in the broadest sense ... Fairness to all parties involved extends both to the processes by which things are done and to the outcomes themselves. Social cohesion is low when individuals or groups feel marginalised'.²⁰⁶

The UK has had similar experiences. The Chairman of the independent UK Audit Commission has commented that:

Time and again we observe in those public bodies, fast increasing in number, which have adopted and embedded human rights principles in their everyday operations, that they provide much higher levels of service to the public.²⁰⁷

²⁰⁵ Defined in section 4 of the *Charter of Human Rights and Responsibilities Act 2006* as meaning Victorian Government departments, agencies, statutory bodies and local councils around the state.

²⁰⁶ New Zealand Ministry of Justice, *Re-evaluation of Human Rights Protections in New Zealand*, 11 August 2000 [pp. 206-207], reproduced in *The Guidelines on the New Zealand Bill of Rights Act 1990: A guide to the rights and freedoms in the Bill of Rights Act for the Public Sector*, 2004.

²⁰⁷ Butler, F., *Improving Public Services: Using a Human Rights Approach. Strategies for Wider Implementation of the Human Rights Act Within Public Authorities*, a report for the UK Department of Constitutional Affairs by the Institute for Public Policy Research, June 2005, available via www.ippr.org. (Excerpt from a 2004 speech by J Strachan).

In 2010, the Commission asked a broad range of Victorian public authorities to summarise their progress in improving human rights protection in the first four years of the Charter's operation. Many public authorities were positive about the impact the Charter has had on their service delivery outcomes and on their accountability to the public.

Four years is a short time in which to assess the impact of a law aimed at changing attitudes and practices. The change process has been one of evolution rather than revolution. Nevertheless, positive achievements have been steadily realised and the examples below demonstrate the effectiveness of the Charter when it is used.

The increased sophistication in the application of the Charter by public authorities has led to positive change by:

- (a) encouraging community participation
- (b) improving accessibility
- (c) delivering services with flexibility
- (d) tailoring responses – thinking about the impact on people
- (e) promoting dignity and respect
- (f) improving accountability
- (g) facilitating risk management, and
- (h) advancing responsive government.

Examples to illustrate these points are set out below. More information is available in the Commission's annual reports on the operation of the Charter. See for example, the 2010 reports, *Talking Rights: 2010 report on the operation of the charter of Human Rights and Responsibilities* at **Appendix I** and *Talking rights: compilation report – resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities* at **Appendix J**.

(a) Encouraging community participation

Many public authorities have been encouraged by the Charter to engage with the communities they serve and to listen to those who are directly affected by the decisions they make. This process of participation helps inform and improve decision-making and can build greater levels of public trust and confidence in government. Some examples include:

- The **Department of Transport** has committed to respectful and inclusive engagement with individuals, the community and stakeholders in the delivery of services, and in the exercise of its powers and functions. Better engagement with the public is now enshrined in law. In the *Transport Integration Act 2010*, '**stakeholder engagement and community participation**' is identified as one of the seven decision-making principles.²⁰⁸
- The **Victorian Code of Conduct for Community Sport**, released in 2010, aims to make sure that everyone, regardless of their background, can take part in sport and play in a safe environment.²⁰⁹ Developed by the Victorian Government in cooperation with VicSport, VicHealth, the Commission and Victoria's peak sporting bodies, the code promotes the fair inclusion of all people, regardless of age, gender, sexual orientation, race, culture or religion, and seeks to ensure opportunities for people of all abilities to participate in sport and develop to their full potential, across the state's 16,000 community sporting clubs.
- **Using human rights to inform primary school redevelopment through community participation:** A medium-sized primary school used human rights principles to inform the re-design and re-development of its school building. Input was sought from all relevant stakeholders, including students, parents and teachers. For example, feedback was sought from all students taking into account their literacy levels; the needs of people with disability were given special consideration; and a local Indigenous co-operative was consulted. The principal noted that the process had a positive effect on students and the broader school community through the development of strong relationships and a positive, supportive community culture.²¹⁰
- The **Office of the Child Safety Commissioner** believes that the Charter is having a meaningful impact on the lives of children in Victoria, with government departments and agencies 'increasingly examining issues relating to children through a human rights lens'.²¹¹ The Office provides the example of the **Victorian Law Foundation's** decision to engage the Create Foundation to consult with children about proposed reforms to the Children's Court; reflecting a commitment to **ensuring that children's voices are heard and reflected in the reforms**.

²⁰⁸ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 19

²⁰⁹ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 19

²¹⁰ Human Rights Law Centre, *Case Studies: How a Human Rights Act Can Promote Dignity and Address Disadvantage*. Available at: www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/

²¹¹ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 38

- **Improving consumer, carer and community participation in the health care system** is the goal of the Department of Health's strategy, 'Doing it with us, not for us'.²¹² It incorporates standards, indicators and targets to assess the policy's achievements that reflect a human rights-based approach to delivering government services. The standards include: a commitment to involving people in informed decision-making about their treatment; providing evidence-based and accessible information; ensuring that people are active participants in the ongoing planning and evaluation of services, and; building the capacity of consumers, carers and community members to participate fully and effectively.

(b) Improving accessibility

Improving the lives of people and communities is at the centre of the work of the Charter. For example:

- **Consumer Affairs Victoria** has developed a range of information services to support marginalised consumers, including people with disability, Indigenous consumers, consumers from non-English speaking backgrounds, seniors and young people.²¹³ This includes: accessible format printed and electronic material; advocacy and outreach services, and; a revised curriculum for use in primary and secondary schools. This approach enables Consumer Affairs to deliver **relevant and accessible consumer protection services** to vulnerable and disadvantaged people, and to regional and rural communities that may otherwise have difficulty accessing these services.
- **Sport and Recreation Victoria** has worked to **eliminate barriers to accessibility** in the recent redevelopment of Melbourne Park. Human rights and universal design principles are being implemented to achieve better inclusion in sporting infrastructure, which means that major public events will be more accessible to a large number of Victorians.²¹⁴
- The **Hume City Council** has funded a number of not-for-profit organisations to work with the community and improve participation.²¹⁵
- **Latrobe City Council** acted to ensure council meeting papers were made available in accessible formats.

²¹² Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 39

²¹³ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 38

²¹⁴ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 32

²¹⁵ Victorian Equal Opportunity and Human Rights Commission, *2010: Talking rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 63

(c) Delivering services with flexibility

The Charter has facilitated a flexible approach by public authorities that takes into account the needs of individuals. For example:

- The **State Revenue Office (SRO)** takes the Charter into account by seeking to balance their responsibility to collect tax with an approach that is fair and equitable. This approach led the SRO to give Victorians affected by job loss and reduced income during the Global Financial Crisis more time to pay taxes, and the option of payment arrangements. People whose homes were destroyed in the 2009 bushfires were also entitled to reduced duty when buying another home. In addition, full or partial tax exemption was offered to those replacing vehicles and the SRO took a **flexible approach to the recovery of outstanding tax from survivors**.²¹⁶
- The **State Coroner's Office** undertook a major reform of its regulations, policies and procedures. Charter obligations were fundamental to the review and have prompted a review of regulations relating to the viewing and touching by persons of the bodies of their deceased relatives.²¹⁷

(d) Tailoring responses – thinking about the impact on people

Being able to explain a decision in the context of having considered relevant Charter rights as well as the principles of the Guardianship and Administration Act 1986 demonstrates how consideration of the person's rights has been central to a guardianship decision.

Office of the Public Advocate²¹⁸

Public authorities have moved beyond simple legislative compliance to a client-centred, service delivery-oriented relationship with citizens. The human rights framework ensures that citizens and their rights are kept at the centre of that relationship. For example:

- The **Office of the Public Advocate** notes that '[t]hose regimes which impact on the freedoms of **people with disabilities** (such as guardianship and civil detention orders) have increasingly been required to ensure the protection of core human rights, and to be implemented in the **least restrictive manner possible**'.²¹⁹

²¹⁶ Victorian Equal Opportunity and Human Rights Commission, *2009 Report on the operation of the Charter of Human Rights and Responsibilities: Making Progress*, 2010, p. 42.

²¹⁷ Victorian Equal Opportunity and Human Rights Commission, *2009 Report on the operation of the Charter of Human Rights and Responsibilities: Making Progress*, 2010, p. 43.

²¹⁸ Submission to the Four-Year Review of the Charter, 2011, p. 3.

²¹⁹ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 41.

- The **Office of Housing** has developed a new briefing note to assist housing staff to make recommendations for VCAT proceedings. The note contains questions with a specific Charter focus and staff must clearly demonstrate that they have considered any restrictions on human rights throughout the decision-making process, including **whether the limitation is reasonable and necessary, and whether or not a less restrictive alternative is available.**²²⁰
- Applying the Charter to the review of the **Mothers and Children Program in women’s prisons**, with the revised policy emphasising human rights, especially the right to protection of families and children.²²¹
- The **Office of the Senior Practitioner** adopted a practical human rights-based approach to working towards **reducing the use of restrictive interventions in the provision of services to people with disability.**²²²
- The **City of Greater Bendigo** rejected calls for the Council to provide a ‘move on and stay away’ provision in local laws to deal with people displaying antisocial behaviour. Councillor Wayne Gregson was quoted in local media as saying that ‘evidence from Queensland and Western Australia showed the law ended up targeting ‘exclusively if unwittingly’ marginalised groups such as the homeless and Indigenous members of the community who are least able to pay infringement notices’.²²³ Local media reported that the Council rejected the move on human rights grounds and noted that the Council’s report on its review of local laws stated that ‘considering the Human Rights Charter, **a person has the right to be in a public place**’.²²⁴

²²⁰ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 41.

²²¹ Victorian Equal Opportunity and Human Rights Commission, *2009 Report on the operation of the Charter of Human Rights and Responsibilities: Making Progress*, 2010, p. 45.

²²² Victorian Equal Opportunity and Human Rights Commission, *2009 Report on the operation of the Charter of Human Rights and Responsibilities: Making Progress*, 2010, p. 68.

²²³ Victorian Equal Opportunity and Human Rights Commission, *2009 Report on the operation of the Charter of Human Rights and Responsibilities: Making Progress*, 2010, p. 98.

²²⁴ Victorian Equal Opportunity and Human Rights Commission, *2008 Report on the Operation of the Charter of Human Rights and Responsibilities*, p. 52.

(e) Promoting dignity and respect

The Charter also promotes inherent dignity and respect for all Victorians.

The Charter sets standards which the public knows it can expect as an entitlement. In simple human terms it requires the agencies of government to treat every individual with the respect that is his/her due. In those terms it requires what I asked of my bureaucratic letter writers as Minister for Social Security, that they write as they would to a parent, brother, sister or friend. They should write as they would like to be written to themselves. The same principle applies in every other aspect of agency activity. This is what a cultural of human rights in the bureaucracy would look like. It would restore the meaning of the term public servant.

The Hon Fred Chaney AO

Chairperson, Consultation Committee for a Proposed WA Human Rights Act, 11 December 2007²²⁵

Some examples:

- The **Victims' Charter** has improved support for young victims of crime, culturally and linguistically diverse communities, people with disability and Indigenous victims of crime. The Victims' Charter was developed in 2006 by the **Victims Support Agency** in anticipation of the Charter's introduction.
- Designing the **Victorian Native Title Settlement Framework** to refocus on **cultural respect in the resolution of native title claims**.²²⁶
- **Mildura Rural City Council** reported adapting its citizenship ceremonies in order to encompass all religions and cultures.²²⁷

²²⁵ Victorian Equal Opportunity and Human Rights Commission, *2008 Report on the Operation of the Charter of Human Rights and Responsibilities*, 2009, p. 62 Fn 1.

²²⁶ Victorian Equal Opportunity and Human Rights Commission, *2009 Report on the operation of the Charter of Human Rights and Responsibilities: Making Progress*, 2010, p. 10.

²²⁷ Victorian Equal Opportunity and Human Rights Commission, *2010: Talking rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 68.

- **Corrections Victoria** established the Wulgunggo Ngalu Learning Place - a **diversion program for adult Koori males** - to address the over-representation of Koori people in Victoria's criminal justice system. The Charter has been a key source underpinning planning and decision-making in the residential program. The residential program established in partnership with Victoria's Koori community supports residents to complete their community-based orders while receiving rehabilitative support and training to reduce the likelihood of their re-offending. Protection of cultural rights is a central theme in the program, reflected in elements such as an elders' program, strong links with external Koori community organisations and services, whole-of-person case management and case planning that is integrated with services from the home community.²²⁸
- The **Department of Sustainability and Environment** has reviewed and amended its business rules to ensure compliance with the Charter. It now includes references to Charter rights in its **Appropriate Workplace Behaviour Complaints Resolution Business Rules**, the Leave to Volunteer for Not-For-Profit Activities Business Rule and the Department's Grievance Procedure.²²⁹

(f) Improving accountability

The Victorian Health Services Commissioner, Beth Wilson, advised the Commission in 2008 that:

*The Charter can be used as a complementary mechanism to support the dignified delivery of health services. It can be a useful tool when used in conjunction with guiding health principles to negotiate with health providers. The HSC has drawn on the Charter to bolster arguments that enhancing and maintaining a high standard of health care is also in the providers' best interests.*²³⁰

The Charter is emerging as an important means of enhancing the essential qualities of open, democratic government. It is providing a framework against which to measure government performance for oversight bodies such as the Ombudsman, Privacy Commissioner, and Child Services Commissioner. For example:

- The **Office of the Public Advocate** and the **Disability Forensic Assessment and Treatment Service** signed a protocol in relation to the sharing of information to ensure that residents' rights are properly protected. The Charter gave them a principled framework within which to work to resolve service delivery concerns.

²²⁸ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 39.

²²⁹ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 26.

²³⁰ Victorian Equal Opportunity and Human Rights Commission, *2008 Report on the Operation of the Charter of Human Rights and Responsibilities*, 2009, p. 45.

- The **Officer of the Disability Services Commission** refers disability service providers to the **good practice guide and self-audit tool**, which includes guidance and a checklist to assist providers to consider how proposed complaint resolution could be assessed in relation to Charter compliance.²³¹ The Commissioner also records and analyses any systemic issues arising in complaints and reports on trends in their annual report.
- In 2010, the **Victorian Ombudsman** identified breaches of human rights by public authorities in three separate reports tabled in Parliament. Each involved the treatment of vulnerable people in settings where their liberty was restricted. The three reports examined: whether the **rights of children**, especially Aboriginal children, were being met by Victoria's child protection system; the safety and quality of care provided to children in out of home care, and; conditions at the Melbourne Youth Justice Precinct.
- The **Coroner's Court** has used human rights to look at the need for **investigation of deaths as part of the right to life**. For example, in *Coronial Investigation of 29 Level Crossing Deaths – Ruling on the Interpretation Clause 7(1) of Schedule 1 of the Coroners Act 2008 (Vic) (25 June 2010)* the Court found that the right to life includes a corresponding obligation on certain public authorities to protect life. In order to comply with this obligation under the Charter, it was deemed necessary that an inquest in relation to the level crossing deaths address broader systemic and prevention issues that may have contributed to the deaths.
- **Darebin City Council** reported that it had modified its procedures governing **appeals** in relation to actions and decisions by council, including cancellation of permits and the issuing of traffic infringement notices.²³²
- The **City of Greater Dandenong** reported planned amendments to local laws to ensure appropriate **review of decisions by council** in relation to permits and other regulatory matters.²³³
- **Campaspe Shire Council** said that they have acted to amend relevant policies to ensure **consistent treatment of volunteer and community groups** with regard to the payment of fees for access to council buildings and services, after identifying variable and inconsistent practices.²³⁴

²³¹ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 30.

²³² Victorian Equal Opportunity and Human Rights Commission, *2010: Talking rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 65.

²³³ Victorian Equal Opportunity and Human Rights Commission, *2008 Report on the Operation of the Charter of Human Rights and Responsibilities*, 2009, p. 76.

²³⁴ Victorian Equal Opportunity and Human Rights Commission, *2008 Report on the Operation of the Charter of Human Rights and Responsibilities*, 2009, p. 78.

- The **Office for Youth** has **incorporated compliance with the Charter into major funding agreements** for youth participation services.²³⁵
- In November 2009, the **Victorian Auditor-General** released a report titled *Responding to Mental Health Crisis in the Community*. The Auditor-General used the Charter alongside the *Mental Health Act 1986* as part of a framework to **assess the performance of the crisis services in Victoria**, noting that ‘agencies need to co-ordinate and focus on the patient’s needs, while also addressing any safety risk ... [A]gency responses need to minimise restrictions on individual freedoms and interference with people’s rights and dignity.’²³⁶ Within this context, the Auditor-General found that aspects of the service response did not meet the standards set by the Charter.

(g) Improving risk management

Perhaps the most significant impact of the Charter on policy development and decision-making is the emerging evidence that the Charter is prompting identification of potential issues in advance, rather than simply being used to assess proposals. It has also encouraged a process of continuous quality improvement within public authorities by requiring ongoing evaluation of the human rights impact of policies and service delivery.

The Charter’s obligations encourage good risk management processes



²³⁵ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 31.

²³⁶ Human Rights Law Centre, *Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage*, citing the Villamanta Disability Rights Legal Service. Available at: www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/.

Some examples:

- **Corrections Victoria** reports that it has reviewed conditions for remand prisoners as a consequence of identifying potential problems with the existing system.²³⁷ This is precisely the result the Charter was intended to achieve; creating an environment where risk of harm to individuals is minimised and respect for human rights is at the forefront of government thinking, rather than having to resolve breaches of rights once they occur.
- Over the past four years, the **Victoria Police** Human Rights Unit Project identified a number of practice areas within the agency that had a potentially high-risk of infringing individual rights. In response, Victoria Police has undertaken practice and policy audits in the Aboriginal Advisory Unit, the Gay and Lesbian Liaison Unit, the Multicultural Advisory Unit, the Victims Advisory Unit, the Youth Advisory Unit, the Prisoner Management Unit, the Witness Security Unit, and the Strategic Research Unit. It has undertaken audits in the areas of family violence and Indigenous women, police interaction with young people in Dandenong, gender integration, the Region 1 – Safe Streets Project, and prison cells. The human rights audit of prison cells informed the development of consistent cell management protocols that aim to minimise human rights risks.²³⁸
- The **Senior Practitioner** has developed practice **guidelines for disability service providers**.²³⁹ The resource includes information on the duty of service providers to consider human rights when making decisions, as well as case studies, a human rights analysis workflow chart and a summary of relevant provisions in the Charter.

(h) Improving decision-making

*Those regimes which impact on the freedoms of people with disabilities (such as guardianship and civil detention orders) have increasingly been required to ensure the protection of core human rights, and to be implemented in the least restrictive manner possible.*²⁴⁰

Office of the Public Advocate

²³⁷ Victorian Equal Opportunity and Human Rights Commission, *2010: Talking rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 191.

²³⁸ Victorian Equal Opportunity and Human Rights Commission, *2010: Talking rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 193.

²³⁹ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 31.

²⁴⁰ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 41.

- The **Victorian Law Reform Commission** report in March 2010 on Protection Applications in Children’s Court looked at human rights and the requirement to act in the ‘best interests of the child’ as a key strategy to inform decision-making and reform the processing of protection applications.²⁴¹
- Following recent VCAT hearings and as part of its ongoing compliance with the Charter, the **Office of Housing** has developed a new briefing note to assist staff when making recommendations in relation to proceedings before VCAT.²⁴² The briefing note contains questions with a specific Charter focus, and staff must clearly demonstrate that they have considered any restrictions on human rights in the decision-making process, including whether the limitation is reasonable and necessary or whether a less restrictive alternative is available. The agency has also put in place a more transparent appeals process to assist its clients.

(i) Advancing responsive government

The Commission receives regular reports of the Charter being used by everyday Victorians to encourage departments and agencies to rethink service delivery, review policies and change practices to focus on better outcomes for Victorians.

- Legal advocates questioned the level of participation permitted to victims of the February 2009 bushfires in the Victorian Bushfires Royal Commission and successfully used the Charter to urge the Royal Commission to **improve the provision of information to victims and to expand the extent to which victims’ experiences** are heard by the Commission.²⁴³
- **Maximising consent in compulsory treatment:** A number of people with mental illness complained to a disability rights service about compulsory treatment plans they felt were not specific enough to allow them to understand what treatment they were receiving and why. When their advocate raised Charter arguments with the relevant government authority, the authority undertook to improve the quality of the plans.²⁴⁴

²⁴¹ Victorian Law Reform Commission, *Child Protection: Protection applications in the children’s court Final Report 19*, 2011.

²⁴² Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, 2011, p. 41.

²⁴³ Federation of Community Legal Centres, *Response to the National Human Rights Consultation*, June 2009, p. 34.

²⁴⁴ Human Rights Law Centre, *Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage*, citing the Villamanta Disability Rights Legal Service. Available at: www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/.

- **Improving community access:** A public authority refused to provide an access ramp for a woman with a disability because of the cost and the belief that it was not their responsibility. The woman was unable to leave her house without the ramp and was socially isolated. After the woman's occupational therapist advocated with the department on her behalf, raising her human rights, the authority reconsidered its decision and provided the access ramp.²⁴⁵
- Five young people with acquired brain injuries had been living in a rehabilitation unit of a public hospital for at least two years. Because they had reached the end of their maximum stay, the hospital was planning to discharge them from its care. However, the only available accommodation options were aged care facilities. Advocates for the young people were concerned that the nursing homes would not provide the social environment or support services that the young people required, and that such a move was potentially detrimental to their health and well-being. Advocates **negotiated with the rehabilitation unit for it to remain their home while further options were explored** and assessed in light of the young peoples' rights under the Charter.²⁴⁶

245 Source: West Heidelberg Community Legal Service.

246 Source: Human Rights Law Resource Centre and Action for Community Living.

Term of Reference 5(d) - The Charter in the Courts

Term of Reference 5(d): What have been the effects of the Charter on litigation and the roles and functioning of courts and tribunals?

Key points and recommendations

Victoria's courts and tribunal play an important role in the human rights dialogue established by the Charter. The courts are required to interpret laws consistently with rights in the Charter as far as possible without changing the original purpose of the law. Compliance with the Charter can also be raised in cases before the courts where this can be tied to an existing cause of action. These mechanisms help to entrench consideration of human rights within the Victorian justice system.

The evidence shows that the Charter is playing a role in achieving more robust decisions and sound human rights outcomes for those individuals and agencies with matters before the courts.

The Charter has been doing this without 'clogging up the courts'. The slowly growing body of Charter-related case law helps clarify the responsibilities of government and can also inform and improve the day-to-day operations of departments and agencies. In this way, the Charter in the courts provides a mechanism to make government both accountable and responsive.

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.

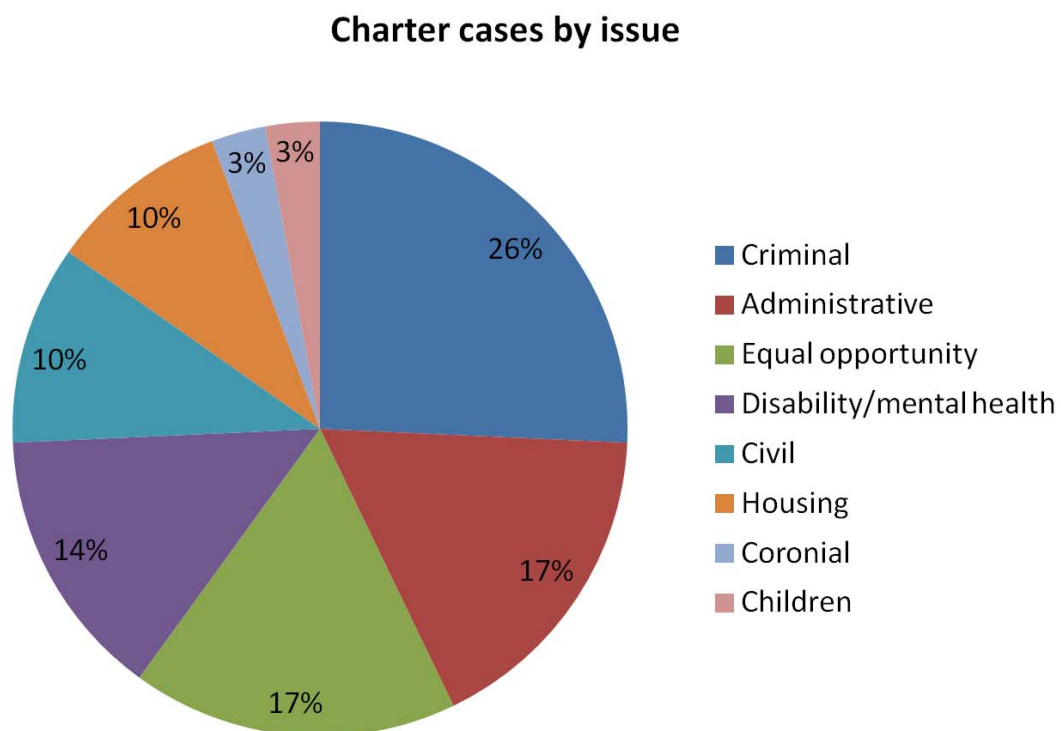
Recommendation 33: The need for a notification requirement should be reconsidered in the eight-year review of the Charter when the jurisprudence is further developed.

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.

Discussion

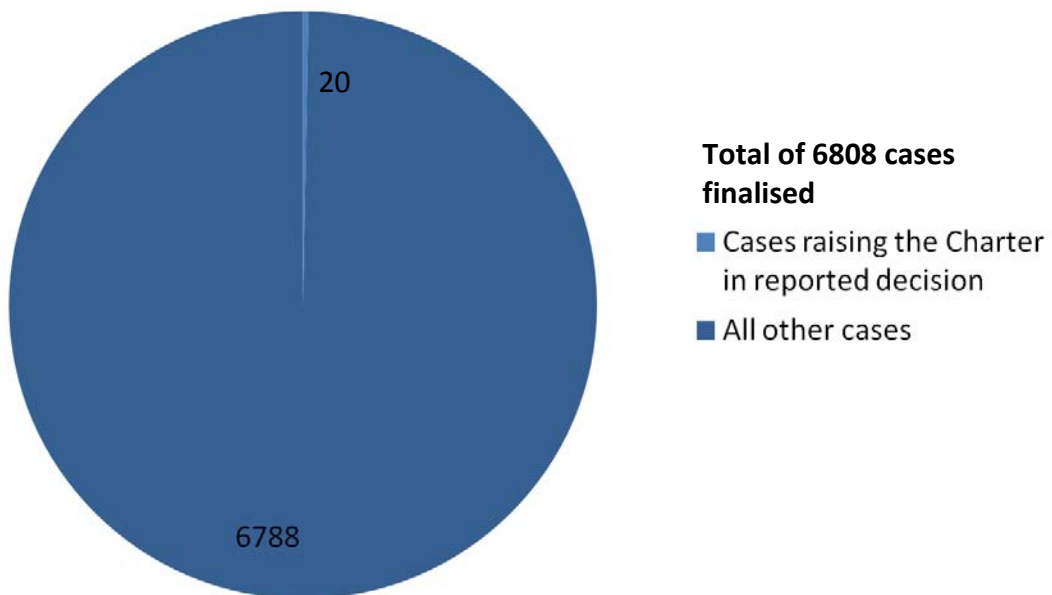
The Commission is aware of 209 cases raising Charter issues in the past four years. Details of these cases are at **Appendix K**. The Appendix shows the three categories of cases: (a) those in which the Charter was central and influential to the outcome of the case (12 cases); (b) cases where the Charter was a substantive issue (94 cases), and; (c) those in which the Charter was briefly raised but not relied on (103 cases).

The Charter is being used in a variety of cases, including: civil and criminal cases, disability and mental health, tenancy, guardianship, and equal opportunity. The chart below shows the split between different areas of the law where the Charter has been raised substantively (categories (a) and (b)).



This second chart gives a snapshot of the number of the cases finalised in the Supreme Court and Court of Appeal in 2009-10 (6808) and the number of reported decisions for this same period where Charter issues had been raised in the case (20 – 9 of which did not raise the Charter substantively).

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



Charter trends in the courts

The Commission's broad involvement in Charter-related proceedings has provided a useful vantage point from which to observe some recent trends in the way different courts engage with the Charter.

- The Court of Appeal and other superior courts have continued to develop the methodology to be adopted when applying the obligation in section 32 of the Charter to interpret laws consistently with the Charter. This has progressed to the point where some determinative guidance from the High Court is possible in 2011 (see page 168).
- The courts have been clear in their decisions about when Charter rights are relevant or not and are starting to give more guidance on the scope of particular rights (for example:
DPP v Ali and Anor (No 2) [2010] VSC 503; *De Simone v Bevnol Constructions & Developments & Ors* [2009] VCAT 888; *Castles v Secretary to the Department of Justice* [2010] VSC 310; *Director of Housing v Sudi* [2010] VCAT 328; *Coronial Investigation of 29 Level Crossing Deaths – Ruling on the Interpretation of Clause 7(1) of Schedule 1 of the Coroners Act 2008* (Vic)).
- There has been some jurisprudence from VCAT that provides guidance on the right to privacy in various contexts, the right to freedom of expression and information, the right to equality and the right to religious freedom (for example: *David Byrnes and others (matters under the Disability Act 2006)* VCAT reference G 41324 (2009); *Director of Housing v Sudi* [2010] VCAT 328; *Dean Maher v Accused Children's Court of Victoria at Sunshine* (5 December 2010); *Department of Human Services & Department of Health (Anti-Discrimination Exemption)* [2010] VCAT 1116; *WBM v Chief Commissioner of Police* [2010] VSC 219; *PJB (Guardianship)* [2010] VCAT 643; *Cobaw Community Health Services Limited v Christian Youth Camps Limited & Anor* [2010] VCAT 1613).
- A stand-alone cause of action is likely to facilitate better development of Charter jurisprudence by providing for human rights matters to be determined in their own right. This would also simplify current litigation allowing alleged breaches to be identified clearly rather than Charter issues being raised as a add on to another cause of action.
- The courts have frequently declined to apply the Charter when there are alternative non-Charter means of getting to a beneficial result (for example: *Castles v Secretary to the Department of Justice* [2010] VSC 310; *Director of Public Transport v XFJ* [2010] VSC 319; *DPP v Ali and Anor* (No 2) [2010] VSC 503). However, in several cases, Charter arguments have prompted an examination of the scope of the common law (for example: *DPP v Brian Pottinger* [2010] VCC; *Antunovic v Dawson & Anor* [2010] VSC 377).
- The courts have at times found it difficult to deal with novel Charter issues in the course of a busy list. For example, jurisdictions such as the County Court have said to the Commission that interlocutory appeals on Charter grounds can fragment the Court's processes.
- Lower courts are seeking guidance on Charter matters. These courts require submissions about the operation of the Charter to be put before them, as well as guidance on the application and impact of the Charter from the Supreme Court and Court of Appeal as opportunities arise.

The role of the courts

There are a range of provisions in the Charter that facilitate and define the role of courts and tribunal in the human rights dialogue. These include:

- Section 32 of the Charter asks courts to interpret statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the provision being interpreted (section 32).
- Where a question of law regarding the application of the Charter, or the interpretation of a statutory provision in accordance with the Charter, arises in proceedings before a court or tribunal, the relevant court or tribunal can refer the question of law to the Supreme Court in certain circumstances (section 33).
- The Supreme Court is empowered to make a declaration of inconsistent interpretation where it is of the opinion that a statutory provision cannot be interpreted consistently with a human right (section 36).
- Where a person is already able to seek relief or a remedy in relation to an act or decision of a public authority on the ground that the act or decision was unlawful, the Charter can be used in support of that claim (section 39).
- Both the Attorney-General and the Commission are empowered to intervene in proceedings before courts and tribunals where a question of law arises regarding the application of the Charter, or the interpretation of a statutory provision in accordance with the Charter (sections 34 and 40).

There has been particular interest in how the interpretive mandate, declarations of inconsistent interpretation and the intervention functions operate. These issues are addressed in more detail below.

The interpretive mandate (section 32)

*The genius of the [Victorian] Charter is the solution of the problem which beset earlier models, namely, the risks of transferring political power to the judiciary. The Charter has brought the judiciary into constructive dialogue with the Parliament, but that is no more than utilising the interpretative skills of the courts to promote good government in the interests of the community.*²⁴⁷

The Honourable Sir Gerard Brennan

The interpretive mandate is an integral part of an effective human rights instrument. It is one of the primary vehicles by which the purpose of the Charter (to protect and promote human rights) is to be achieved.

The obligation on courts, the tribunal and any other entity engaged in interpreting statutory provisions operates alongside and to support:

- (a) Parliament's obligation to develop laws compatibly with human rights, and
- (b) the obligation on public authorities to act compatibly with human rights.

More than just a codification of existing common law presumptions and rights, section 32 constitutes a rule of statutory construction – but it is just that, a rule of statutory interpretation. This is the role of the courts.

The interpretive mandate is limited and guided by other provisions.

Section 32 also points courts to the international context so they are not applying the Charter rights in isolation. Section 32(2) provides that:

International law and the judgements of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

²⁴⁷ The Hon Sir Gerard Brennan AC KBE, 'The Constitution, Good Government and Human Rights', 12 March 2008, pp 22-23. Available at: www.hrlc.org.au.

Subsection 32(3) of the Charter confirms the supreme role of Parliament within the interpretation/legislation paradigm. The Charter clearly recognises that it is the role of Parliament to make the laws. It is the role of the courts to interpret them. In particular, section 32(3) provides that **the interpretive mandate does not affect the validity of an Act, a statutory provision, a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right under the Charter.**

There is also an internal qualification to the reach of section 32. It can only interpret legislation consistently with the Charter 'so far as it is possible to do so consistently with its purpose'. The Explanatory Memorandum to the Charter provides:

The reference to statutory purpose is to ensure that in carrying out the interpretive mandate courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.

This makes clear that the courts cannot change Parliament's stated intention and it means that the Charter cannot be used by the courts to 're-legislate' as some have feared.

There has already been some significant jurisprudence on the interpretive mandate and how it should be interpreted and applied. This jurisprudence has been especially concerned with the limits and bounds of what constitutes 'interpretation' for the purposes of the interpretive mandate.

***Momcilovic* – interpreting legislation consistently with the Charter**

In *Momcilovic v The Queen* [2010] VSCA 50, the Court of Appeal held that the reverse onus established by section 5 of the *Drugs, Poisons and Controlled Substances Act 1981 (DPCSA)* was a breach of section 25 of the Charter because it wholly subverted the presumption of innocence. The reverse onus meant that the accused was presumed to be in possession of drugs found in her apartment and she was therefore convicted of trafficking.

The Court held that it was not ‘possible’ to interpret this provision consistently with the right to the presumption of innocence. In accordance with the dialogue model in the Charter, the Court notified the Commission and the Attorney-General that it intended to issue a Declaration of Inconsistent Interpretation. This Declaration has not yet been issued to the Attorney-General because the matter is on appeal to the High Court.

In terms of how the interpretive mandate is applied, *Momcilovic* clarified the methodological approach to section 32 of the Charter. Specifically, the Court set out the steps to be followed when exercising the interpretive mandate. The Court equated the interpretive mandate with that of section 35(a) of the *Interpretation of Legislation Act 1984* (Vic). In particular, the Court held that section 32 of the Charter is a ‘statutory directive, obliging courts (and tribunals) to carry out their task of statutory interpretation in a particular way. It is part of the body of rules governing the interpretive task’ (at [102]). While the Commission does not agree with the Court of Appeal’s methodological approach to the interpretive mandate, the characterisation of section 32 as a ‘statutory directive’ and just another tool in the statutory construction toolbox, is one with which the Commission agrees. This is a role the courts already undertake and it does not usurp Parliament’s role in legislating.

Wang – asking Parliament to be clear when it limits rights

More recently, in *DPP v Kelun Wang* ([2011] VCC unreported), the County Court has handed down a decision on the use by Victoria Police of ‘pretext conversations’ to gather evidence. The matter involved an application by Mr Wang to have evidence of a recording of a phone conversation between himself and the complainant excluded in his trial. This recording had been made at a police station using police equipment, although that equipment was operated by the complainant. No warrant had been obtained for the use of this equipment on the basis of Victoria Police’s view that the ‘participant surveillance’ exemption under the *Surveillance Devices Act* applied to this method of evidence gathering.

It was argued that the word ‘use’ in the relevant provision of the *Surveillance Devices Act* should be interpreted using the Charter and its right to privacy to include the manner in which the police ‘used’ the surveillance device here – by setting up their own equipment and instructing the complainant in how to use it. The Court accepted these submissions and held that the Charter required this section to be read in this more rights protective manner. As a result, police will have to obtain a warrant under the *Surveillance Devices Act* before they ‘use’ a surveillance device through another person, as they are required to in all other circumstances. Notwithstanding this conclusion, the Court decided not to exclude the evidence because the desirability of admitting it outweighed the undesirability.

This case is currently on appeal, but it does provide an example of how the interpretive mandate can be used to provide a framework within which the court can balance the rights of an individual against the operations of a state agency.

As a result of this case, greater levels of independent scrutiny are required where the police are seeking to invade an individual’s privacy. In some cases, state interference with privacy is reasonably justifiable having regard to the factors in section 7(2) of the Charter; in others, it will result in a court finding that an invasion is unjustifiable. Both the decision-making process and the outcome ensure the actions of government and its agencies are transparent and accountable. In this case, the outcome supports Parliament’s intention in regulating the use of surveillance devices in the first place.

There is no evidence in Victoria of the courts usurping the power of Parliament. The judiciary’s interpretive exercise now involves the consideration of human rights; but only because that is what the legislature has instructed and authorised the judiciary to do. The balance across the three arms of government continues unchanged; however the content of the exchange between them is expanded and enriched. The supremacy of Parliament still reigns.

In addition, critics have argued that the interpretive mandate gives the judiciary too much discretion and unqualified power in areas of social policy that are usually reserved for elected parliamentarians. The decisions of the Court of Appeal and County Court mentioned above demonstrate that the Victorian courts are acutely aware of the boundaries to ‘interpretation’ and the limits to the exercise of this tool of statutory construction.

Moreover, any such criticism levelled at the Charter overlooks the fact that judges are already required to make decisions that have fundamental social policy implications and dimensions. A human rights Charter simply provides a transparent framework to use in their resolution – that framework having been set by Parliament.

Examples – balancing rights and interests

Cobaw v Christian Youth Camps (VCAT)

In her judgement on the operation of the religious exemption provisions of the *Equal Opportunity Act 1995*, her Honour Judge Hampel considered that the rights to freedom of thought, conscience, religion and belief in section 14 of the Charter had to be interpreted in a manner compatible with the rights to equality and freedom from discrimination. Her Honour held that this interpretation should not privilege one right over another, but rather recognise their coexistence and the need to balance the rights.

Her Honour referred to section 14 of the Charter and Article 18 of the International Covenant on Civil and Political Rights (the ICCPR) and noted that both distinguish between the right to freedom of religion or belief, and the right to demonstrate or manifest religion or belief in worship, observance, practice and teaching. She noted that, generally, the right to hold a belief is broader than the right to act upon it.

Her Honour found that, while members of the Christian Brethren are entitled to their personal and religious beliefs, they were not entitled to impose their beliefs on others in a manner that denies them the enjoyment of their right to equality and freedom from discrimination in respect of a fundamental aspect of their being. In so finding, Judge Hampel struck a balance between the right to freedom of religion and the right to equality and freedom from discrimination.

RJE v Secretary to the Department of Justice (Court of Appeal)

The case of *RJE v Secretary to the Department of Justice* [2008] VSCA 265 is another example. Whether the Charter existed or not, judges would continue to be required to consider how the test for granting extended supervision orders in relation to serious sex offenders should be interpreted. At the heart of this legal issue is the complex policy question of the extent to which it is just and appropriate to hold people accountable for things they only might do in the future. The Charter did not create this issue for the courts, it did not convert a previously technical legal question into a free-ranging social inquiry, rather it provides the courts with an objective tool to assist them in their determination of the appropriate answer.²⁴⁸

²⁴⁸ Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities*, 2009, pp. 101-102.

DPP v Brian Pottinger

In *DPP v Brian Pottinger* ([2010] VCC unreported) the County Court was asked to give precedence to the Charter rights of child complainants in criminal proceedings when interpreting and applying a provision in the *Criminal Procedure Act 2007*. The Act provides that the evidence of the complainant may be given at a special hearing and recorded as an audiovisual recording in sexual offence and assault cases where, at the time at which the proceeding commenced, the complainant was either a child (under 18) or has a cognitive impairment. There is a three-month timeframe from the date the accused is committed for trial, unless exceptional circumstances exist. In this case, the Court was unable to comply with the three month timetable for a special hearing due to unavailable court resources. The Director of Public Prosecutions made an application before the Court for an extension of time on account of exceptional circumstances. The Court was asked that when it interprets 'exceptional circumstances', it have regard to the interpretive obligation in section 32 of the Charter to interpret the provision in a manner that is compatible with the child complainants' rights under the Charter. The Court found that exceptional circumstances did exist, having regard to the Charter amongst other factors, and the child complainants were able to provide their evidence by special hearing. This case is another example of the interpretive mandate in the Charter being used in coming to a more robust and rights-protective outcome.

Adoption Act case

In *AB and Victorian Equal Opportunity & Human Rights Commission and Department of Human Services and Separate Representative of J* ([2010] VCC AD-10-003), the County Court was asked to grant an adoption order in favour of a man who was in a same-sex relationship, in relation to a child that had been in his care through fostering arrangements for four years. Initially, the Court was concerned that it may not have jurisdiction to grant an adoption order in favour of one person in circumstances where the Court was aware that the person was in a same-sex relationship. The Charter imposes a positive obligation to protect the best interests of the child and to interpret the *Adoption Act* in light of the child's rights. Using the Charter as a tool of statutory interpretation, and having regard to international jurisprudence, the Court ultimately found that it did have jurisdiction to grant an adoption order in favour of one person who is in a same-sex relationship.

Declarations of Inconsistent Interpretation (section 36)

The Charter's requirement that all statutory provisions be interpreted compatibly with human rights is not unlimited. Specifically, the endeavour to interpret statutory provisions compatibly with human rights must stop at the point at which such an interpretation would be inconsistent with the purpose of the relevant provision. This is a normal approach to statutory interpretation.

In proceedings before any court or tribunal where a statutory provision cannot be interpreted compatibly with human rights, the relevant court or tribunal must apply the human rights *inconsistent* interpretation of the provision to determine those proceedings. However, should the proceedings be before the Supreme Court or Court of Appeal, the Court has an additional discretion to make a declaration of inconsistent interpretation.²⁴⁹

A declaration of inconsistent interpretation does not affect the validity of the particular statutory provision or the rights of any party to the relevant proceedings.²⁵⁰ A declaration acts as a form of notification from the judiciary to the legislature that an aspect of Victorian statutory law is, in the view of the Court, inconsistent with human rights and needs to be scrutinised. The making of a declaration triggers the following process²⁵¹:

- the declaration is forwarded to the Attorney-General
- if the relevant statutory provision falls within the portfolio of another Minister, the Attorney-General must forward the declaration to that Minister
- then within six months, the responsible Minister must respond to the declaration and the response must be tabled in Parliament and published in the Victorian Government Gazette.

Declarations do not encroach on parliamentary sovereignty, but offer information to Parliament to help it to do its work. The inclusion of the declaration provision is an integral feature of a robust human rights dialogue. Declarations highlight the Court's human rights reasoning in a matter and bring Parliament's attention to why the Court considers that a provision of legislation is incompatible with human rights. This is essential for generating robust institutional dialogue, and it is achieved without upsetting or amending the constitutional roles and balance across the judiciary and legislature.

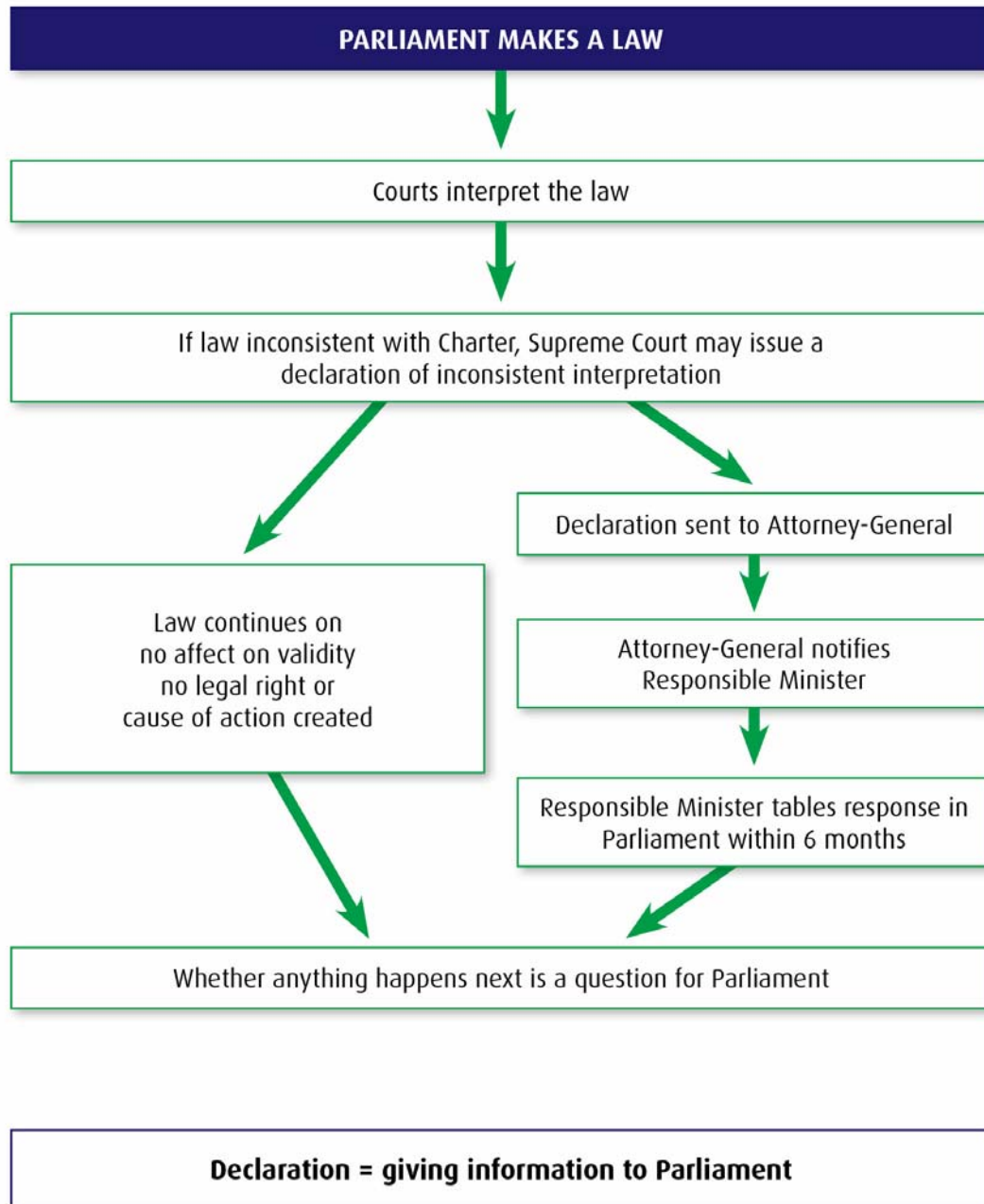
Evidence from the United Kingdom (UK) also demonstrates that it is effective. In July 2006, at the time of the Department for Constitutional Affairs Review in the UK, all declarations issued under the *Human Rights Act* had resulted in the relevant legislative incompatibility being remedied.

²⁴⁹ Section 36(2), *Charter of Human Rights and Responsibilities*.

²⁵⁰ Section 36(5), *Charter of Human Rights and Responsibilities*.

²⁵¹ Section 36(6)-(7) and section 37, *Charter of Human Rights and Responsibilities*.

Declarations of inconsistency: Facilitating dialogue between the courts and the Parliament



Interventions (sections 34 and 40)

Interventions are another area where the Charter has had an impact on litigation and the role and functioning of the courts.

The Attorney-General and the Commission have a statutory right to intervene in cases raising Charter issues (under sections 34 and 40). This role is provided in recognition of the Charter being new in the legal landscape and needing input for the jurisprudence to develop.

- In 2011 to date, the Commission has received 18 notifications and have intervened in four cases.
- In 2010, the Commission were notified of 63 cases and intervened in 14.
- In 2009, the Commission were notified of 48 cases and intervened in seven.
- In 2008, the Commission were notified of 38 cases and intervened in five.

More information about the Commission's use of its intervention function and the review of that function is available at page 242.

The Commission's review of its intervention function in 2010 found that there was support for the distinct role of two statutory interveners on the basis that these interveners have taken on markedly different but equally valid roles in Charter matters. For example, President Maxwell of the Court of Appeal indicated that in the matters that had been before him it was valuable to have two statutory interveners in light of the very different views put by each. Having first hand experience of the use of the intervention function, he supported its existence and use, noting that the courts appreciate the interveners articulating the Charter arguments in this new area.

The review found that in the nine matters where the Commission and the Attorney-General have both intervened, the Commission's submissions directly contradicted those of the Attorney-General on pivotal Charter issues, although not on all Charter issues. The Commission's submissions have always differed in some material way from those of the government party involved, and at times from the individual claiming rights.

A copy of the Report to Stakeholders on the review of the intervention functions is at **Appendix L**.

There has also been some concern about the Attorney-General's role, and the potential duplication of roles between the Attorney-General and other public authorities. In most cases, a public authority is already a party in the case. This is not always a state government department. For example, the Attorney-General has intervened in a number of matters where the State Government is not a party:

- *Sabet v Medical Practitioners Board* [2008] VSC 346 (Unreported)
- *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) & ors (No 2)* [2011] VSC 153 (19 April 2011)
- *Sudi v Metrowest* [2009] VCAT 2025 (9 October 2009) (Unreported)
- *C L (a minor) v Lee & Ors* [2010] VSC 517 (16 November 2010)
- *R v K Mokbel* [2009] VSC 342 (14 August 2009)
- *Thales Australia Ltd v Coroners Court of Victoria & Cook Teena* [2011] VSC 133.

However, at least one of the parties (usually the respondent) is a statutory entity (i.e. the Medical Practitioners Board, Consumer Affairs Victoria, or the Children’s Court of Victoria).

There are a number of examples where the Attorney-General has intervened in matters where a state government department is a party to the proceedings and is already legally represented.²⁵² In most instances, the Attorney-General makes submissions that diverge from those of the other government department with respect to the Charter issues. In circumstances where a government department agrees with the Attorney-General’s submissions on the Charter issues, then the department will usually adopt the Attorney-General’s submissions to this extent.

Section 35 notification of Charter matters

Section 35 of the Charter requires that notice of Charter matters arising in the Supreme or County Court be given to the Commission and the Attorney-General, unless the State or the Commission is a party:

(1) A party to a proceeding must give notice in the prescribed form to the Attorney-General and the 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.

(2) For the purpose of sub-section (1), a notice is not required to be given to—

(a) the Attorney-General if the State is a party to the relevant proceeding; or

(b) the Commission if the Commission is a party to the relevant proceeding.

²⁵² *MVB v Secretary, DOJ* 2011, Court of Appeal (settled); *AB v Secretary DOJ* [2009] VCC 1132; *RJE v Secretary DOJ* [2008] VSCA 265; *Watershed Victoria v Paul Evans & Ors*, 2011 Supreme Court (ongoing).

The Supreme Court has issued a practice note in relation to Charter matters – *Practice Note No 3 of 2008* states that the Attorney-General and the Commission should generally be provided with 14 days’ notice of a Charter matter. The Court notes that adjournments will be at the discretion of the judicial officer hearing the matter.

Since the Charter fully entered into force, concerns have been raised, both by the judiciary and the legal profession, about the notification requirement. In particular there is a concern that the notification requirement may discourage the use of the Charter because of this additional requirement and because it requires a level of preparedness not always achieved in the litigation process.

In *R v Benbrika & Ors (Ruling no 20)* [2008] VSC 80, Justice Bongiorno observed:

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 for other good reason. That is, for obvious reasons, particularly important in criminal proceedings. Without such a power there is a real danger that the notice provisions of the Charter will be used to delay or even disrupt the orderly conduct of criminal trials.

Through the Commission’s review of its intervention function under the Charter, various stakeholders from the legal sector responded that the notification requirement does sometimes discourage Charter arguments being raised. It was suggested that judges should have a discretion to waive the notification requirement so that Charter issues can be raised from the bar table where notice would unduly delay or disrupt proceedings.

*I welcome your support for the suggestion made by Bongiorno J . . . that there be a residual discretion in the judge to relieve a party from giving notice where to do so would unduly delay or disrupt a proceeding.*²⁵³

Chief Justice Warren, Supreme Court of Victoria

It was also suggested that if the Commission and the Attorney-General decided to intervene they should endeavour not to delay proceedings, as this may discourage the use of the Charter. This has invariably been the Commission’s approach to the use of the intervention power.

The notification requirement should not cause unnecessary delays in itself. The provision does not require anything other than the sending of a notice, which need only take place just prior to those arguments being run.

²⁵³ *Report to Stakeholders – Review of the Commission’s Intervention Function in the Charter of Human Rights and Responsibilities Act 2006*, p. 7.

In addition to providing notice of matters in which the Commission may wish to intervene, the Commission uses the notification process as a way of targeting its education about the Charter and as a source of information for its annual reports on the use of the Charter. The Commission will often be contacted by individuals or lawyers before or after serving notices under section 35 of the Charter, to discuss the issues they will be running. The Commission makes its submissions from past interventions available online as a resource: both to encourage an understanding of how the Charter can be used, and; to minimise the costs and delays that can be associated with the development of jurisprudence around any new piece of legislation.

As the list of cases at **Appendix K** shows, the number of cases raising the Charter in which Charter issues ultimately prove irrelevant (the 103 cases in category (c)), highlights that there is still not a good understanding of the Charter within the community and the legal profession. The requirement to notify the Commission provides a mechanism for putting the Commission in contact with individuals and organisations that are raising Charter arguments, which have on occasion resulted in Charter arguments being withdrawn, and in others resulting in the Charter arguments being substantially amended.

While the notification requirement may be a disincentive to some parties considering raising Charter matters, matters being run in the County and Supreme Courts will generally involve a level of preparation that allows a notice to be considered (once its existence becomes more widely known).

Although the Commission does not oppose the removal of the notice provision if there is evidence that it is in fact materially stifling the use of the Charter, its removal will inhibit the ability of the Commission to intervene to provide guidance while the courts and the legal profession gain confidence in this area. The Attorney-General's awareness of Charter matters is likely to be impacted less because the State will often be a party to Charter matters. If there is not a strong evidence base for removal at this stage, the notification procedure should be retained. This issue should be revisited at the eight-year review of the Charter when the jurisprudence is further developed.

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

Term of Reference 5(e): What have been the effects of the Charter on the availability to Victorians of accessible, just and timely remedies for infringements of rights?

Key points and recommendations

There is demonstrated evidence that the Charter is helping to improve the lives of Victorians, particularly in the context of their interaction with government and service providers.

The human rights framework that the Charter provides has improved access to justice, however without access to both judicial and non-judicial remedies, the realisation of rights protection is limited. Human rights need enforcement mechanisms in order to properly give effect to them. The Commission believes that:

- (a) the Charter is providing a useful framework and has improved access to justice for Victorians
- (b) in addition to the court-based remedies discussion under Term of Reference 4, a flexible dispute resolution procedure such as that found in the *Equal Opportunity Act 2010* would improve options for just and timely remedies
- (c) human rights education is important to ensure that all Victorians can understand and engage with their human rights and responsibilities.

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.

Discussion

*The law can often perpetuate injustices and discrimination, but it can also be a powerful tool for the powerless. The Victorian Charter is a prime example of how the law can work in favour of those who are discriminated against.*²⁵⁴

Uyen Nguyen, Human Rights Youth Ambassador

(a) A framework for dealing with government

The existence of a clear, accessible statement of rights has made it possible for everyday Victorians to navigate the complex patchwork of laws and service standards. It has provided Victorians with a tool to question and challenge government policy, law and decisions. In this way, the Charter has helped to empower everyday Victorians by providing them with a framework to have their voices heard.

Significant outcomes have been achieved outside of the courts in interactions between the community and public authority service providers. Community engagement with the Charter has ranged from one-off discussions to rectify isolated human rights issues with public authorities, to more robust negotiations with public authorities to address serious and systemic breaches of human rights. Although advocates have played a role in facilitating this engagement in some matters, community awareness of the Charter has also led to the identification and prompt resolution of human rights issues without advocates in others.

Community awareness and use of the Charter continues to gain momentum. Consultations conducted by Colmar Brunton Social Research on behalf of the Commission between May and August 2010 highlighted that despite a need for greater community awareness of the Charter, there is community support for the government to be accountable for the standards set out in the Charter.²⁵⁵ As awareness increases, so too will the capacity of the community to have constructive engagement with public authorities on rights issues, contributing to fairer outcomes and improved service delivery.

²⁵⁴ 2008 Charter Report, p. 35.

²⁵⁵ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights: 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, 2011, from p 12.

Practical outcomes

Raising the Charter, both formally and informally, has led to practical outcomes for disadvantaged Victorians. The breadth of Charter-driven outcomes achieved below signifies that the Charter has been, and continues to be, a relevant and persuasive tool that can be used by everyday Victorians outside the courtroom to encourage public authorities to act compatibly with human rights:²⁵⁶

Dignity in disability services

- Five young people with acquired brain injuries used the rights of young people in the Charter to allow them to stay in a public hospital once they had reached the end of their maximum stay, until appropriate options were explored and assessed. The only available options in the short-term were aged care facilities. Advocates for the young people were concerned that the nursing homes would not provide the social environment or support services that the young people required, and that such a move was potentially detrimental to their health and well-being.²⁵⁷
- A male client in care, who shared his bed with his wife, was about to be forced to use a single bed in order to use a slide sheet for occupational health and safety reasons. A disability advocate successfully employed the Charter to prevent this from happening and find other solutions.²⁵⁸
- The partner of a person with a disability was restricted from entering their supported accommodation because of staff concerns that they could not monitor the partner in the residence. No proper grounds could be given for the restriction. The decision was reviewed so that the presumption became that the client's wishes should be granted.²⁵⁹

²⁵⁶ The following examples are cited in Homeless Persons' Legal Clinic, *Submission to the four year review of the Charter*, 2011.

²⁵⁷ Source: Human Rights Law Resource Centre and Action for Community Living.

²⁵⁸ Example provided at Disability Forum, October 2010, reported in the Victorian Equal Opportunity and Human Rights Commission, *Talking Rights: Consulting with Victorians about the rights of people with disabilities and the Charter* (2011), p. 23.

²⁵⁹ Victorian Council of Social Service, *Using the Charter in Policy and Practice: Action taken and planned in response to the Victorian Charter of Human Rights and Responsibilities* (2008), p. 15.

- During a routine visit to a residential service, a Department of Human Services officer observed carers assisting a client to shower from the door of the unit. The officer provided information on human rights and discussed the impact of the physical environment on the client's right to privacy and on workplace safety. The residential service then reviewed the physical environment, with a simple solution adopted – in this case, the fitting of a shower curtain; guaranteeing the privacy and dignity of the resident at very little cost to the service.²⁶⁰
- A number of people with mental illness complained about compulsory treatment plans they felt were not specific enough to allow them to understand what treatment they were receiving and why. When their advocate raised Charter arguments with the relevant government authority, the authority undertook to improve the quality of the plans.²⁶¹

Accessible housing

- A public authority refused to provide an access ramp for a woman with a disability because of the cost and questions about its responsibility. The woman was unable to leave her house without the ramp and was socially isolated. After the woman's occupational therapist advocated with the department on her behalf, raising her human rights, the authority reconsidered its decision and provided the access ramp.²⁶²
- The Housing Resource and Support Service Inc, a not-for-profit community organisation that assists people with disabilities to actively participate in community life, has published a charter of consumer rights that sets out its human rights based approach to client relationships and business.²⁶³

Sport and Recreation

- Victoria has worked to eliminate barriers to accessibility in the recent redevelopment of Melbourne Park. Human rights and universal design principles are being implemented to achieve better inclusion in sporting infrastructure; which means that major public events will be more accessible to a large number of Victorians.²⁶⁴

²⁶⁰ Reported in Victorian Equal Opportunity and Human Rights Commission, Talking Rights: compilation report - Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities (2011), p. 37.

²⁶¹ Source: Villamanta Disability Rights Legal Service, reported in online Human Rights Law Centre Case Studies: How a Human Rights Act Can Promote Dignity and Address Disadvantage.

²⁶² Source: West Heidelberg Community Legal Service.

²⁶³ Reported in Victorian Equal Opportunity and Human Rights Commission, Talking Rights: compilation report - Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities (2011), p. 145.

²⁶⁴ Reported in Victorian Equal Opportunity and Human Rights Commission, Talking Rights: Consulting with Victorians about the rights of people with disabilities and the Charter (2011), p. 25.

Benefits for older people

- A middle-aged woman with an acquired brain injury needed urgent treatment for a severe condition in her hand that caused her considerable pain and suffering. Without treatment, it was likely she would require far more radical surgery that potentially could involve either severing the tendons of her fingers or amputation of her hand. Although the woman had been waiting for therapy for over three years, she was not considered a priority by the health authority because she was aged over 50. Using the Charter, her advocates were able to obtain one-off funding for urgent treatment, while other options for a longer term support package were explored.²⁶⁵

Community perspectives: A snapshot

The Colmar Brunton Consultation Report's key findings²⁶⁶ include:

- **Organisations are more positive than individuals about the current state of human rights in Victoria** and the operation of the Charter. Positive attitudes were reflected in high levels of agreement among organisations that there is a growing interest and dialogue about human rights, and that steady progress is being made towards a culture where human rights are recognised, respected and protected.
- **The Charter is generally perceived to have had a positive impact in terms of bringing about a cultural shift** at senior and strategic levels in government. Across all participants, there was a strong sense that the training, guidelines and obligations accompanying the Charter have contributed to changes in the way that policy issues are analysed, opportunities are created for advocacy and auditing of government actions, and a greater respect established for human rights principles.
- However, this **positive impact is not perceived to have fully flowed through to 'frontline' functions** and there are polarised views regarding the success of the Charter in these areas. The interview findings suggest that, due to the uneven adoption and internalisation of Charter obligations and values across different public authorities, there are wide disparities in the degree to which the operations of these public authorities are seen as Charter compliant. In conjunction with varying levels of success in attaining remedies for Charter breaches, these disparities lead to significant variation in satisfaction with the operation of the Charter across the different sectors. For example, those working in the area of housing and homelessness services tended to be far more positive about the impact of the Charter than those working in disability services.

²⁶⁵ Source: Human Rights Law Centre.

²⁶⁶ Victorian Equal Opportunity and Human Rights Commission, Talking rights: compilation report. Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities, May 2011, pp. 141-142.

- While there is significant disappointment among respondents from organisations with the recent uses of statements of incompatibility, on balance **the Charter is perceived to have contributed to greater transparency and dialogue in law-making**, even where the legislation may not ultimately be Charter compliant. Among individuals, the fact that the Charter must be considered in the development of new laws was an important factor.
- Those who had been involved with Charter cases before Victorian courts and tribunals believed **the Charter is having a positive impact on the way in which laws are being interpreted by the courts and breaches remedied**. While awareness of the Charter's impact on Victorian courts and legal systems was low; the general sentiment among respondents from organisations and individuals was that benefits in this area seemed to outweigh any downsides. Those with legal training noted that the number of cases invoking the Charter being seen in courts and tribunals were 'literally miniscule' and this was seen as appropriate.
- Among organisations particularly, **the Charter is credited with a number of successes in terms of improving outcomes for Victorians**. The sense that the Charter has made a concrete contribution to fairer outcomes for the Victorian community is reflected in 59 per cent of survey respondents from organisations agreeing or strongly agreeing that this is the case.
- Survey respondents noted that **further progress requires that the Charter makes the shift from what is essentially a bureaucratic function to making a difference to the way things are done** – that is, to a '*genuine rights-based culture*', rather than a culture that has merely been '*relabelled*' as rights based. This is seen to be dependent upon: time, political will and commitment; broader awareness of, support for and uptake of the Charter, and; being able to effectively '*demonstrate how human rights can influence outcomes*'.

The feedback from the community is that the Charter provides them with clear standards for good governance and accountability from public authorities. In this way, it provides clearer protections than existing common law and administrative law frameworks.

Common law and administrative law protections

Some human rights are protected by established common law principles. For example, fair trial rights are well developed in the common law. However, as the Hon Michael McHugh, former Justice of the High Court of Australia has observed in the national context: *'the development of the common law by an independent judiciary by no means provides an adequate safeguard for human rights. It can not provide the same level of protection as a national Bill of Rights can do'*.²⁶⁷

Charter rights have proven to be accessible and, in many areas of the law, provide clearer guidance and protection than common law standards. This is particularly so in areas before VCAT's jurisdiction, such as housing and guardianship. Charter rights are also more broadly applicable than many remedies provided by administrative law because they relate to all areas of government activity rather than just administrative decisions.

Parliament can override the common law or administrative law protections at any time, without giving due consideration to human rights implications and without having to offer justification. The Charter dialogue process means that human rights are considered and limitations on rights explained.

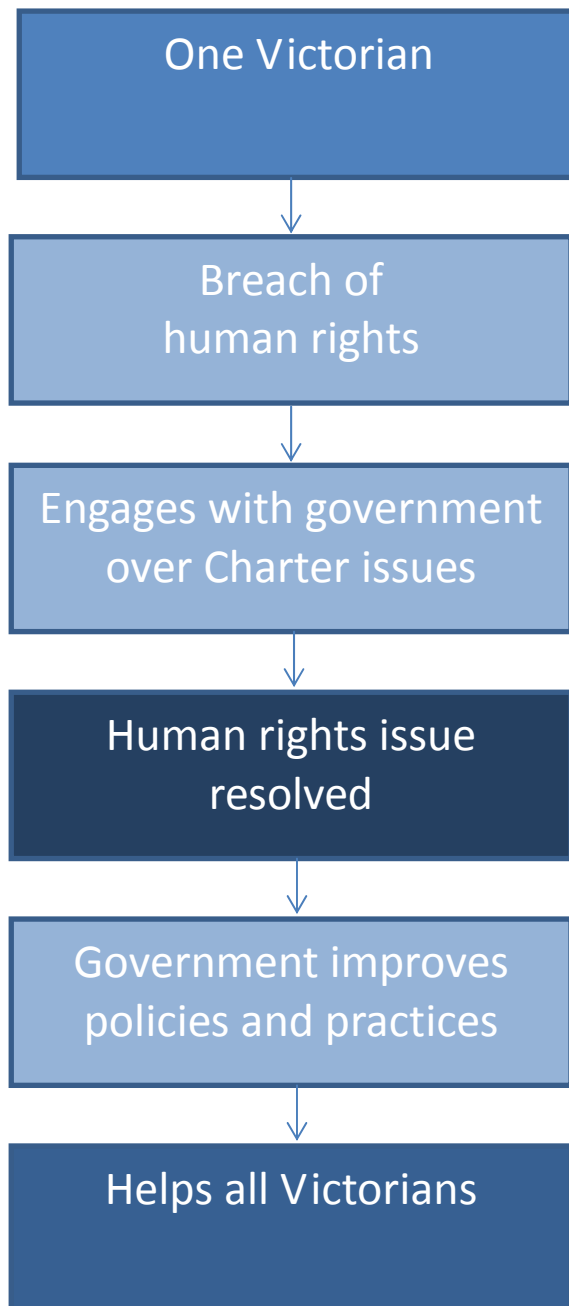
The Charter also applies to all of government, thereby ensuring a single standard for service delivery. Like the Public Service Code of Conduct it ensures all of government is working to one standard and one set of expectations. It will be strengthened by a direct cause of action, allowing Victorians to outline their concerns directly to a public authority through a rights lens, rather than a client based lens, thus evening up the balance of power between individuals and the government.

Service standards

Service standards are one way people can engage with different government departments and agencies. The Charter can be used to strengthen these and put them in a framework of minimum standards the community expects from government. However, service standards are set and overseen by the agency they relate to. They do not help assure the community of the transparency and accountability of government activities, they do not provide assistance with engaging government and resolving disputes, and they do not provide a mechanism to force an outcome when human rights are being breached.

²⁶⁷ The Hon M McHugh AC QC, *Does Australia Need a Bill of Rights?* (Speech delivered at Law Week Oration, University of Melbourne, 15 May 2007). At <http://acthra.anu.edu.au/resources/DoesAustraliaNeedABillofrights.pdf> (viewed 30 June 2011).

The charter helps government look at its impact on individuals and make systemic changes



An example of how the process illustrated above works well in practice is the following case study, which was reported by West Heidelberg Community Legal Service.

Example: patient treatment

On the same day as receiving advocacy training [through West WHCLS] on how to use the Charter, a community nurse who had been trying to assist a very ill asylum seeker access a hospital, used the Charter to remedy the refused treatment. The hospital was refusing treatment on the basis the asylum seeker could not afford to pay and did not have a Health Care card. While a more senior person had assured the nurse the asylum seeker would be able to have access to the hospital's health service, when it came to receive the access it was indicated the service would be denied unless the patient paid. On questioning the staff member on whether this 'contravened the Charter', the staff member said she did not know. The community nurse then sent an email to senior staff at the hospital raising the Charter rights. On receiving her email a further email from the hospital was sent out to all hospital staff in Victoria. This email directed staff to follow a DHS directive stating all asylum seekers and refugees were to receive free services from the hospitals.²⁶⁸

(b) Better ways to engage with government – dispute resolution

While the Charter is having an impact, it is clear from the experience of the community that things could be improved. As set out earlier in the submission, helping Victorians get better outcomes and remedies for human rights breaches is not just about legal proceedings in a court. A specific human rights complaints mechanism leading to dispute resolution would help people to resolve concerns about human rights breaches quickly and efficiently.

The Commission, as the authority with expertise in the Charter and an established dispute resolution service for equal opportunity matters, is well placed to deliver a dispute resolution process for human rights complaints.

The current role of the Ombudsman

The power to receive and investigate individual complaints that a government agency, public statutory body or municipal council, is acting incompatibly with a human right set out in the Charter currently vests with Ombudsman Victoria in accordance with subsection 13(1) of the *Ombudsman Act 1973* (the Ombudsman Act).²⁶⁹

²⁶⁸ West Heidelberg Community Legal Service, 2009/2010 Annual Report, p. 14.

²⁶⁹ 'The functions of the Ombudsman under subsection (1) include the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities'.

The scope of the Ombudsman's complaint-handling function includes the option to resolve a complaint by informal means (for example, discussing the issue with the public authority) or by a formal investigation of a complaint; which may involve reporting on the investigation to Parliament.

There are a number of limitations with the Ombudsman's role for resolving human rights complaints. This is primarily because this is not the aim of, nor what the Ombudsman's functions were designed to do.

Focus of the Ombudsman is on administrative processes

The Ombudsman's role is to investigate administrative actions. It does not have a human rights focus. This is reflected by the fact that as at June 2011, there are no publicly available figures on the number of complaints received and investigated by the Ombudsman (in a financial year) that relate to an alleged breach of Charter rights, or complaints that raise issues regarding human rights.²⁷⁰

The key focus of the Human Rights section of the Ombudsman's Annual Report is on the important own motion investigations undertaken by the Ombudsman that engage rights issues, such as the *Own motion investigation into the Department of Human Services – Child Protection Program* (November 2009) and the *Own motion investigation into Child Protection – out of home care* (May 2010). There is also discussion about the investigation (and outcomes following those investigations) of rights-based complaints in closed environments.²⁷¹

To promote the Government's key aims of transparency, accountability and best practice public administration, it would be useful for recording purposes to determine what rights are most commonly reported as breached, what agencies have the greatest number of rights-based complaints made against them, and the de facto 'satisfactorily resolved' rate of human rights complaints.

Definition of 'public authority' and 'statutory body'

The Ombudsman has jurisdiction over 'public statutory bodies'. The definition of such a body appears to be narrower in scope and purpose than the definition of 'public authority' under the Charter.

The definition of **public authority** in the Charter relevantly provides as follows:

*(c) an entity 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 (whether under contract or otherwise).*²⁷²

²⁷⁰ Ombudsman Victoria Annual Report 2009 – 2010, Part I, 'Human Rights', pp. 44 – 47.

²⁷¹ Ombudsman Victoria Annual Report 2009 – 2010, Part I, p. 47.

²⁷² Charter of Human Rights and Responsibilities, Paragraph 4(1)(c).

By comparison, the definition of a **public statutory body** for the purposes of the Ombudsman Act is as follows:

*Public Statutory Body means a body of persons, whether corporate or unincorporated, constituted or established under an Act for a public purpose, in respect of which the Governor in Council or a Minister has a right to appoint all or some of its members and includes State Trustees.*²⁷³

The Ombudsman Act requires the Body to be established or constituted by an Act for a public purpose. By comparison, the Charter definition of a public authority merely requires the entity to be exercising functions on behalf of the State, or on behalf of a statutory authority.

The practical effect of this difference in definitions is that the jurisdiction of the Ombudsman to receive and investigate Charter rights complaints is limited to agencies governed by statute, and does not clearly extend to receiving complaints about agencies or organisations carrying out functions on behalf of the State (for example, a community organisation such as a disability service provider). There are also bodies that have obligations under the Charter that are excluded from the Ombudsman's jurisdiction (for example, the courts and tribunals).

Ombudsman does not offer statutory dispute resolution service

The Ombudsman has effective powers to negotiate with agencies, investigate, seek evidence, and report on complaints about public authorities, and also has an 'own motion' power to investigate agencies and authorities in the absence of an individual complaint.²⁷⁴ The Ombudsman has the power to respond flexibly to complaints; for example, the Ombudsman might make enquiries to the public authority who is the subject of a complaint and attempt to resolve a complaint through these discussions,²⁷⁵ or conduct a formal (or informal) investigation of the agency in question.²⁷⁶

The Ombudsman Act does not provide for an internal complaint resolution process for individual complaints, or empower the Ombudsman to convene mediations, conciliations or meetings between the parties.

²⁷³ Ombudsman Act, section 4.

²⁷⁴ Ombudsman Act, subsection 14(1).

²⁷⁵ Ombudsman Act, section 13A.

²⁷⁶ Ombudsman Act, subsection 17(3).

While publicising complaints and drawing attention to systemic failures in public administration is an effective means of achieving an outcome of systemic change, other methods of alternate dispute resolution could offer a flexible and case-specific resolution to individual human rights complaints without going to court. If, under a revised Charter, a breach of human rights creates a stand alone cause of action it is appropriate that people have access to a dispute resolution option prior to a tribunal or court process. The Ombudsman's jurisdiction does not offer formal dispute resolution and is not a statutory 'pre-court' conciliation model, as complaints to the Ombudsman do not lead to an enforceable right.

The Commission's role

The Commission currently has the responsibility of receiving and attempting to conciliate complaints made under the *Equal Opportunity Act 1995*, the *Racial and Religious Tolerance Act 2001*, and from 1 August 2011, the *Equal Opportunity Act 2010*. The statutory conciliation process focuses on providing a flexible, fast and informal dispute resolution service to individuals, business and organisations who are parties to a complaint.

The Commission recognises the valuable service provided by Ombudsman Victoria in receiving and investigating complaints against Victorian statutory authorities. The Ombudsman plays an important role in monitoring and reporting on instances of misadministration and systemic problems in statutory agencies. However, the Ombudsman's role has gaps in jurisdictional coverage, is focused on administrative processes not human rights, and has limits in terms of process and available outcomes.

As discussed earlier under Term of Reference 4, the most appropriate means of addressing these gaps would be to vest the Commission with a statutory responsibility to resolve complaints of human rights breaches under the Charter, by way of a flexible dispute resolution service similar to what it provides under equal opportunity legislation.

The Commission also has considerable statutory responsibilities under the Charter already, including: the responsibility to educate people about the rights and responsibilities contained in the Charter,²⁷⁷ to assist the courts in its interpretation,²⁷⁸ and to report annually to the Attorney-General about the operation of the Charter.²⁷⁹

The Commission already provides a comprehensive public information service about the Charter and equal opportunity law, and has the staff, expertise and experience to incorporate complaints of alleged breaches of human rights into this service, with appropriate resources. As noted earlier, the number of complaints made to the Ombudsman is small, and the number of complaints lodged under federal human rights law is also small, so the likelihood of an expanded dispute resolution service encouraging a flood of cases seems remote.

²⁷⁷ Charter of Human Rights and Responsibilities, subsection 41(d).

²⁷⁸ Charter of Human Rights and Responsibilities, section 40.

²⁷⁹ Charter of Human Rights and Responsibilities, subsection 41(a).

The provision of a free, impartial and voluntary dispute resolution service for Charter complaints would be a logical addition to the human rights framework to help people engage public authorities on Charter issues and provide an opportunity for people to resolve complaints in a sub-judicial forum. This could limit the number of cases being litigated where Charter issues form the substantive basis of the application.

In practice, the Commission would receive complaints and enquiries about Charter matters via its online complaint form or general enquiry line. A dispute would be lodged, and a Commission staff member would liaise with the parties, with a view to achieving resolution of the issue as quickly as possible. The dispute resolution process often involves a face-to-face conciliation, but may also be resolved via more informal negotiation between the parties.

Unlawfulness under the Charter would remain one of many factors the Ombudsman could consider when investigating the administrative actions of statutory bodies, just as unlawfulness under the Charter is one of the many factors the Auditor-General can consider when looking into the legislative compliance of public bodies. An effective dispute resolution service to help individuals engage with government when they feel their human rights have been breached would not overlap with these roles.

This function would also help the Commission to identify systemic issues in its monitoring and reporting roles. The information the Commission could then provide will help the government to identify issues and improve human rights practices.

(c) Helping the community use the Charter - human rights education

Finally, it is important to recognise that human rights education is a critical building block in helping the community to know about, understand and effectively use the Charter. This education starts with young Victorians in school.

Human rights education is an integral component of, and a specific obligation under many of the international human rights instruments to which Australia is a party.²⁸⁰ For example, Australia has agreed under the Convention on the Rights of the Child to direct the education of children, amongst other things, to '[t]he development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations'.²⁸¹ The convention provides an authoritative reference point for the Victorian Government, when reviewing and developing educational initiatives in schools.

²⁸⁰ See for example, the International Covenant on Economic, Social and Cultural Rights (Article 13(1)), the Convention on the Rights of the Child (Article 29(1)(b)), the Convention on the Rights of Persons with Disabilities (Article 24(1)(a)) and the Convention on the Elimination of All Forms of Discrimination Against Women (Article 10).

²⁸¹ Convention on the Rights of the Child Article 29(1)(b).

Human rights education in schools is much more than simply teaching students the rights that are enshrined in domestic and international human rights instruments. While an awareness and understanding of human rights and the role of such instruments is an important educative outcome, the objective and potential of human rights education extends much further:

*Human rights education is an effective means to educate children from a very young age to develop respect for self, for other people and humanity, appreciation of diversity, valuing of freedom, equality and justice, determination, intelligent inquiry and a critical independent mind for reflective citizenship, upon global, moral, civic, and multicultural concerns, all of which compose the basis of a democratic society and humane citizenry.*²⁸²

At both the state and federal levels, there is an increased focus on equipping students with the skills, attitudes and values to participate fully in civic life. In Victoria, the Victorian Essential Learning Standards (VELS) outline what is essential for all Victorian students to learn in school from Prep to Year 10.²⁸³ VELS includes a civics and citizenship domain with a focus on civic knowledge and understanding and community engagement.²⁸⁴ Human rights education should be a core component of this learning for all Victorian students up to Year 10. This will give students the values, skills and knowledge to become active citizens in the protection of democracy and rights in Australia and globally.

Quite simply, human rights education is one of the most effective ways to build a culture in a community that respects human rights. This is an investment in the future of Victoria.

Many educational authorities already provide human rights education and are doing some great work with Victoria's children and young people. However, there is a need for Government mandate and support to include this across the board.

²⁸² Frantzi, K, Human Rights Education: the United Nations Endeavour and the Importance of Childhood and Intelligent Sympathy, *International Education Journal*, Vol 5, No 1 2004, p. 3.

²⁸³ See <http://vels.vcaa.vic.edu.au/> (last visited 11 June 2011). Year 11 and 12 students go on to complete either the Victorian Certificate of Education (VCE) or the Victorian Certificate of Applied Learning (VCAL), possibly with some Vocational Education and Training (VET) units. See the Victorian Curriculum and Assessment Authority (VCAA) website for further information: www.vcaa.vic.edu.au/ (last visited 11 June 2011).

²⁸⁴ See <http://vels.vcaa.vic.edu.au/civics/index.html> (last visited 11 June 2011).

The Department of Education and Early Childhood Development

The Department has told the Commission that schools have been encouraged to include the Charter in induction processes. The updated *What's the Deal?* kit, produced by Victoria Legal Aid and community legal centre Youthlaw to help teachers educate young people about their legal rights and responsibilities, has been distributed in schools. The Department has also been working with agencies such as Foundation House on training students and teachers in Charter-related rights.

Human rights convention for high schools

In 2010, four high school students organised a human rights convention that was attended by students from Taralgon College, Trafalgar High School and Kurnai College Churchill in Gippsland. At the convention, after a productive discussion about human rights, a great majority of those attending agreed that Australia should have a national bill of human rights to protect essential freedoms.

Victorian Equal Opportunity and Human Rights Commissioner Helen Szoke attended the convention and spoke to the students about the way governments needed to adapt laws to meet social changes. Students attending raised many human rights issues, including the protection of rights and freedoms in a democratic system and the issue of rights for same-sex couples, including same sex marriage.

Following the convention, students wrote a letter to the Prime Minister and the Commonwealth Attorney-General, urging the Government to adopt a national bill of rights. The convention demonstrated the high interest young people have in debate and discussion about human rights, and the relevance of the issue of a human rights bill to young Australians.

VELS and human rights: Guidance for schools

The Victorian Curriculum and Assessment Authority provides a useful guide on its website about how the VELS provides opportunities for a range of teaching and learning activities that cover aspects of human rights associated with the Universal Declaration of Human Rights and the Victorian Charter. See:

<http://vels.vcaa.vic.edu.au/support/crosscurricular/rights.html>

Term of Reference 6 - Benefits and costs of the Charter

Term of Reference 6: What, if any have been the overall benefits and costs of the Charter?

The Commission supports scrutiny of the Charter, its costs and benefits, noting that it is not the value of human rights that is under review, but rather the model of the statutory protection.

It is recognised that the Government, in seeking the costs and benefits associated with the Charter in Victoria, seeks to understand the additional benefits of a state-based human rights framework over and above the protections provided by other national and state domestic law.

To inform this submission, the Commission sought advice from Deloitte's Access Economics to identify a methodology to analyse the **economic costs and benefits** associated with the introduction of a human rights regulatory framework.

In addition, our own reporting function identifies the **qualitative and legal benefits** associated with the introduction of the Charter, along with the routine reporting of other agencies.

Deriving from this analysis, it is our view that further work must be done to identify the longer-term benefits and costs associated with a human rights framework, within an economic analysis.

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.

Discussion

The nature of benefits and costs

The Commission acknowledges the range of costs associated with the implementation of the Charter.

In relation to the direct costs of implementation of the regulatory functions, the Commission will outline direct costs associated with our functions under the Charter. The Whole-of-Government submission will outline other direct costs.

In reviewing direct costs, it must be understood that any new passage of law will involve direct costs that may be associated with:

- administration costs associated with development and implementation
- learning and development costs for government
- awareness raising, training and education for community
- legislative and policy scrutiny
- departmental costs, e.g. policy advice and compliance
- non-government costs
- monitoring and evaluation costs.

The challenge in understanding the economic costs and benefits is to determine the framework of identifying what these are in the long term, and looking at diversified outcomes. For example, changes to the guardianship framework and mental health legislation currently being reviewed will incur costs, but it is acknowledged that there are long-term benefits to the individuals affected by this legislation, and ultimately, the community will benefit from those changes. Similarly, investment in additional police will initially be a cost to the State, but should lead to longer-term benefits related to community safety and a reduction in crime.

The initial investment of legislative changes can only be assessed over the long term. This does not mean Government does not make the investment. Rather, the long-term interests of the community are served by the initial cost associated with these policy decisions.

Similarly, the challenge of considering the costs and benefits of the Charter is that while the immediate, direct costs to Government are identifiable, the benefits of the Charter are diverse and in many cases qualitative, and so more difficult to define at this early stage.

The Commission notes that where human rights legislation has been formally assessed in other jurisdictions, for example in the United Kingdom and the Australian Capital Territory, it has been found to have a significant, beneficial effect upon the development of public policy, and to have promoted better public services and outcomes.²⁸⁵

*While these effects [the social benefits] are no less important than more quantifiable impacts, they are certainly less tangible. Including them within the analytical framework would require explicit quantification or monetisation of the impact on social wellbeing. This is notoriously difficult.*²⁸⁶

The Commission agrees that while the immediate costs of implementing the Charter are a consideration, securing more equitable, fair and accessible services for all Victorians has the potential to deliver future cost savings. Modelling this social return on investment may be possible through individual case examples.

Quantifying the value of better decision-making and public policy to the individuals, families and communities is also difficult to assess. If one takes a well-being or quality-of-life approach to such measurement, the challenge remains in assessing the transformative effect of the Charter within a range of factors that may contribute to any changes.

Importantly, if using well-being as a measure, the severity and persistence of entrenched disadvantage needs to be factored in against the protective factors that rights-consistent service delivery and policy may deliver in the immediate and long term.²⁸⁷

To make a cost-benefit analysis even more challenging, the Charter may arguably have a multiplier effect, so that improving services and policy in one area may have flow on effects in other areas.

Some contemporary techniques are available to quantify social goods, however these are subject to considerable uncertainty, and for the purposes of this review are impractical given the timing and budgetary constraints on SARC.

The work prepared by Deloitte Access Economics concluded that an economic analysis of the impacts of the Charter would be best served by setting out and profiling the nature of the social impacts in a *qualitative* fashion. This approach will allow SARC to form its own judgements on the merits of the social impacts of the Charter, when placed alongside its more quantifiable (direct) costs.²⁸⁸ This is demonstrated in the graph outlined below:

²⁸⁵ See e.g. Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act (2006)* 1, ACT Human Rights Act Research Project, *The Human Rights Act 2004: The first five years of operation* (2009), p. 7.

²⁸⁶ Deloitte Access Economics, *Impacts of the Victorian Charter of Human Rights and Responsibilities Some Economic Perspectives* (2011), Victorian Equal Opportunity and Human Rights Commission, p. 3.

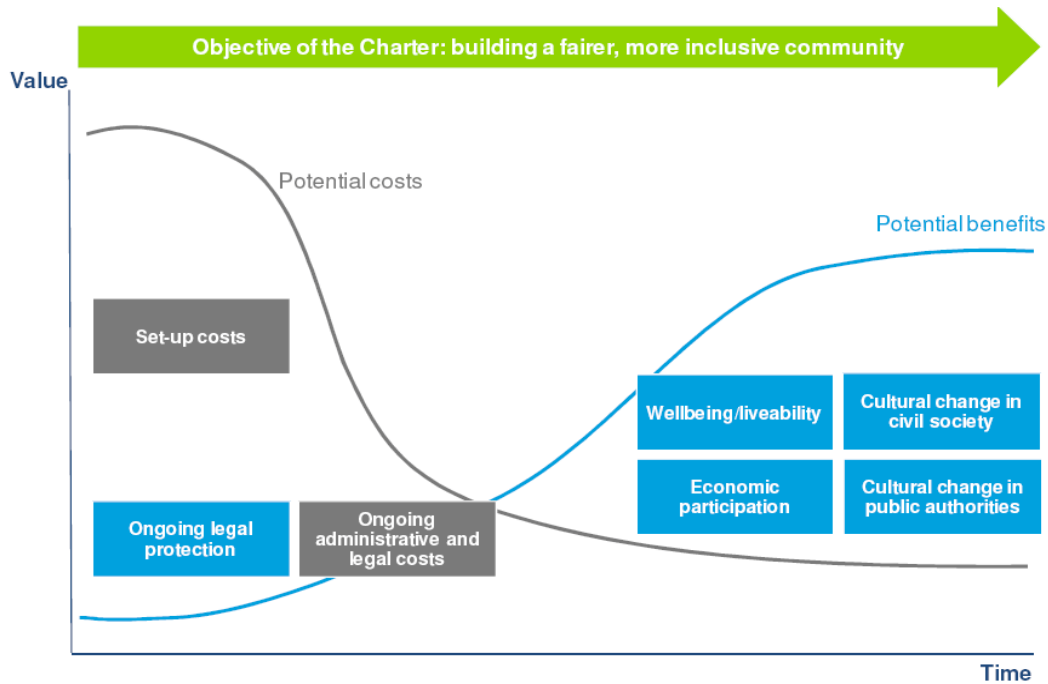
²⁸⁷ See e.g. Australian Government Treasury, *Wellbeing Framework* (2004) at:

www.treasury.gov.au/documents/876/HTML/docshell.asp?URL=Policy_advice_Treasury_wellbeing_framework.htm

(viewed at 25 May 2011). The dimensions chosen for the wellbeing framework include 'the level of opportunity and freedom that people enjoy'. For a discussion of well-being indicators in the context of the right to equality, see Cabinet Office United Kingdom, *Fairness and Freedom: The Final Report of the Equalities Review* (2007), pp. 127-129. This measures aspects of wellbeing in the areas of health, physical security, legal security, education and learning, standard of living, productive and values activities, identity expression and self-respect, participation, influence and voice, and individual and family life.

²⁸⁸ Deloitte Access Economics, *Impacts of the Victorian Charter of Human Rights and Responsibilities Some Economic Perspectives* (2011), Victorian Equal Opportunity and Human Rights Commission, p. 3.

Figure: Possible pattern of benefits and costs of the Charter



Legend: Costs Benefits

Note: These patterns of potential impacts are conceptual and stylised in nature and have not been based on specific assessment. They do not represent the estimated magnitude of impacts.

Source: Deloitte Access Economics

A broad analysis is preferable

Consistent with standard practices, reviewing the operation of the Charter is ideally undertaken in a benefit-cost framework that recognises the full range of financial and social benefits and costs. This is designed to determine the estimated (net) payoff to society of a regulation or policy – in this case, how the Charter affects community wellbeing.²⁸⁹

Deloitte Access Economics

²⁸⁹ Deloitte Access Economics, *Impacts of the Victorian Charter of Human Rights and Responsibilities Some Economic Perspectives* (2011), Victorian Equal Opportunity and Human Rights Commission, p. 1.

This approach is supported by the finding of the Productivity Commission that the many ways legislative rights protections affect the community means that costs and benefits ‘must be considered in a broad framework that takes into account equity and social welfare, among other considerations’.²⁹⁰

Deloitte Access Economics suggests some potential benefits and costs of the Charter, summarised in the following table.

Table: Broad categories of potential benefits and costs

Impacts	Quantifiability	Timeframe of impacts	Uncertainty
Benefits			
Enhanced legal protection of human rights (including preventing unfair treatment)	Difficult	Available immediately	Difficult to identify
Improved well-being and liveability among Victorians	Various metrics available	Longer term	Difficult to attribute
Increased economic participation of Victorians	Data readily available	Longer term	Difficult to attribute
Positive cultural change in public authorities	Difficult (and highly subjective)	Likely to be longer term	Difficult to attribute
Positive cultural change in civil society	Difficult (and highly subjective)	Changes occur slowly	Difficult to attribute
Costs			
Start up administration costs	Costs available	Short term	Low
Ongoing administration and legal costs of implementing Charter requirements	Costs available	Annual (year-to-year)	Low
Compliance costs of agencies	Difficult	Annual (year-to-year)	Medium-High

Source: Deloitte Access Economics

Deloitte stress that many of the impacts are *potential* benefits and costs, as their realisation is ‘very much dependent’ on implementation and effectiveness.²⁹¹ While this is true of any

²⁹⁰ Productivity Commission, *Review of the Disability Discrimination Act 1992 Productivity Commission Inquiry Report Volume 1* (2004), p. xxxvii.

²⁹¹ Deloitte Access Economics, *Impacts of the Victorian Charter of Human Rights and Responsibilities Some Economic Perspectives* (2011), Victorian Equal Opportunity and Human Rights Commission, p. 4.

law, it is particularly so for the Charter, which is reliant upon both attitude and practice change within the public sector.

They further identify longer-term impacts, including: improvement in the way laws account for human rights; change in the way government delivers its services, and; helping courts take into account human rights. Noting that while these are inherently more challenging to encompass within a measurement framework, this does not mean they are any less important – ‘indeed they are the very reason for its existence’.²⁹²

In addition, any policy, action or decision by government is subject to multiple influences, of which the Charter is but one. Hence apportioning costs and benefits to the Charter is more difficult. Further, there is not an elusive category of government activity that is labelled ‘human rights’, as human rights are relevant to all the work of government and Charter-related practices have been increasingly brought within the normal business plans and policies of government.

The relative importance of each category of benefit and costs suggested by Deloitte must be considered within the context of the stated policy aims of the Charter. For example, enhanced legal protection was the primary policy purpose of the Charter when enacted. Whereas, increased economic participation was not a policy imperative for this particular piece of legislation. It may well be a long-term benefit, but the Charter legislation was not designed with this as an expressed policy aim. Any benefit-cost analysis needs to reflect this distinction.

Further, while the economics of equality is increasingly understood, in particular the costs to businesses of discrimination, the broader economic benefits of human rights are less understood, or subject to clear economic analysis.

Direct costs are more easily quantified

Deloitte Access Economics identifies three main forms of costs:

- **Administration costs** - these are incurred in the design, implementation and enforcement of the Charter. These are the most visible costs; however, there are still challenges in quantification. For example, only a proportion of agency and legal system costs would be directly attributable to the Charter, and these are not always separately identified in departmental accounts.²⁹³
- **Non-government compliance costs** - for example the costs of training for frontline staff in non-government service agencies. Deloitte says: ‘Again there are considerable uncertainties in determining what proportion of relevant costs can be properly ascribed to Charter compliance’.²⁹⁴
- **Dynamic efficiency effects** - these arise from the Charter’s position within the broader regulatory framework, by adding to the complexity of compliance issues that public authorities must meet.

²⁹² Deloitte Access Economics, *Impacts of the Victorian Charter of Human Rights and Responsibilities Some Economic Perspectives* (2011), Victorian Equal Opportunity and Human Rights Commission, p. 5.

²⁹³ Deloitte Access Economics, *Impacts of the Victorian Charter of Human Rights and Responsibilities Some Economic Perspectives* (2011), Victorian Equal Opportunity and Human Rights Commission, p. 5.

²⁹⁴ Deloitte Access Economics, *Impacts of the Victorian Charter of Human Rights and Responsibilities Some Economic Perspectives* (2011), Victorian Equal Opportunity and Human Rights Commission, p. 6.

The Commission notes the initial implementation costs of the Charter have been realised. While the value of these implementation costs needs to be incorporated into any benefit-cost analysis, 'only the on-going and long-term costs should have a bearing on decisions made in relation to the future scope of the Charter'.²⁹⁵ There would be, in addition, a cost associated with dismantling the Charter system now that it has been incorporated into the business of government.

Opportunity costs

Assessing the value of rights protection under the Charter is further complicated when attempting to quantify the impacts of not having rights protection under the Charter, or reducing the rigour of the existing rights framework (the counterfactual – what would have happened without the Charter?).

While this is challenging, not properly representing these alternatives can lead to either an over or under-representing of costs and benefits.

As some of the processes the Charter impacts on are confidential to government (such as the preparation of the legislation), SARC may wish to seek information from the Government about the opportunity costs that would be lost if the Charter were not guiding and underpinning decision-making and policy making by public authorities.

Cost-benefit approaches in other reviews of human rights laws

Given these challenges, it is of little surprise that a traditional cost-benefit analysis has not been applied when human rights legislation has been reviewed in other jurisdictions.²⁹⁶ However, where Charter-like legislation has been formally assessed it has been found to have a significant, beneficial effect.²⁹⁷

Further, as part of the National Human Rights Consultation in 2009, the Allen Consulting Group provided a report to the Australian Government Attorney-General's Department assessing options for human rights protection. This high-level analysis did not attempt to assess the options in dollar terms; however, it did rate the various options for social benefit, costs and risk.

Significantly, noting the experience in Victoria, the Allen Consulting Group reported that legislative rights protection offers 'better grass roots protection of human rights, and potential to deliver social benefits-due to the requirement for compliance from public servants, government agencies, statutory authorities and private entities with public functions'.²⁹⁸ Noting 'this is a highly beneficial shift since it is disadvantaged and vulnerable people who are most likely to require public and social services, and are in greatest need for better human rights protections'.²⁹⁹

²⁹⁵ Deloitte Access Economics, *Impacts of the Victorian Charter of Human Rights and Responsibilities Some Economic Perspectives* (2011), Victorian Equal Opportunity and Human Rights Commission, p. 5.

²⁹⁶ The Commission notes that the recent Bill of Rights Commission announced by the UK Government in March 2011 does not include a cost benefit analysis in its Terms of Reference.

²⁹⁷ See e.g. Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act (2006) 1*, ACT Human Rights Act Research Project, *The Human Rights Act 2004: The first five years of operation* (2009), p. 7.

²⁹⁸ The Allen Consulting Group, *Analysis of options identified during the National Human Rights Consultation Final Summary Report* (2009), p. 10.

²⁹⁹ The Allen Consulting Group, *Analysis of options identified during the National Human Rights Consultation Final Summary Report* (2009), p. 10.

Benefits of the Charter

Aligning the policy aims of the Charter with benefits and costs

Deloitte Access Economics identify broad categories of benefits and costs that need to be considered in the context of the stated policy aims of the Charter.³⁰⁰ Principal among these are enhanced legal protection of rights, greater transparency and accountability of government, and improving service delivery and outcomes.

The Commission has endeavoured to map the Deloitte categories against the Charter's policy aims in the table below.

Table: The analytical framework

<i>Benefits identified by Deloitte</i>	<i>Beneficiaries</i>	<i>Policy aim expressed as a benefit</i>
Enhanced legal protection of human rights (including preventing unfair treatment)	Individuals and families Community	Fostering better service delivery Providing redress Improved laws Better public policy Improved decision making by public officials
Positive cultural change in public authorities	Individuals and families Community Government	Fostering better service delivery More transparent and accountable government Increased parliamentary scrutiny Stronger Parliament Strengthening integrity of public institutions Better public policy Improved decision making by public officials Minimising risk to government
Positive cultural change in civil society	Community	Fostering better service delivery Improved decision making by public officials
Improved well-being and liveability among Victorians	Individuals and families Community	Fostering better service delivery A competitive economy
Increased economic participation of Victorians	Community	A competitive economy

³⁰⁰ See table at page 197.

Benefits to individuals and families

Fostering better service delivery

One of the tests for the success of the Charter is the extent to which it has improved the delivery of public and community services, and therefore contributed to better outcomes for Victorians.

Charter-based service delivery is consistent with encouraging and building on the resilience of the Victorian community, instead of adopting a ‘top down’ approach that treats citizens simply as passive recipients of government services.

As noted by a person with disability at a Commission forum in July 2010:

*We no longer have to beg for our rights, as the Charter clearly declares the rights that are to be afforded to all people.*³⁰¹

Some examples of where the Charter has been used by individuals and advocates to secure better services are provided under Term of Reference 5(e) (page 178).

In considering how the Charter has led to service improvements it is important to consider the direct costs to government of service enhancements, which will vary considerably across the examples (from the cost of a shower curtain in one example to provide residents in a care facility with privacy, to a \$2.5 million program enhancement for children with disability in another). The potential savings (cost-offsets) generated by investing in the long-term well-being of individuals and families, either through prevention and early intervention, or targeted support which prevents ongoing reliance on the State, must also be considered. The collateral effects of a decision, where one family achieves access to services for many others must also be considered.

Three case studies are provided below to illustrate the nuance of this cost offset approach: provision of disability support to a child with autism; release of a person with disability from inappropriate residential care, and; homelessness prevention.

³⁰¹ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights, Consulting with Victorians about the rights of people with disabilities and the Charter* (2011), p. 22.

Case study one: costs and benefits of using the Charter to guarantee support services to children with autism

A 13-year-old boy with Asperger Syndrome was ineligible to receive disability support services because Autism Spectrum Disorders (ASD) were not treated as falling within the definitional scope of the *Disability Act 2006*. His mother applied to VCAT for a review of the eligibility decision, using the Charter.

Before the application was heard, the former Victorian Government advised that it would acknowledge ASD as a disability under the Act, thereby extending eligibility to those with autism.³⁰² An additional \$2.75 million funding was subsequently provided to the program.

Although this may be viewed as an additional cost burden to the state, its impact on the well-being and life chances of the one in 160 Victorian children between six and 12 years who have ASD cannot be underestimated.³⁰³ Nor can its value as a support to families as the principal caring unit.

Further, international research suggests that the lifetime costs to the state of ineffective ASD interventions is in the order to \$7 million, both for direct support costs, loss of potential income and lost income for one parent to remain at home as the primary carer. The Australian Centre for Autism Services further supports this research. They estimate lifetime costs at \$8 million if a child with ASD is placed in supported accommodation.³⁰⁴

Clearly, if this can be avoided through using the Charter to gain timely and appropriate support early in life, the benefits to the individual child and family, and the costs savings to the State are considerable.

³⁰² Source: *Human Rights Law Centre Bulletin*, vol. 33, January 2009.

³⁰³ MacDermott, Williams, Ridley, Glasson & Wray, *The prevalence of an ASD in Australia. Can it be established from existing data?* (2006) Australian Advisory Board on Autism Spectrum Disorders.

³⁰⁴ Autism Victoria, *Whole of Life* (2010), p. 1.

Case study two: release of a person with disability from inappropriate residential care

A 23-year-old Iraqi refugee with a severe intellectual disability and autism was placed in supported accommodation. There were no Arabic speaking workers and the young man's ability to observe his religion and contact his family was significantly limited. He was frightened of another resident with whom he shared a room and was otherwise lonely, bored and unhappy.

The young man's advocate raised the Charter with the relevant public authority and he was not forcibly returned to the supported accommodation. Instead, he was allowed to reside in his family home, with support provided so that he could stay where he wished to be, and his rights to culture, freedom of religion and protection of the family were observed.

Clearly, the costs savings associated with the young man leaving supported accommodation are considerable, given that the unit cost of residential care is in the order of \$121,000 per annum.³⁰⁵ At age 23, assuming another 50 years of residential care, the total saving would be in the order of \$6 million at today's level of funding.

While some of this cost has effectively shifted to the family as carers, this is an active choice the family and the young man has made, with access to support, likely to be much cheaper to the state in the long term. Most importantly, the young man is living safely and in dignity.

³⁰⁵ Cost estimated on basis of output and cost measures for Residential Accommodation Support contained in Department of Treasury and Finance, *Budget Paper 3, Service Delivery 2011-12*, Department of Human Services, p. 221. This estimates an output cost of \$657.7 million for 5,433 residential service clients, of which 5259 are shared accommodation.

Case study three – preventing family homelessness

The Charter provides an important form of legislative rights protection for people experiencing homelessness in Victoria. They do not enjoy specific protection under the *Equal Opportunity Act 1995*, as homelessness is not recognised as an attribute.

In a case before the Victorian Civil and Administrative Tribunal,³⁰⁶ the Director of Housing was found to have acted unlawfully under the Charter in seeking to evict a man and his three-year-old son from public housing without providing any justification.³⁰⁷ The Office of Housing is now reviewing its 120 ‘no –reason’ Notice to Vacate, which should lead to better outcomes for public housing residents.

In another example, a pregnant single mother with two children was living in community housing. She was given a ‘no cause’ eviction notice, which didn’t provide any reasons as to why she was required to vacate the property and did not allow her to address the landlord’s concerns. The Homeless Person’s Legal Clinic used the Charter to negotiate with her landlord to prevent an eviction into homelessness, and an alternative arrangement was reached.³⁰⁸

Where the Charter has prevented homelessness, the cost to the State will be the imputed rent subsidy and maintenance costs of the ongoing social housing tenancy, some of which is subsidised by the Australian Government funding under the National Affordable Housing Agreement. In the case of housing associations, further cost transfers to the Commonwealth arise through the availability of Commonwealth Rent Assistance.

By contrast, the costs of the family becoming homeless and potentially remaining so for many years are considerable. Not just in human terms, including the negative impacts on the employability of the parents, but also on the nutrition, health and education for children experiencing homelessness. In addition, the direct costs to the State of the family cycling through emergency and temporary housing would be considerable. Financial modelling indicates that the direct program costs of a family in the homelessness system is in the order of \$26,000, with additional cost offsets in health and justice of around \$12,000 per annum (\$307,000 over a lifetime).³⁰⁹

³⁰⁶ *Director of Housing v Sudi* [2010] VCAT 328 (31 March 2010).

³⁰⁷ This decision is now subject to an appeal in the Supreme Court. Despite its appeal, the Office of Housing is reviewing its 120 day ‘no-reason’ Notice to Vacate under the *Residential Tenancies Act 1997*, which should lead to better outcomes for public housing residents.

³⁰⁸ Source Homeless Person’s Legal Clinic. See: www.pilch.org.au/homelessnesshumanrights (Viewed at 24 May 2011).

³⁰⁹ No Victorian figures are available as Budget papers do not provide a unit cost for homelessness services. These figures are from a study examining costs in Western Australia. See Paul Flatau et al, ‘The cost-effectiveness of homelessness programs’, *AHURI Research and Policy Bulletin 104* (July 2008).

Benefits to Victoria as a whole

The Charter also provides benefits to both the community and government as a whole by improving practices and supporting transparency and accountability.

More transparent and accountable government

The Charter is a beacon for good governance by imposing a clear standard for public sector conduct and increasing the level of scrutiny of government by the Parliament, the courts and regulators.

The Charter is not designed to solve the myriad problems and complex considerations involved in the work of government. What it does do is provide a mechanism to help identify and avert problems at the early stages of law and policy making, and resolve them when Victorians come into direct contact with services.

Each year, the Commission is required to produce a report on the operation of the Charter. All government departments and Victoria Police provide information on their compliance with the Charter. The evidence indicates that four years after its introduction, the Charter is making an appreciable difference in how government goes about its business.

While in these early stages there are variations in the integration and implementation of the Charter, the cumulative outcome is one of improved decision-making and accountability. Examples of this are provided elsewhere in this submission, but the Commission has found government agencies to be positive about the impact the Charter has had on their accountability to the public. Far from being a radical instrument, the Charter is taking its place in the Victorian public sector environment. As the commitment to human rights becomes more firmly embedded, the Charter has the potential to become one of the cornerstones of good government in Victoria.

More analysis on the benefits of auditing and reporting is set out at page 96.

Increased Parliamentary scrutiny

The Charter has brought human rights questions explicitly into the consideration of the Parliament, because of the requirement to issue a statement of compatibility for each new Bill.

Since the introduction of the Charter, 362 Bills have been introduced into the Victorian Parliament. When assessing the Charter's overall impact on the legislative process, the Commission believes it is pertinent to ask one very simple question: if it was not for the Charter, would the human rights dimensions of these 362 Bills have been identified, analysed and debated?

In all but a few cases, the answer is clearly 'no'. For this reason alone, the initial impact of the Charter is significant as it has already expanded the parameters of public policy analysis to include the transparent assessment of new laws against human rights.

Further discussion about the benefits of parliamentary scrutiny is set out at page 137.

Strengthening the integrity of public institutions through effective oversight

The Charter complements and supports a broader regulatory context concerned with the quality, transparency and accountability of government, and the relationship between citizens and the State. This includes the *Freedom of Information Act 1973*, *Information Privacy Act 2000*, and the operations of the Victorian Ombudsman, Auditor-General and others.

The Charter has enhanced the role of these regulators by providing an additional lens of accountability by which to review government performance.

The Auditor-General used the Charter alongside the *Mental Health Act 1986* to assess the performance of crisis mental health services in Victoria, noting 'agency responses need to minimise restrictions on individual freedoms and interference with people's rights and dignity'.³¹⁰ Within this context, the Auditor-General found that aspects of the service response did not meet the standards set by the Charter.

The Ombudsman has recently tabled a number of reports that identified breaches of Charter responsibilities in dealing with vulnerable people. These include:

- *Own motion investigation into the Department of Human Services – Child Protection Program* (November 2009), which concluded that DHS was not meeting a variety of its obligations to children under the Charter.
- *Own motion investigation into Child Protection – out of home care* (May 2010), which examined the safety and quality of care being provided to children in out of home care by DHS and identified numerous instances of failure to comply with Charter obligations.
- *Investigation into conditions at the Melbourne Youth Justice Precinct* (October 2010), which identified numerous human rights concerns, including: health and safety concerns (such as hanging points and unhygienic conditions), use of excessive force to restrain detainees, failure to provide a safe and healthy environment, and failure to ensure adequate support for mentally ill detainees.
- *Ombudsman Investigation Assault of a Disability Services Client by Department of Human Services Staff* (March 2011), where it was found that the Department's response to the incident was inadequate and showed a disregard for the resident's human rights and the duty of care that the Department has a responsibility to exercise.

The outcomes - far-reaching reform agendas which benefit all Victorians - are developing as a result. For example, the Protecting Victoria's Vulnerable Children Inquiry is comprehensively reviewing child protection.³¹¹

However, independent oversight of Charter obligations could be improved: see discussion at page 97.

³¹⁰ Victorian Auditor-General's Office, *Responding to Mental Health Crises in the Community* (2009), p. vii.

³¹¹ While advising that there is still much work to be done, the Child Safety Commissioner has noted that 'the Charter has an important role to play in improving the quality of outcomes for children and young people in care in Victoria, as it provides a foundation for ensuring that their human rights are protected'. Office of the Child Safety Commissioner, *2009 Report to VEOHRC*, p. 3.

Improved laws and public policy

The rigour afforded by the parliamentary scrutiny process is a valuable bolster for democratic debate. Four years since the introduction of the Charter, departments across all portfolios report that human rights considerations now feature prominently throughout the public policy cycle. While this level of routine human rights scrutiny reflects the new legal landscape created by the Charter, it leads to a maturing awareness and understanding of human rights issues and how they directly relate to government service provision.

As noted by the Australian Government Treasury in 2004 ‘freedom can be considered to be both a goal and an instrument for public policy’.³¹² The Charter reflects this duality by creating a legal obligation to consider human rights when framing new policy and practice.

It is difficult to provide a definitive and comprehensive list of the way the Charter has influenced policy development over the last four years. However, a range of examples that departments have reported as featuring in their Charter implementation are set out below.³¹³

While the tangible dividend of these policies may be difficult to price, the importance of sound public policy in ensuring Victorians are better off, not just financially but in every way, cannot be underestimated.

- People whose homes were destroyed in the February 2009 bushfires were entitled to reduced duty when buying another home and a full or partial exemption was offered to those replacing vehicles. The State Revenue Office also took a flexible approach to the recovery of outstanding tax from survivors.
- During the Global Financial Crisis, the State Revenue Office provided Victorians affected by job loss and reduced income with more time to pay taxes and the option of payment arrangements.
- The *Victims Charter* was developed to improve support for victims of crime in anticipation of the Charter’s introduction.
- *A Right to Respect* – the 10 year plan to prevent violence against women.
- Office of Senior Victorians’ *Elder Abuse Prevention Strategy*.
- Department of Health *Family and Reproductive Rights Education Program* to reduce and eliminate female genital mutilation.
- *Student Engagement Policy Guidelines* for government schools. These aim to build student attendance and positive behaviours in schools and were revised to reflect the rights of families and children in the Charter.
- *Protecting the Safety and Wellbeing of Children and Young People* in schools and licensed children’s services.
- *Dardee Boorai – Victorian Charter of Safety and Wellbeing for Aboriginal Children and Young People* - a framework to promote improvements in the safety, health, development, learning and well-being of Aboriginal children aged 0 to 18.

³¹² Australian Government Treasury, *Wellbeing Framework* (2004) at: www.treasury.gov.au/documents/876/HTML/docshell.asp?URL=Policy_advice_Treasury_wellbeing_framework.htm (Viewed at 25 May 2011).

³¹³ These examples are drawn from evidence provided by agencies to the Commission in the compilation of the annual reports on the operation of the Charter.

- *Aboriginal Inclusion Framework* - used to review and reform government practice when working with Aboriginal people, families and communities.
- *Code of Conduct for Community Sport* - outlines the behaviours expected of people participating in state's 16,000 community sporting clubs.
- All procedures contained in the *Victoria Police Manual* were reviewed for Charter compliance. Police training now specifically includes human rights.
- Amendments to the *Mental Health Regulations* and Patients Rights Statement.
- Review of Guidelines on Seclusion published by the Chief Psychiatrist.
- Senior Practitioner's *Enlivening Human Dignity and Rights: guidelines for disability service providers and practitioners*. In another initiative, 'Promoting Dignity' grants are provided directly to disability support professionals to find creative alternatives to restrictive interventions.
- The Corrections Victoria *Disability Framework 2010–2012* recognises human rights, with specific emphasis on practical interventions to reduce the over-representation of offenders with intellectual disability in prisons.
- The Charter prompted a review of regulations relating to the viewing and touching of bodies by relatives by the State Coroner's Office.
- The Department of Transport worked with Public Transport Access Committee to develop accessible signage on buses, trams and trains, including the installation of bus stop identification badges in Braille.

The influence of the Charter on policy and practice extends to where functions are contracted to private providers, such as private prisons and private health providers. Corrections Victoria has incorporated the Charter into contracts and tender specifications, which requires each private prison to report on the Charter compatibility of its operational instructions, and includes a Charter analysis in the process for approving amendments to operating procedures in private prisons.

Further information about how the Charter improves laws and public policy is set out under Term of Reference 5(a) at page 126 and 5(e) at page 178.

Improved decision-making by public officials

The Charter aims to improve fairness and consistency in decision-making and thereby support responsible government. Service providers must move from a welfare or medical model to a rights-based model recognising the inherent dignity and rights of recipients of their services. For many people who engage with government through necessity because of their disability, capacity, or economic status, this is a significant shift in their relationship with government.

This shift reinforces modern policy directions of control and choice. An example of this is the movement towards individualised funding and self-directed approaches to the provision of disability services, typified by the recently announced trial of the National Disability Insurance Scheme in Victoria. These initiatives recognise that rights are not an add-on; rather they are a smart way of delivering on the organisational ethos to improve the quality of life for people with disability.

The last four years have shown that government and community services are better services when they put human rights at the centre of their day-to-day work, and are legally required to do so. No person will be worse off when their rights are observed, and no public service is diminished by treating people with dignity and respect.

Developments in public sector attitudes and organisational practice emerging from the Charter's operation include:

- Expertise in human rights across government is increasing, with departments and agencies reporting an increase in the capacity of staff to identify and analyse potential human rights infringements.
- There is an increased use of international human rights standards as benchmarks for policies, programs and services, with a number of public authorities recognising the value of going beyond mere technical compliance with the Charter to better protect rights.³¹⁴
- More robust processes are being introduced, with departments and agencies taking the opportunity to increase the participation of citizens in their operations.³¹⁵
- We are starting to see a move away from blanket policies, so that each case is assessed on its merits.³¹⁶

While much of this investment is taking place up front, as public authorities learn how to improve their approach to rights, the return on this investment is likely to be significant in the long term; both for individuals who will receive better services, and for the reputation of Victorian public services.

These issues are discussed further under Term of Reference 5(c) at page 147.

A competitive economy – increased liveability and economic participation

The Commission notes the support for legislative human rights protection from one of Australia's largest corporate citizens, Telstra, who used the Victorian Charter as an example of the type of rights protection they would like to see adopted federally. In particular, that

³¹⁴ For example, the DHS Restrictive Practices Cross-Jurisdictional Reference Group using the *International Convention on Rights of Persons with Disability* as its standard. Victoria Police has now also undertaken practice audits of police cells and holding rooms to document compliance with the *Convention against Torture* to identify any gaps or areas of risk upon Australia's ratification of the optional protocol.

³¹⁵ For example, the Department of Health consumer and carers participation strategy - *Doing it with us, not for us: Participation in the health care system*.

³¹⁶ See e.g. David Byrnes and others (matters under the Disability Act 2006) VCAT reference G 41324 (2009)].

*Telstra believes that corporations - large and small - share a common interest with individuals in promoting and enshrining human rights. Corporations, like individuals, value administrative accountability and fair and impartial judicial and administrative "due process". Such due process promotes good governance and improves quality of decisions; this benefits not just individuals and corporations but also governments.... Telstra sees great worth in a Charter that is capable of engendering a culture in the governmental sphere characterised by administrative accountability and transparency.*³¹⁷

It is arguable that in the longer term, Victoria's competitiveness will be strengthened where it can show its human rights credentials. This encourages a stable environment for investment, attracts skilled migration and can be a selling point internationally.

The Commission notes the findings of the Victorian Competition and Efficiency Commission (VCEC) that there are three primary drivers of liveability:

- economic strength and markets
- governments
- human rights.³¹⁸

In exploring the link between liveability and competitiveness, VCEC particularly noted 'liveability attributes can be a significant factor in attracting and retaining labour and capital resources in Victoria, thereby enhancing competitiveness'.³¹⁹

Other economists and urban geographers argue that community expressions, openness, tolerance and other values akin to human rights are of particular importance in the location choices of highly skilled, creative class workers.³²⁰

Deloitte Access Economics identified increased economic participation as a potential, long-term benefit of the Charter. However, while the benefit itself is a measurable outcome (increased labour force participation), it is dependent on an intermediate step of increased social inclusion; itself subject to the influence of more direct policies.³²¹

³¹⁷ Telstra 'In support of a Human Rights Charter for Australia', *Submission to the National Human Rights Consultation* (2009), p. 15. See at: [www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Telstra_AGWW-7N42E2.pdf/\\$file/Telstra_AGWW-7N42E2.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Telstra_AGWW-7N42E2.pdf/$file/Telstra_AGWW-7N42E2.pdf) (Viewed at 24 May 2011).

³¹⁸ Victorian Competition and Efficiency Commission, *A state of Liveability: An Inquiry into Enhancing Victoria's Liveability, Final Report* (2008), p. xxv.

³¹⁹ Victorian Competition and Efficiency Commission, *A state of Liveability: An Inquiry into Enhancing Victoria's Liveability, Final Report* (2008), p. xxiv.

³²⁰ See e.g. Richard Florida, *Cities and the Creative Class* (2003), p. 11.

³²¹ Deloitte Access Economics, *Impacts of the Victorian Charter of Human Rights and Responsibilities Some Economic Perspectives* (2011), Victorian Equal Opportunity and Human Rights Commission, p. 8.

Reduction in government-related litigation

In assessing the costs of the Charter, it is important to note that the Department of Human Services (DHS), Corrections Victoria and Victoria Police received one-off funding as part of the implementation budget, to pursue Charter compliance strategies in the first years of the Charter's operation.

This acknowledged that the specific nature of the services provided by these agencies – and the often-vulnerable position of recipients of these services - meant they would be most likely to interact with Charter obligations.

If we take the example of Victoria Police, their up-front investment in policy and practice reviews, and examination of high-risk areas was a prudent use of public funds. For example, their audit of holding cells was a useful means of minimising the risk of negligence and the substantial damages that might flow from a successful claim.

Given the significant concerns raised by the Office of Police Integrity and Ombudsman Victoria in successive reports examining conditions in police custody, this focussed effort by Victoria Police was long overdue. While the Charter was not the only catalyst for this investment, it did help to crystallise the issues, and provide a means by which Victoria Police could start to make progress in this challenging area.

Costs of the Charter

Commission costs

The Commission receives funding to perform its statutory duties under the Charter. These include community education, annual reporting on the Charter and interventions in significant cases before the courts. The costs outlined below demonstrate the staged implementation of the statutory functions performed by the Commission.

Table: Victorian Equal Opportunity and Human Rights Commission costs

	2006/07	2007/08	2008/09	2009/10	2010/11
	\$mill	\$mill	\$mill	\$mill	\$mill
Human Rights Implementation and Education	.5	.5	.337		
Human Rights Education				.203	.209
Human Rights Inquiry and Reporting		.275	.319		
Human Rights Intervention, Review and Reporting				.485	.498
Total per annum	0.50	0.78	0.66	0.69	0.71

Source: VEOHRC

Term of Reference 7 - Looking ahead: Strengthening the Charter

Term of Reference 7: What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

Key points and recommendations

The Four-Year Review provides an excellent opportunity to improve and strengthen the operation of the Charter. Drawing on the Commission's experience of working closely with the Charter and its conversations with members of the community, the Commission has made a number of recommendations for improvement throughout this submission. In summary:

Coverage that reflects community values (Terms of Reference 1 and 2)

- Explicit recognition of additional rights in the Charter to better reflect international law and the needs and priorities of the Victorian community. This includes the right to health, the right to housing, the right to education, recognition of women's rights and the rights of persons with a disability, the extension of children's rights, filling gaps between the International Covenant on Civil and Political Rights (ICCPR) and the Charter, and the right to Indigenous self-determination.

Transparency and accountability (Term of Reference 3 and 5)

- The integration of the Charter into ordinary compliance and reporting systems.
- The improvement of oversight through a review function, which the Commission could initiate.
- A draft statement of compatibility to accompany exposure drafts of Bills and facilitate public engagement on human rights issues.

Better outcomes for Victorians (Terms of Reference 4 and 5)

- A dedicated dispute resolution mechanism, a clear and freestanding cause of action, and the ability to receive appropriate remedies.
- Strengthening the role of SARC and the parliamentary scrutiny process.

Clarity and efficiency (Term of Reference 5 and 6)

- The impact of proposed measures on human rights should be part of the government's internal decision-making processes.
- The section 35 notification process should allow for discretion in the judge to relieve a party from giving immediate notice where doing so would unduly delay or disrupt a proceeding.
- Continued cost benefit analysis to assess and improve the Charter.

In addition to these points, the Commission recommends the following improvements:

- (a) clarifying the meaning of a 'public authority'
- (b) applying the obligations in the Charter to all public authorities by removing the exemption for the parole boards
- (c) clarifying the limitations on rights and recognising that some rights are absolute
- (d) monitoring and follow-up to ensure the link between the right to equality and non-discrimination is not limiting the scope of this right in Victoria
- (e) a plan of action is set out for the Eight-Year Review due in 2015.

(a) Clarifying the term ‘public authority’

Key points and recommendations

The obligations on public authorities under the Charter have been unclear in two key areas: the application to courts and tribunals and the application to functional public authorities.

- The obligations of courts and tribunals have been clarified in case law.
- The application of the Charter to functional public authorities, however, continues to cause confusion in the community and should be clarified.

The application of the Charter to public authorities should be clarified so that organisations and the community are clear about who has obligations under the Charter so that court time does not have to be devoted to resolving these issues.

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.

Discussion

Courts and tribunals as public authorities

The courts have different roles and functions under the Charter. In this section, the Commission looks at the way courts and the Victorian Civil and Administrative Tribunal (VCAT) have obligations under the Charter when they carry out some of their functions.

Section 4(1)(j) of the Charter excludes courts and tribunals from attracting the obligations of a public authority under section 38, except for when acting in an administrative capacity.

The Charter does not define administrative capacity. It does provide some guidance as to what 'acting in an administrative capacity' means. The Note under section 4(1)(j) of the Charter states that:

Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

The Explanatory Memorandum further clarifies that courts and tribunals are considered to be public authorities and exercising their administrative capacity when hiring staff.

The obligation to comply with the Charter does not extend to the courts when acting in a judicial or quasi-judicial capacity, except to the extent that they have functions under Part 2 and Part 3, Division 3 of the Charter (set out in section 692)(b)). For example, the obligation contained in section 32(1) to interpret statutory provisions in a manner that is consistent with the rights protected in the Charter will apply to courts and tribunals.

Through their guidance in cases before them, the courts and VCAT have helped to clarify the operation of these provisions.

Examples – Charter obligations of VCAT and Boards

The key issue for consideration by the Victorian Civil and Administrative Tribunal (VCAT) in the matter of *Kracke v Mental Health Review Board* [2009] VCAT 646 was whether the failure of the Mental Health Review Board to review an involuntary treatment order constituted a breach of the Charter. To determine this VCAT needed to consider whether the Board, when making decisions, acts in an administrative or in a judicial or quasi-judicial capacity. Section 38 obligations would only apply if the Board was found to be acting in an administrative capacity.

In that case, VCAT accepted the submissions of the Commission that:

- the Board and members of the Mental Health Review Board were public officials and that the Board was an entity established by statutory provisions that has functions of a public nature
- the Board is a Tribunal acting in an administrative capacity when conducting hearings under the *Mental Health Act 1986*
- VCAT was also a public authority when reviewing the determination of the Board
- there was no conflicting statutory requirement in the Mental Health Act that relieves the Board and VCAT of obligations under section 38(2) of the Charter, and
- section 6(2)(b) of the Charter meant that the Board and VCAT must comply with sections 24 and 32 of the Charter when acting in a judicial capacity.

The decision of *Kracke* has confirmed that courts and tribunals are bound to act compatibly with all of the human rights in the Charter when deciding cases that are administrative in nature in a public law sense.

In *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346, Hollingworth J considered the Medical Practitioners Board to be a public authority within the meaning of section 4(1)(b) of the Charter as it performs functions of a public nature, is established by statute and is publicly funded, and its functions are inherently public insofar as it regulates and supervises medical practitioners.

In considering what is meant by the term 'administrative capacity', the parties agreed that it was appropriate for the Court to analyse the concept of 'administrative capacity' in accordance with the definition of 'administrative power' at common law. Judicial power is the determination of a dispute between parties regarding the existence of a legal right or obligation and the application of the law to facts that have been determined by the Court. The Court found that where the Board was making a decision that was regulatory in nature and was not a final determination (of Dr Sabet's right to practice medicine); it was exercising an administrative power, and therefore was required to comply with section 38 of the Charter.

Statutory and functional public authorities

Contrary to the experience with courts and tribunals, after four years the case law is not well developed in relation to other categories of public authorities. There is still considerable confusion in the community and amongst entities themselves about whether they have obligations under the Charter.

For example, some public authorities are bound by the Charter only where they are carrying out certain functions – functional public authorities as described in section 4(1)(c). These are functions of a public nature carried out on behalf of the State or, in turn, on behalf of another public authority.

In *Metro West v Sudi* [2009] VCAT 2025, Justice Bell determined that Metro West, a non-profit housing agency, was a public authority under section 4(1)(c) of the Charter. Justice Bell said two questions may be considered to determine whether an entity is a public authority:

1. Are the functions being exercised on behalf of the State or a public authority?
2. Are the functions being exercised of a public nature?

In relation to the first question, Justice Bell said that the relationship between the State or public authority and the relevant entity should be considered. This includes consideration of whether there is an agreement that an entity acts as the representative for the public authority in any manner. The consideration of whether the functions being exercised are functions of a public nature will depend on the nature of the functions and whether they are being exercised in the public interest. This was distinguished from the question of the general nature of the entity.

While section 4(2) of the Charter goes some way to providing a list of factors that will be relevant to determining whether a function is of a public nature, this list is not exhaustive and debate remains. For example, are private electricity providers providing electricity services on behalf of the State following deregulation of the industry?

Other entities may be statutory authorities but there is debate about whether they are performing functions of a public nature, i.e. whether they are connected to or generally identified with functions of government (s 4(2)).

For example, in Alert Digest No 5 of 2009 SARC identified uncertainty around the transfer of public functions from entities established under Victorian statute to bodies that have been set up for the purpose of joint Commonwealth and State schemes. This was noted in the context of the National Electricity and National Gas Law. The Committee expressed concern that *'the Bill may have the effect of transferring public functions exercisable in Victoria . . . from a body subject to the Charter to one that is not'*.

National schemes and model laws should be Charter-compliant when they are implemented in Victoria and joint-entities should be required to comply with the Charter when exercising functions in relation to Victoria. There is no reason to give Victorians lesser protection when entering into these arrangements. For example, the proposed National Legal Services Board would have investigatory and decision-making powers in relation to Victorian lawyers. If this model is adopted, the Board should function in accordance with the Charter when operating under Victoria's jurisdiction. This would include the application of privacy and reputation and due process rights.

It is also not particularly clear whether universities fit within the definition of 'public authority'. While it is clear that universities are a statutory entity, the question of whether tertiary education is a function of a public nature is debatable.³²² Universities receive the majority of their funding from other sources and tertiary education is not a function that is generally identified with functions of state government.

The ongoing uncertainty for both organisations who may have obligations and the community who interact with them is not helpful and should be addressed by Parliament.

For example, Parliament should clearly indicate its intention that a statutory entity is a public authority for the purposes of the Charter or not when it is establishing such a body.

Section 4(2)(b) of the Charter could also be clarified to give more of an indication of when a function is deemed to be connected to or generally identified with functions of government. This could be achieved through further examples in the notes to this section. The current note states:

Example

*Under the **Corrections Act 1986** a private company may have the function of providing correctional services (such as managing a prison), which is a function generally identified as being a function of government.*

Further examples should also be given in relation to universities, statutory corporations and joint bodies under national schemes.

The power to make Regulations to prescribe entities to be public authorities for the purposes of the Charter (s 46(2)(a)) should also be used to provide clarity.

³²² Section 4(1) (b) of the Charter states that an entity established by a statutory provision that has functions of a public nature may be considered to be a public authority.

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

Key points and recommendations

The Charter allows for Regulations to declare that an entity is not a public authority for the purposes of the Charter. This power has been used to exclude the Parole Boards from the operation of the Charter for a number of years. There has never been an adequate reason for treating the Parole Boards differently to public authorities operating in complex environments.

The Commission is also concerned about the use of the regulation-making power as an exemption provision rather than a tool for clarifying the meaning of ‘public authority’. This clarification could be achieved in other ways as discussed above.

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.

Discussion

Section 4(1)(k) of the Charter states that for the purposes of the Charter a public authority does not include:

an entity declared by the regulations not to be a public authority for the purposes of this Charter.

Section 46 of the Charter then provides the Governor in Council with the power to make the necessary regulations.

The use of these provisions raises two issues: firstly, the compliance of the Parole Boards with the Charter, and secondly, the use of this mechanism as an ‘exemption clause’ rather than as a tool for clarifying the meaning of ‘public authority’.

Application of the Charter to the Parole Boards

In December 2009, a Regulation was made declaring that the Adult Parole Board, the Youth Residential Board and the Youth Parole Board were not public authorities for the purposes of section 38 of the Charter for a period of four years.

This continued an earlier exemption and allows the Parole Boards an extended time to prepare themselves for Charter compliance before they are legally bound to act compatibly with human rights.

The important functions performed by the Parole Boards engage complex human rights considerations. However, there has never been a sufficient explanation to the public as to why the challenges for these Boards is so different to that experienced by many other public authorities who have obligations under the Charter, such as Victoria Police and the Mental Health Review Board.

Parole Boards in the United Kingdom, New Zealand, Canada and the Australian Capital Territory have to comply with their human rights laws.

The main impact Charter compliance will have on the Parole Boards is the need to provide procedural fairness and natural justice. The Parole Boards in other jurisdictions have achieved this.

The period of exemption has been used well to work through the issues that were seen as requiring resolution by the Parole Boards. The Department of Justice has appointed a senior project manager to map and review the processes of the Parole Boards and work with the Boards to improve Charter compliance. The project is well underway.

The Commission believes that after four years, all public authorities have had time to ensure they comply with the Charter.

Use of the Regulations as an exemption clause

The second issue that these Regulations illustrate is that section 4(1)(k) is being used as an 'exemption clause'. It is not being used to provide clarity about which entities are or are not a public authority. It is clear from the Explanatory Memorandum to the Charter that section 4(1)(k) was not intended to provide a way for entities that are clearly public authorities performing public functions to escape from compliance with the Charter. Rather, it was included to provide a means of adding clarity to the scope of the definition of public authority.

The Charter also provides that regulations made under it may declare that a particular entity is, or is not, a public authority for the purposes of the Charter (paragraphs (h) and (k)). This provision will assist in adding clarity to the scope of the definition.

For example, there can be confusion when a security company might be a public authority under the Charter when it is running a prison, but the same company would not be a public authority when providing security to a shopping centre.

The provision is clearly not serving its purpose and its only use has been as an exemption clause for the Parole Boards. The obligations of a 'public authority' should instead be clarified in its definition in section 4 and its application in section 6.

(c) Clarifying the limitations on rights

Key points and recommendations

In general, human rights are not absolute and may be limited in some circumstances. The challenge is to determine whether all human rights should be limited, when human rights should be limited and what circumstances will justify a limitation.

The Commission has set out below the different ways in which human rights are limited within the legal framework of a human rights instrument. Domestically, there are three options that can be used:

- a general reasonable limits clause applying to all (or most rights)
- a series of specific limits imposed on a right-by-right basis as appropriate
- a statement of the general reasonable limit and then inclusion of some specific limitations as appropriate.

The Charter takes this last dual approach of a general limitations clause and internal limitations within a rights framework. Both are borrowed from models in other jurisdictions.

Section 7(2) if the Charter provides that all rights may be subject to ‘such reasonable limits as can be demonstrably justified in a free and democratic society’.

- This has been a useful mechanism for dealing with different rights and reconciling the competing rights of individuals and the interests of the general community.
- However, it is a provision that is often not well understood in practice and can be difficult to apply. It is an area that would benefit from clarity through guidance from the Courts.

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.

Discussion

The application of human rights charters often involve reconciling conflicting rights or seeking to strike a balance between the rights of the individual and the interests of the community generally. Limitations provisions have therefore been built into international and domestic human rights instruments.

International law

The International Covenant on Civil and Political Rights (ICCPR), upon which much of the Charter was based, takes a 'rights by rights' approach to deal with limitations, but it deals with them in different ways.

Absolute rights

There are some human rights under the ICCPR that are not subject to any limitations:

- Article 7- the right to be free from torture
- Article 8 - the right not to be subjected to slavery
- Article 16 - the right to recognition everywhere as a person before the law
- Article 18(1) - freedom of thought and conscience
- Article 19(1) - freedom to hold opinions.

Claw-back clauses

Some ICCPR rights have inbuilt limitations (claw-back clauses) that qualify the nature of the right. These rights 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 claw-back clauses do not turn on there being a purpose for limiting the right or a need to demonstrate that the limitation is proportional. The limitation is not directed to striking a balance.

For example, Article 9 of the ICCPR guarantees a right not to be subjected to *arbitrary* arrest or detention. This means that arrest and detention of a person is *prima facie* permissible up to the point the arrest or detention is arbitrary. The issue of arbitrary is then concerned with an assessment of whether the *particular* arrest or detention is inappropriate, unjust, capricious, not based on any identifiable criterion or criteria or lacking predictability. Detention must not only be lawful but 'but reasonable in all the circumstances'.

Internal limitations for a particular purpose

Other ICCPR rights – such as Articles 18, 19, 22 – include a limitation clause which provides that the right can be limited for a particular purpose and by law. The limitation must be necessary to achieve its particular purpose.

For example, Article 22(2) of the ICCPR provides:

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.

In-built limitations based on the nature of the right

Finally, some rights have been interpreted as having a limitation because of the nature of the right. For example, Article 26 of the ICCPR provides:

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 General Comment No. 18: *Non-discrimination*, the UN Human Rights Committee said:

the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Non-derogable rights – emergency situations

There are also some human rights described as ‘non-derogable’. It is important to note that the issue of non-derogation of rights during an emergency and limitation of human rights generally are different concepts. The concept of non-derogation is concerned with suspending some human rights in emergency situations.

Article 4 of the ICCPR applies in times of public emergency which threaten the life of the nation, and to the extent strictly required by the exigencies of the situation. Article 4 acknowledges that a State may suspend some human rights where it follows specified procedures and can justify the reasons by which such suspension was activated.

Rights in Articles 6, 7, 8, 11, 15, 16 and 18 of the ICCPR are non-derogable - the right to life, freedom from torture, freedom from slavery, the right not be imprisoned merely on the ground of inability to fulfil a contractual obligation, retrospective criminal laws, recognition before the law and freedom of religion.

Other jurisdictions

Other jurisdictions with a domestic human rights instrument similar to the Victorian Charter have all adopted a limitation provision of some kind.

Table: Limitations clauses in other jurisdictions

Jurisdiction	Limitations clause
Canada	<p>Section 1 of the Canadian Charter of Rights and Freedoms (which is entrenched in the Constitution of Canada) provides <i>‘The [Charter] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’</i>. In <i>R v Oakes</i>,³²³ Chief Justice Dickson said that a “reasonable limit” must meet two criteria in order to satisfy s 1. First, the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, the means chosen must be “reasonable and demonstrably justified” - a form of “proportionality test”.³²⁴</p>
South Africa	<p>Section 36 of the South African Constitution sets out a list of factors to take into account in determining whether a law constitutes a reasonable limit, as follows:</p> <p><i>‘The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-</i></p> <ul style="list-style-type: none"> <i>a. the nature of the right;</i> <i>b. the importance of the purpose of the limitation;</i> <i>c. the nature and extent of the limitation;</i> <i>d. the relation between the limitation and its purpose; and</i> <i>e. less restrictive means to achieve the purpose.</i> <p><i>Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.’</i>³²⁵</p>
New Zealand	<p>Section 5 of the <i>New Zealand Bill of Rights Act 1990</i> provides:</p> <p><i>‘5. Justified limitations- Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’</i></p>
United Kingdom	<p>The UK <i>Human Rights Act</i> incorporates the provisions of the European Convention which in turn limits rights on a rights-by-right basis. It does not contain a general limitations clause.</p>
Australian Capital Territory	<p>Section 28 of the ACT <i>Human Rights Act 2004</i> provides that <i>‘Human Rights may be subject only to such reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society’</i>. Section 28 was amended in 2008 to introduce a list of factors almost identical to those in s 36 of the South African Constitution.</p>

³²³ *R v Oakes* [1986] 1 SCR 103.

³²⁴ [1986] 1 SCR 103 at [69]-[70].

³²⁵ With some minor editorial changes, this list of factors to consider is now mirrored in s 28(2) of the *Human Rights Act 2004* (ACT).

How the limitations provisions in the Charter have been applied

The Charter works with both a general limitations clause and internal limitations provisions.

The general limitations clause is found in section 7(2) which provides that:

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including -

(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.

The Explanatory Memorandum relevantly provides:

Parliament considers a general limitation to be preferable to limitations that operate on a clause-by-clause basis. Pursuant to clause 7 of the Charter, a human right may only be subject under law (whether statutory or common law) to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The Victorian Court of Appeal considered the application of the general limitations clause in *R v Momcilovic* [2010] VSCA 50. The Court found that the reasonable limits test is applied after determining that there would be a breach of the relevant right. The approach to statutory interpretation is therefore:

Step 1: Ascertain the meaning of the relevant provision by applying the interpretation provision in 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.

This case is currently on appeal to the High Court of Australia.

In *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009), Bell J provided further guidance on the operation of section 7(2):

- **Importance of the purpose of limitation:** The limitation must relate to societal concerns which are ‘pressing and substantial’ and should be identified with clarity and evidence if necessary.
- **Relationship between limitation and purpose:** The limitation must be rationally and reasonably connected to its purpose. If the limitation on the right is not rationally connected, it is not justified however important the purpose may be.
- **Less restrictive means:** The limitation should impair the right ‘as little as possible’. It is not necessary for the limitation to be the least restrictive means available to achieve the ends, but that it ‘falls within a range of reasonable alternatives’.

Through cases such as this the Courts are providing clarity on the operation of the limitations clause in practice. We would expect this to continue as with any other area of the law. For example, case law has provided practical guidance on the meaning and scope of misleading conduct in a trade practices context.

The reasonable and proportionate test is also similar to other legal tests frequently applied by the Courts and public authorities. These tests allow requirements to be tailored to specific circumstances.

Table: Examples of other ‘reasonableness’ tests that apply to public authorities

Equal Opportunity Act 2010	Part 3 provides that duty holders under the Act must take reasonable and proportional measures to eliminate discrimination, sexual harassment and victimisation as far as possible. The legislation lists factors – including, size, resources and business priorities – which must be considered when determining whether a measure is reasonable and proportionate.
Civil Procedure Act 2010 (Vic)	Section 24 creates an overarching obligation to ensure that litigation incurred costs are reasonable and proportionate to the complexity of the matter in dispute.
Occupational Health and Safety Act 2004 (Vic)	Section 4 provides that if an inspector determines that there was reasonable cause for employees to be concerned for their health and safety, that an employee who, as a result of the issue arising, does not work for any period pending its resolution but would otherwise be entitled to be paid for that period continues to be entitled to be paid for that period. Section 21 sets out the duty of employers to employees and states that an employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

What are preferable – rights-by-rights or general clauses?

The Commission believes that a general limitations clause such as section 7(2) of the Charter is preferable for the practical operation of domestic human rights law. However, there should also be recognition of absolute rights. Section 7(2) should take into account the nature of the rights that it is applying to. For example, there is no reasonable and proportionate limitation on the prohibition against torture.

Specific limitations on a rights-by-rights basis have the advantage of adding some clarity but they also tend to make a human rights instrument cumbersome, complex, and less accessible for public authorities and the community. The scope of each internal limitation can also be subject to legal debate.

If the ICCPR is followed as a model, it would be preferable for rights to be limited on a rights-by-rights basis consistent with the ICCPR and recognising that not all human rights should be limited and/or limited without reference to the proportionality test.

There are rights in the Charter that are not limited under the ICCPR. The rights to be free from torture, the right not to be subjected to slavery, and freedom of thought, should not be subject to any form of limitation, and should be treated as absolute guarantees.

It is also the case that some human rights in the Charter have a double limitation in the sense that the claw-back provision or inbuilt limitation is expressed and then the right might be limited further by section 7(2) of the Charter:

- Section 9 - Right to life - Every person has the right to life and has the right not to be *arbitrarily* deprived of life.
- Section 12 - Freedom of movement - Every person *lawfully* within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.
- Section 13(a) - Privacy - A person has the right (a) not to have his or her privacy, family, home or correspondence *unlawfully or arbitrarily* interfered with.
- Section 16(1) - Peaceful assembly - Every person has the right of *peaceful* assembly.
- Section 20 - Property rights - A person must not be deprived of his or her property other than *in accordance with law*.
- Section 21(2) - A person must not be subjected to *arbitrary* arrest or detention.

Further, in some places the internal limitations have been included in Charter rights and in others they have been left off. For example, the freedom of expression (s 15) recognises limitations on the right for the protection of national security, public order, public health or public morality. The right to peaceful assembly and freedom of association (s 16) contains similar internal limitations under international law, but not in the Charter.

The Commission appreciates the need to localise these internal limitations arrangements and provide clarity around issues such as legal aid. However, there has been no justification for the inconsistency taken to internal limitations from the ICCPR and this casts doubt on the way these limitations relate to the general limitations clause in section 7(2). The borrowing of internal limitations from international law should be clarified and applied consistently to avoid doubt.

Reverting completely to the ICCPR language would require significant redrafting of the Charter and would remove the consistency a general limitations clause provides.

The argument in favour of a single limitation clause is that section 7(2) ensures that there is a consistent approach to determining when human rights are limited. It avoids the risk of limitations being 'read in' in cases where the claw-back clause is not clear. It also means that Courts and VCAT are more likely to take a uniform approach to the factors that should be considered, the type of evidence required and it would reduce the risk that they will apply different tests depending upon the rights in issue. This provides greater clarity for public authorities and the community.

(d) Equality and non-discrimination

Key points and recommendations

There have been concerns about the way the Charter ties the right to equality in section 8 of the Charter to the list of protected attributes in the *Equal Opportunity Act 1995*.

This may limit the ability of the equality right to keep up with developments in society in the same way as equivalent provisions under international law have in areas such as sexual orientation and homelessness.

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.

Discussion

The list of attributes for which discrimination is prohibited in international law, as highlighted in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights includes ‘sex, race, colour, language, religion, political or other opinion, national or social origin, property, birth *or other status*’.³²⁶ The list is illustrative and not exhaustive due to the inclusion in the list of the open-ended phrase ‘other status’. Consequently, the prohibited grounds of discrimination are not limited and additional grounds can be brought within the ambit of ‘other status’.

The attribute of ‘other status’ allows international law to respond flexibly to changing community attitudes about what should constitute unlawful discrimination. It has been crucial in allowing international law to keep pace with changing views. For example, the UN Human Rights Committee (HRC)³²⁷ has found the following to constitute ‘other status’ under Articles 2(1) and 26 of the ICCPR: dwarfism, place of residence within a State, a distinction between ‘foster’ and ‘natural’ children, a difference between students at public and private schools, and a difference between employed and unemployed persons.³²⁸

³²⁶ Emphasis added. See also Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) and Article 14 of the European Convention of Human Rights.

³²⁷ The Human Rights Committee is the body of independent experts that monitors implementation of the ICCPR.

³²⁸ For a more complete list and associated cases, see Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004), p. 690 [23.24]. For further background on how the HRC has dealt with ‘other status’, see [23.20]-[23.30].

The European Court of Human Rights has gone further in finding the following to constitute 'other status' under Article 14 of the European Convention on Human Rights: distinction based on military rank, difference in treatment between different categories of property owners, difference in treatment between holders of planning permissions, distinction between tenants of the State and tenants of private landlords, and different treatment of different categories of prisoners depending on the sentences imposed.³²⁹

In considering 'other status' under Article 14 of the European Convention, the issue for the Court to determine has been whether there has been a 'difference of treatment based on a personal or identifiable characteristic'.³³⁰ This makes it clear that the 'article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent'.³³¹

On the other hand, the list of attributes for which discrimination is prohibited by the right to equality in section 8 of the Charter is limited to those specified in section 6 of the Equal Opportunity Act.³³² There is no open-ended attribute of 'other status' in the Equal Opportunity Act. Without such an attribute, the Charter right to equality lacks the flexibility inherent in the right to equality at the international level, leaving it with potentially a much narrower scope of operation. It also means the Charter right to equality has no scope to expand the grounds of discrimination to which it applies in light of changing community views. Therefore, the right to equality in the Charter is restricted compared to the same right in international law.

An alternative way to consider this issue would be to remove the link with the Equal Opportunity Act. Instead, the definition of discrimination in section 3 of the Charter could list the attributes from section 6 of the Equal Opportunity Act with the addition of 'other status' at the end of the list.

This would not lead to an explosion in discrimination causes because even without an explicit limitations provision, the UN Human Rights Committee has held that:

*not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*³³³

³²⁹ For a discussion of 'other status' under Article 14 and the relevant cases, see *Clift v The United Kingdom* [2010] ECHR 1106, [55]-[63]. The case of *Clift* concerned the differential treatment of different categories of prisoners depending on the sentences imposed. The case is available at: www.bailii.org/eu/cases/ECHR/2010/1106.html (Viewed at 6 June 2011).

³³⁰ *Clift* [60].

³³¹ *Clift* [59].

³³² Section 3, *Charter of Human Rights and Responsibilities*.

³³³ Human Rights Committee, General Comment 18 [13].

The European Court of Human Rights has similarly held that:

*[a] difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*³³⁴

The Charter also has the explicit limitations clause in section 7 that would prevent this provision being read too broadly. Section 7(2) allows limitations on the right to equality that are reasonable, necessary, proportionate and justified. This is a similar test to that implied into the international instruments. The use of this test should be the method of deciding whether differential treatment by public authorities is a breach of the right to equality, rather than restricting the prohibited grounds of discrimination to the fixed list of attributes in the Equal Opportunity Act. This would ensure the Charter right to equality is consistent with international law and enable it to keep up with developments in society.

This issue should be monitored for any practical implications in Victoria.

³³⁴ *Clift* [73].

(e) Eight-Year Review

Key points and recommendations

Section 45 of the Charter makes provision for a review of the 5th to 8th years of the Charter's operation. It obliges the Attorney-General to report to Parliament by 1 October 2015.

Other than a requirement to recommend whether any further reviews of the Charter are necessary, no other terms of reference are built in for consideration in 2015. The Four-Year Review is an opportunity to establish framework for the Eight-Year Review.

It is important to build on the important work done to date in implementing and improving the operation of the Charter. Issues not addressed as a result of the current Review should be put forward in a model for consideration by the community in the lead-up to the Eight-Year Review of the Charter. There should be a timetable for consultation ahead of the 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.**

The role of the Commission

Overview

The Victorian Equal Opportunity and Human Rights Commission is a statutory authority, originally established under the *Equal Opportunity Act 1977*. It has over 30 years experience as Victoria's leading human rights agency.

The Commission is governed by a Board comprising the Commissioner and four or six members appointed by the Governor-in-Council. Current members of the Board include:

- Dr Helen Szoke - Commissioner
- Mr Michael Gorton AM – Partner, Russell Kennedy Solicitors
- Dr Paula Gerber – Deputy Director, Castan Centre for Human Rights Law, Monash University
- Mr Brendon Gale – CEO Richmond Football Club
- Ms Carolyn Creswell – Company Founder, Carman's Fine Foods
- Ms Joumanah El Matrah – Executive Director of the Australian Muslim Women's Centre for Human Rights

The Commission has responsibilities under three laws:

- *Equal Opportunity Act 1995* (from 1 August the *Equal Opportunity Act 2010*)
- *Racial and Religious Tolerance Act 2001*
- *Charter of Human Rights and Responsibilities Act 2006*

The **Equal Opportunity Act** makes it against the law to discriminate against people on the basis of a number of different personal characteristics. It also makes sexual harassment and victimisation unlawful. The Act applies to activities in eight areas of public life: employment, education, the provision of goods and services, accommodation, clubs, sport, disposal of land and local government.

The **Racial and Religious Tolerance Act** makes it against the law to vilify people because of their race or religion. Vilification is behaviour that incites or encourages hatred of, serious contempt for, revulsion or severe ridicule of another person or group of people on the grounds of their race or religion.

Under these two Acts, the Commission helps people resolve complaints of discrimination, sexual harassment and racial or religious vilification through a free and impartial dispute resolution service. Serious racial or religious vilification is a crime and is referred to Victoria Police.

The **Charter of Human Rights and Responsibilities Act** requires Victorian public authorities to act compatibly with the Charter and to take relevant Charter rights into account when making decisions or providing services. The Commission's roles under the Charter are: to educate people about the rights and responsibilities contained in the Charter, to assist the courts in its interpretation, and to report annually to the Attorney-General about the operation of the Charter.

Services and activities of the Commission

The Commission provides a broad range of services to all Victorians and maintains a regular presence in regional Victoria as well as through its metropolitan office. These services include:

- a free telephone and internet-based information service
- a comprehensive website at www.humanrightscommission.vic.gov.au
- a free and impartial dispute resolution service
- general information and education programs about equal opportunity, racial and religious vilification and the Charter
- tailored education and training programs about equal opportunity, racial and religious vilification and the Charter
- consultancy services to assist corporate and community organisations achieve compliance with their rights and responsibilities under these laws and move towards good practice
- publications, toolkits, guidelines and resources to assist individuals, business and government to understand and (where appropriate) comply with their equal opportunity and human rights obligations
- toolkits, guidelines and resources for business, government to assist with understanding and compliance with equal opportunity and human rights
- policy advice to government, the community, peak advocacy bodies on issues related to equal opportunity and human rights
- research relevant to human rights and equal opportunity
- submissions to state and national inquiries on issues relevant to equal opportunity and human rights
- legal education through seminars, web-based information, joint continuing legal education events
- project and policy work to identify and address serious equal opportunity and human rights issues.

Regional engagement

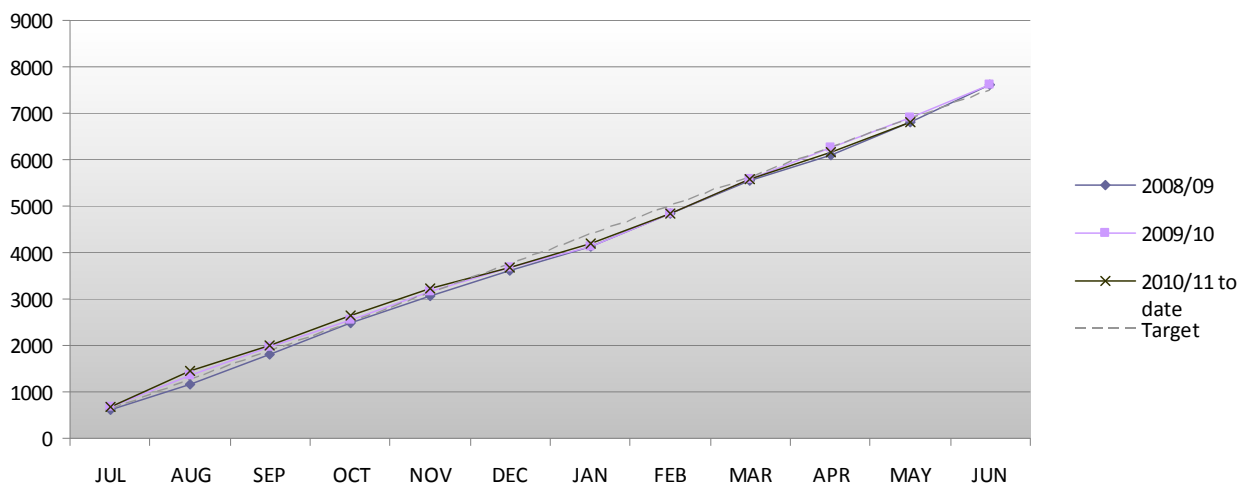
The Commission has a comprehensive community liaison strategy under which staff undertake regular visits to regional Victoria to ensure accessibility of the Commission's services. In 2010/11, in response to feedback from regional business, the Commission also commenced regional training programs providing regular calendar training events in regional centres. These have been well attended and have led to demand for increased scheduling of these events across Victoria.



Public information service

The Commission receives about 7,500 contacts to its public enquiry line per year through phone, email and direct visits. These calls relate to discrimination law, human rights, general information provision about the law and rights and obligations under the laws it administers. The Commission provides an extensive referral process to other agencies where issues are better dealt with in another forum, such as consumer affairs, tenancy issues and workplace rights issues. The Commission also receives calls from employers and advocates about obligations under the laws it administers, and provides a range of resources for business, government and service providers about how to comply with the law.

All public enquiries - total year to date



Of the 7,500 contacts the Commission receives, it accepts about 800 formal complaints under the Equal Opportunity Act each year. These are complaints about alleged discrimination on the basis of race, age, disability, colour, sex, sexual harassment in areas of public life covered by the legislation such as employment, the provision of goods and services, accommodation and education.

Dispute resolution service

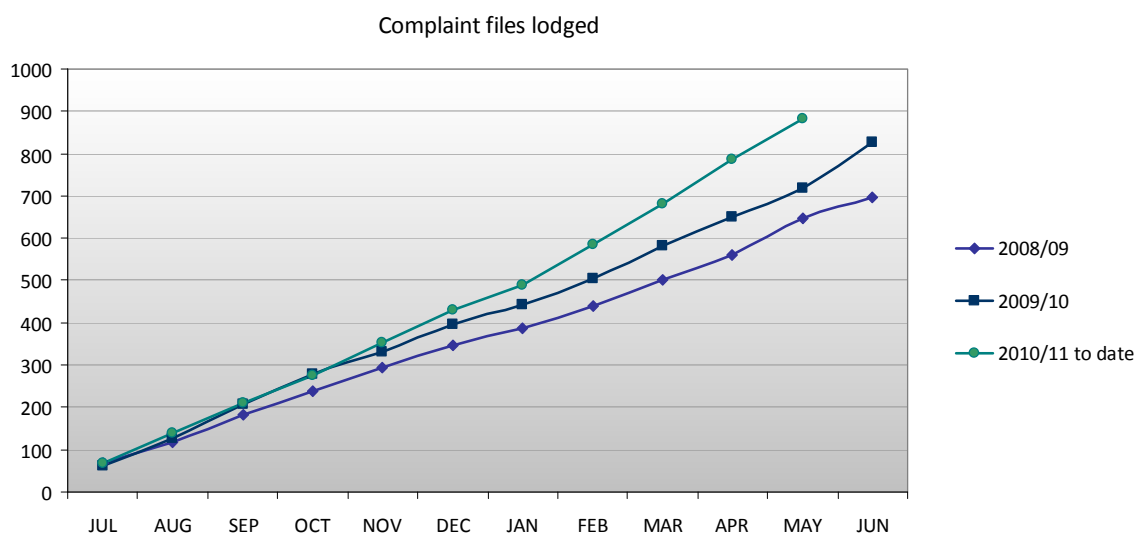
The Commission provides a free, fair and timely dispute resolution service which allows the parties to a complaint to try to resolve the matter through a facilitated conciliation process. The purpose of the service is to provide parties with an opportunity to resolve their matters in a voluntary, low-cost, efficient and informal environment.

In 2010, the Commission streamlined its dispute resolution process. The changes have reduced the administrative burden on parties to provide comprehensive written material as part of a complaint investigation and optimise the opportunities for resolution by offering the parties earlier access to dispute resolution.

In 2009/2010, the Commission received 900 complaints which raised 2,427 issues across all areas of the *Equal Opportunity Act 1995*. For example, a complaint from an individual may allege discrimination on the basis of both disability and age in employment, against both an employer and an individual.

The Commission finalises 88% of matters it receives within six months of acceptance. Currently, 55% of complaints where conciliation is attempted are resolved and 34% of all complaints received are resolved. The Commission attempts conciliation in approximately 75% of matters received and resolves about 60% of those matters.

Where a complaint cannot be resolved, or is declined on the basis it is lacking in substance or on another ground, the matter is finalised and the complainant may make an application to the Victorian Civil and Administrative Tribunal (VCAT) to have the matter determined. Approximately 200 matters finalised each year are referred to VCAT. This accounts for 25% of all matters finalised. Only a very small proportion of those matters are heard and determined by VCAT.



Matters resolved by conciliation at the Commission

Following are examples of matters that have been resolved through conciliation facilitated by the Commission:

Sexual harassment, sexual orientation and disability in the area of employment

The complainant was employed for a security firm. She alleged that during the course of her employment she was subjected to sexual harassment (pornographic images on the work computers). She also alleged that she was discriminated against by colleagues on the basis of: sexual orientation (implying she was a lesbian); impairment (calling her stupid and an idiot and implying low intelligence); physical features (asking her to remove piercings, implying she is ugly); her sex (piercings were not girly), and; employment activity (after raising rostering issues was victimised). She alleges that she complained to management about the behaviour, in particular the impairment allegations, and they did not do anything to stop it (authorising and assisting impairment discrimination). She also alleges that her employment was terminated as a result of her making complaints (victimisation).

The respondent denied all of the allegations.

The complaints were resolved at conciliation by allowing the complainant to resign instead of being dismissed, a statement of regret and service, equal opportunity training for all employees of the company (3500 employees) and payment of \$6,000 pain and suffering.

Race and disability discrimination in the area of employment

The complainant was employed in the motor vehicle industry. He is of Sri Lankan descent and alleges he was verbally abused, physically assaulted and subjected to comments of racist nature such as “black pig” by co-workers during his employment. As a result, the complainant suffered stress and anxiety and was absent from work. He alleged that the respondent refused to accept his medical certificates covering his absence from work.

The respondent denied the allegations.

The complaints were resolved at conciliation, resulting in a payment of \$23,000 pain and suffering, the complainant deciding to end his employment, verbal apology from the head of the respondent company, statement of service and for the respondent to provide training in equal opportunity to its staff and provide evidence of this within six months of the signing of the agreement.

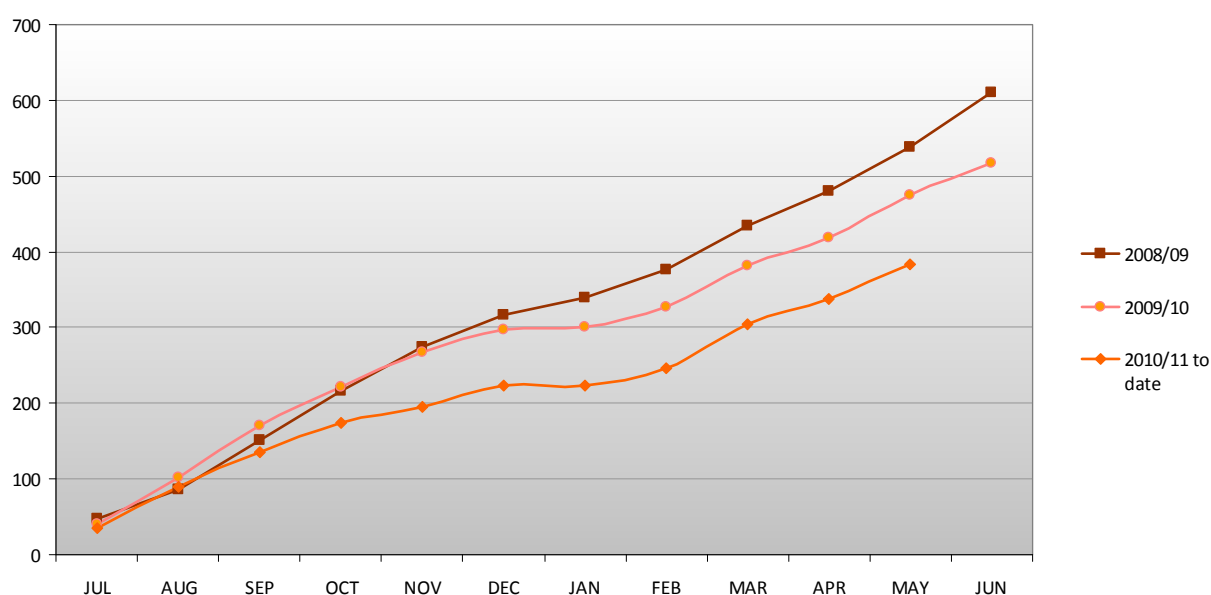
Training, education and information events

The Commission provides a wide range of free and fee-based training, education and information events to the community, government and business. The Commission has a calendar of scheduled training covering key areas of the Charter and human rights, as well as the Equal Opportunity Act. These include general workshops which detail rights and responsibilities under current legislation and encourage participants to discuss case studies and understand how the legislation works in practice.

The skill-based workshops help organisations and service providers know how to build simple and effective equal opportunity strategies into the way they work to prevent and eliminate discrimination and promote human rights. Topics include: managing workplace flexibility, workplace grievance and dispute resolution processes, and managing sexual harassment in the workplace.

Demand for training and information events remains consistently high, although the Commission notes peak demand following the introduction of new laws, such as the Charter in 2007. The Commission regularly conduct more than 400 sessions each year: this comprises between 80-100 calendared sessions and approximately 300 tailored in-house sessions. The Commission is also committed to capacity building within organisations and conducts in-house and onsite train-the-trainer courses to equip them to undertake their own internal training. Training commitments for the first half of 2011 were slightly lower due to staff changes and the re-development of training to reflect the new *Equal Opportunity Act 2010*. Training commitments for the second half of 2011 are high in response to new legislation and increased stakeholder engagement activities, particularly in regional areas. The Commission expect this interest to grow as more organisations become aware of the new Act and seek to understand their obligations.

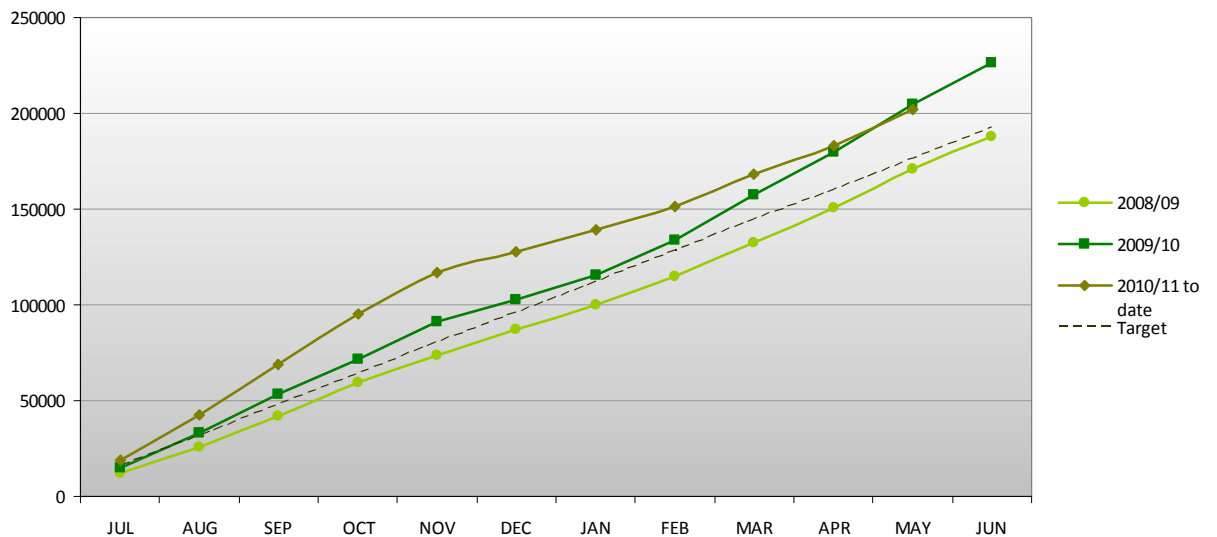
Number of training and information events



Accessible information through the website

The Commission's website is a focus for information delivery and continues to see an increase in visitors to the site. The Commission launched an Employer's webpage in 2010 and, in response to feedback, will follow this up with a series of targeted employer toolkits in 2011, providing information about a number of specific priority areas, including: women's workplace rights, disability in employment, recruitment and retention of mature age workers. These are being jointly developed with stakeholders from government, business and the community. The Commission are also finalising the development of an online tool designed to educate and inform young women (aged between 20 and 30) about equal opportunity protections in the workplace.

Number of visitors to VEOHRC website - total year to date



Responsibilities under the Charter

The Commission has a responsibility to perform a range of functions under the Charter. These include:

- a discretionary power of **intervention** by the Commission in a matter before a court or a tribunal where a question of law arises with respect to the application of the Charter or the interpretation of a statutory provision in accordance with the Charter (section 40)
- present an **annual report** to the Attorney-General on the operation of the Charter (section 41(a))
- **review the effect of statutory provisions and the common law on human rights** at the request of the Attorney-General (section 41(b))
- undertake **reviews** at the request of the Attorney-General or a public authority (section 41(c))
- provide **education** about human rights and the Charter (section 41(d))
- assist the Attorney-General in the **reviews of the Charter** (section 41(e))
- **advise the Attorney-General** on anything relevant to the operation of the Charter (section 41(g)).

More detail about key functions is provided below.

Interventions

Section 40 of the Charter confers on the Commission a statutory right to intervene in legal proceedings initiated by other parties:

The Commission may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which 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.

The breadth of this power was acknowledged in the Explanatory Memorandum to the Charter:

Clause 40 establishes the Commission's unqualified right to intervene in proceedings involving the Charter... Whether the Commission exercises the right to intervene is a matter for its discretion.

The Commission undertakes its intervention role to assist the courts with the interpretation and application of the Charter. Support for the development of jurisprudence is important for the Charter, as it is in the early period of any new legislation.

*I have discussed the Court's experience of the Commission's exercise of the power of intervention with other members of the Court and there is a consensus across the board that the Commission's participation in cases and the submissions made in relation to Charter issues have been useful.*³³⁵

Chief Justice Warren, Supreme Court of Victoria

*VLA [Victoria Legal Aid] believes that the Commission's intervention function is vital to ensuring that where Charter issues are identified, 'questions of law, policy and issues of broader public interest' (paragraph 5 of the Commission's Intervention Guidelines) will be fully vented. The Commission's intervention function also supports the Commission's education and review function – the more the Commission intervenes, the more readily information about the application of the Charter can be disseminated by the Commission. This in turn supports the confidence of public authorities, the legal profession, legal consumers and courts to engage with the Charter.*³³⁶

Kristen Hilton, Director Civil Justice, Access & Equity, Victoria Legal Aid

The Commission exercises its power to intervene in matters where it anticipates that its involvement will provide information or arguments that would not otherwise be put before the court and where it is likely to have a significant and positive impact on the enjoyment of Charter rights by Victorians. The Commission seeks only to intervene in matters where the Charter issues are significant, and the Commission's independent voice and expertise is likely to be of benefit to the court in its determination of the Charter-related issues.

Although the Commission's interventions have benefited specific individuals and groups, the Commission's role is to advocate for the Charter and its underlying principles. Accordingly, the Commission's interventions will generally focus on questions of law, policy and issues of broader public interest rather than detailed arguments about the facts of a particular case, except to the extent that those facts

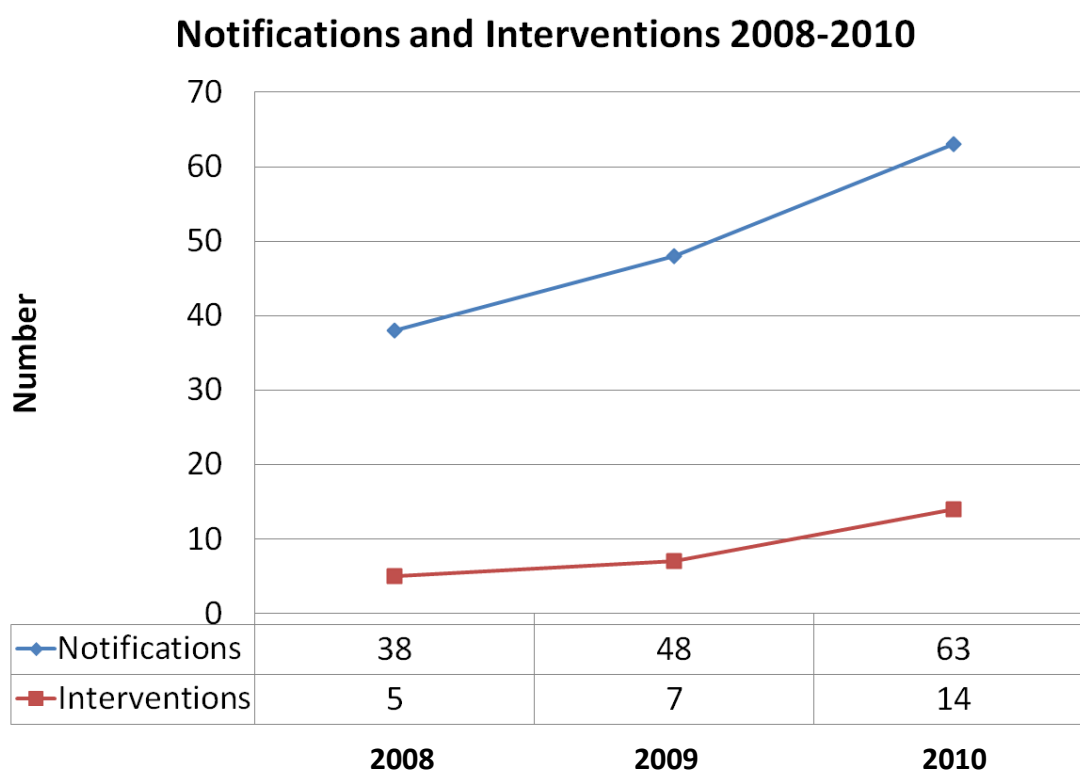
³³⁵ Report to Stakeholders – Review of the Commission's Intervention Function in the Charter of Human Rights and Responsibilities Act 2006, p. 3.

³³⁶ Ibid p. 3

are relevant to systemic issues or a broader class of persons than is otherwise represented.

As the figures below show, the Commission do not think it is necessary that they be heard every time a Charter question arises. Instead it aims to use its intervention function strategically and to promote the effective operation of the Charter and its integration into Victorian law and public policy.

- In 2011 to date, the Commission have received 18 notifications and have intervened in four cases.
- In 2010, the Commission were notified of 63 cases and intervened in 14.
- In 2009, the Commission were notified of 48 cases and intervened in seven.
- In 2008, the Commission were notified of 38 cases and intervened in five.



The Commission has set guidelines for how it will exercise its intervention function. These guidelines are available on its website.³³⁷

The Commission will only consider intervening in cases where:

- the Charter issues are significant and not peripheral to the proceedings and/or
- the orders that could be made in the proceedings may significantly affect the Charter rights of persons who are not parties to the proceedings and/or
- the proceedings may have significant implementations for the ongoing interpretation or operation of the statutory provision being interpreted in light of the Charter and/or
- the proceedings may have significant implications for the ongoing application, implementation and/or operation of the Charter, and
- the Commission has appropriate resources available.

A summary of all cases the Commission has intervened in is at **Appendix N**.

The Commission has chosen to intervene in cases that raise significant Charter issues and cases that may help to develop an understanding of how the Charter operates in practice. These have varied in subject matter from criminal procedure and fair trial rights to the best interests of the child in adoption proceedings, and the duties of the Victorian Civil and Administrative Tribunal (VCAT) when making decisions about guardianship.

It is natural that a number of the significant Charter issues have come up for the first time in the context of criminal proceedings. Criminal proceedings raise significant issues of individual rights. This is well recognised in the long common law tradition of fair trial rights. This is also an area where, because of this tradition, advocates and courts are comfortable applying a human rights framework. Just four years into the application of the Charter in Victoria we are already starting to see the principles that are established and the clarity that these decisions bring to the operation of the Charter in practice being applied to a broad range of areas, including: tenancy issues, guardianship, protection of children and disability services.

³³⁷ www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&layout=item&id=1196&item_id=474#intervention%20guidelines (Viewed at June 2011).

Table: Examples of human rights and other bodies with an intervention function

Agency	Function
Australian Human Rights Commission (Cth)	Section 11(1)(o) of the <i>Australian Human Rights Act 1986</i> allows the Commission, where it considers it appropriate to do so and with leave of the court hearing the proceedings, intervene in proceedings that involve human rights issues, subject to any conditions imposed by the court.
The Human Rights Commission (NZ)	Section 5(2)(j) of the <i>Human Rights Act 1993 (NZ)</i> allows the Human Rights Commission to apply to a court or tribunal, to be appointed as intervener or as counsel assisting the court or tribunal if the Commission considers taking part in the proceedings will facilitate the performance of its functions.
Equality and Human Rights Commission (UK)	Section 30(1) of the <i>Equality Act 2006</i> gives the Equality and Human Rights Commission the capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function.
Australian Competition and Consumer Commission (Cth)	Section 87CA of the <i>Competition and Consumer Act 2010</i> was enacted in 2001 to allow the ACCC, with the Federal Court's leave and subject to any conditions imposed by the court, to intervene in any proceeding instituted by the Act. The enactment was aimed at enhancing the ACCC's ability to protect consumers and small businesses
Australian Securities and Investments Commission (Cth)	Section 1330 of the <i>Corporations Act 2001</i> allows ASIC to intervene in any proceeding relating to a matter arising under the Act. ASIC will consider intervening where the matter is of national significance, involves matters of construction of the Corporations Law, where ASIC has information that could assist the court which is acquired through its investigative functions and/or involves the protection of minorities. Australian Securities and Investments Commission, Regulatory Guide 4 – Intervention.

Monitoring and reporting

Another important function of the Commission is to monitor the operation of the Charter and report to the Attorney-General each year. This report is tabled in Parliament.

The Commission's reporting role helps to ensure transparency, oversight and a consistent vehicle by which systemic issues can be highlighted to the Government and to Parliament.

Section 41 of the Charter requires the Commission's report to cover the following matters:

- the operation of the Charter, including (but not limited to) its interaction with other statutory provisions and the common law
- all declarations of inconsistent interpretation made by the Supreme Court in the course of the year, and
- all override declarations made by Parliament during the relevant year.

In putting together these reports, the Commission canvasses the views of government departments and Victoria Police, local government and a range of statutory authorities to ascertain the steps they have taken to integrate the Charter into their operations. The reports are based on their responses.

The Commission also monitors the human rights dialogue in Parliament throughout the year. This includes statements of compatibility, the views of the Scrutiny of Acts and Regulations Committee, and any debate that occurs in Parliament as a result of the human rights issues raised. The Charter reports include a summary of this discussion and highlights significant human rights discussions.

The Commission also examines the use of the Charter in Victoria's courts and tribunals. The Commission reports each year on the cases in which the Commission has intervened, as well as reporting on other significant cases that have raised the Charter, whether or not the Commission intervened in the matter.

These reports can help to identify good practice and highlight areas where there are challenges implementing the Charter and where more work is needed.

Each year, the Commission has also prepared thematic reports to assist the Four-Year Review of the Charter.

Commission's annual and thematic reports on the operation of the Charter

- *Talking Rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, in addition to:
 - Talking Rights: Charter compilation Report 2010 (online only)
 - Talking Rights: Consulting with Victorians about economic, social and cultural rights and the Charter
 - Talking Rights: Consulting with Victoria's Indigenous community about self-determination and the Charter
 - Talking Rights: Consulting with Victorians about the rights of people with disabilities and the Charter.
- *2009 Report on the operation of the Charter of Human Rights and Responsibilities*, in addition to:
 - 2009 Summary Report on the Operation of the Charter of Human Rights and Responsibilities
 - Economic, social and cultural rights and the Charter of Human Rights and Responsibilities – A framework for discussion
 - Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion
 - Advancing women's rights – exploring the relationship between the Charter of Human Rights and Responsibilities and the Convention on the Elimination of All Forms of Discrimination Against Women.
- *2008 Report on the Operation of the Charter of Human Rights and Responsibilities*, in addition to:
 - 2008 Summary Report on the Operation of the Charter of Human Rights and Responsibilities.
- *2007 Report on the Operation of the Charter of Human Rights and Responsibilities*, in addition to:
 - 2007 Summary Report on the Operation of the Charter of Human Rights and Responsibilities.

Reviews under the Charter

In another side to the Commission's monitoring role, section 41(c) of the Charter provides that a public authority can ask the Commission to review that authority's programs or practices to determine their compatibility with human rights. A review may be about a specific practice or program or area of operation of an authority.

The purpose of a review is to provide advice to an authority on the compatibility of a program or practice with the Charter and where appropriate make recommendations to the authority on how to improve compliance with the Charter.

This review function is designed to assist with compliance, but also to build an organisation's internal capacity to achieve better human rights compliance and ultimately improve client outcomes.

The Commission has established guidelines for the exercise of its review function. These are publicly available on the website.

The Commission's approach to conducting a review is consultative and flexible. The scope of a review is developed in consultation with the authority seeking the review.

The Commission has only received a handful of requests for a review and has undertaken two: one on the County Court's gaol calendar procedures and one looking at Greater Shepparton City Council's Charter compliance policy.

Training and education

Another one of the Commission's functions under the Charter is to provide education about human rights and the Charter. To undertake this function, the Commission has developed a range of initiatives involving the community, non-governmental sector and local government.

The focus of the Commission's educative role is helping people in Victoria understand the rights and freedoms set out in the Charter, and providing information about the practical and contemporary relevance of these rights and freedoms for individuals, communities and organisations.

The Commission provides free and fee-based training and information sessions to the Victorian community about the Charter. They have scheduled events in metropolitan and regional Victoria, and provide training and development on a consultancy basis to many public authorities wishing to enhance their understanding of human rights.

Charter training currently offered by the Commission

- The Charter of Human Rights and Responsibilities: Introduction
- The Charter of Human Rights and Responsibilities: Advanced
- Human rights for local government
- Human rights and equal opportunity training for schools
- Human rights and equal opportunity advocacy
- Tailored sessions: such as human rights for volunteer organisations, union organisers and delegates, local government, sports and other clubs.

The Commission also supports its education function through public events, media activity, publications, research programs, community engagement activities and submissions into public inquiries and law reform processes.

Further information about these activities is at **Appendix O**.

The Commission's Charter obligations as a public authority

The Commission is also a public authority for the purposes of the Charter and it must act in accordance with its obligations under section 38.

To ensure compliance with its own obligations, the Commission has developed a Charter Compliance Strategy, which has recently been evaluated. The Charter Compliance Strategy reflects the commitment in the Commission's Strategic Plan 2008-2013 to achieving both 'compliance and demonstrated good practice with human rights and equal opportunity laws', and 'development of our expertise and capability'. It is also consistent with the Victorian Government's Better Business Regulation framework that has been a key planning reference for the Commission over the last two years.

The shift to considering human rights and acting compatibly with the Charter is an important one for all Victorian public authorities, including the Commission. Poor performance in human rights has the potential to result in adverse outcomes for the individuals and workplace involved. The Commission recognises that it is particularly important, as the lead human rights organisation in Victoria, to uphold and demonstrate best practice human rights compliance.

As part of its Charter Compliance Strategy, the Commission has developed an Action Plan, conducts regular self-audits against the Commission's service standards, conducts staff training, staff surveys, reviews of complaints files and policy reviews.

The introduction of the Charter has also influenced the way the Commission manages its functions. For example, its Charter obligations and a human rights approach has informed processes such as the way the Commission assess complaints for conciliation and ensures that they look at potential impacts on individual parties before they intervene in a case before the courts.

Regular evaluation against the Charter Compliance Strategy is an integral element of best practice, enabling identification of areas for improvement. It will also improve the quality of the Commission's services, capacity to exemplify human rights-based approaches in the public sector, and the Commission's commitment to its Charter mandate.

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