

Submission for the Inquiry into Australia's Human Rights Framework

**Parliamentary Joint Committee
on Human Rights, July 2023**



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1 Introduction

In 2010, the Australian government launched the National Human Rights Framework (the Framework).¹ The Framework contained commitments to strengthen the promotion and protection of human rights in Australia, including the establishment of the Parliamentary Joint Committee on Human Rights and the development of a National Action Plan on Human Rights. There was also a commitment to conduct a four-year review.

Thirteen years on, the review has not yet occurred, and several critical elements of the National Human Rights Action Plan have not been implemented.

The Framework was released four years after the introduction of the Victorian Charter of Human Rights and Responsibilities (the Charter).² Approaching almost two decades in operation, the Charter is now the second longest operating human rights act in the country after the Australian Capital Territory's *Human Rights Act 2004* and has been the subject of two statutory reviews.

Since the introduction of the Charter, Queensland introduced its *Human Rights Act 2019* (QLD) and the ACT has passed reforms that allow a person to bring an independent cause of action against a public authority for a breach of the *Human Rights Act 2004* (ACT).³ There are significant lessons to be learned from the experiences of these three jurisdictions with human rights legislation in place.

The Victorian Equal Opportunity and Human Rights Commission (the Commission) considers that the introduction of an Australian Human Rights Act would complement existing state and territory human rights laws and aid in incorporating rights contained in international human rights treaties ratified by Australia.

The scope of this Inquiry broadly falls under two categories: the first relates to the effectiveness of the Framework and the Action Plan; the second relates to the need for a national Human Rights Act and how that might operate.

The Commission broadly supports the re-establishment of the Framework.

This submission focusses on the proposal for a national Human Rights Act. The Commission's experience in overseeing the operation of the Charter provides critical insights into the value of human rights legislation, the components that should be included and the most effective means of implementation. The insights contained in this submission also reflect the issues addressed in the two statutory reviews of the Charter, noting that the recommendations from those reviews are yet to be implemented in Victoria.

¹ Australian Human Rights Commission 'Background and Framework for Promotion and Protection of Human Rights' (Web Page) < <https://humanrights.gov.au/our-work/2-background-and-framework-promotion-and-protection-human-rights>>.

² *Charter of Human Rights and Responsibilities 2006* (Vic).

³ *Human Rights Amendment Act 2008* (ACT) s 40(c).

2 Benefits of a Human Rights Act

Human rights and freedoms belong to everyone, regardless of our background, culture, gender, age or belief. Anyone could find their human rights at risk – whether it be in seeking health care, in accessing education, in interactions with the justice system or any other area of public life.

A Human Rights Act provides overarching principles and protections that safeguard the rights and freedoms of every person, no matter where they live, what they look like or what they believe. It sends a strong statement that the rights of people are valued, respected and prioritised over the day-to-day political context.

The Victorian Charter in action

The Victorian Charter was introduced in 2006. It sets out the foundational rights and freedoms of all people in Victoria, and the responsibilities of the public authorities that observe them. At the time it was introduced, the ACT was the only other jurisdiction in Australia with a Human Rights Act.

Without this legal framework of human rights protections, the values that drove the day-to-day operation of government and public authorities in Victoria did not link directly to human rights.

The Victorian Charter includes 20 civil and political rights:⁴

- The right to recognition and equality before the law
- The right to life
- The right to protection from torture and cruel, inhuman or degrading treatment
- The right to freedom from forced work
- The right to freedom of movement
- The right to privacy and reputation
- The right to freedom of thought, conscience, religion and belief
- The right to freedom of expression
- The right to peaceful assembly and freedom of association
- The right to protection of families and children
- The right to take part in public life
- Cultural rights, including Aboriginal cultural rights
- Property rights
- The right to liberty and security of person
- The right to humane treatment when deprived of liberty
- Rights of children in the criminal process
- The right to a fair hearing
- Rights in criminal proceedings
- The right to not be tried or punished more than once
- The right to protection from retrospective criminal laws

⁴ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ss 7-27.

Since the Charter came into full effect on 1 January 2008, the Commission has seen tangible evidence of its ability to protect the human rights of all people in Victoria. It has improved the quality of government services and decisions, reduced discrimination, resulted in fairer laws and policies, and provided avenues (albeit limited in nature) for redress and remedies when rights are breached.⁵

The Charter achieves this by requiring public authorities to give proper consideration and act compatibly with human rights,⁶ requiring the parliament to consider human rights in law-making,⁷ and requiring all statutory provisions to be interpreted in a way that is compatible with human rights.⁸

As Victoria's independent human rights body, the Commission has several roles and functions in relation to the Charter, including:

- intervening in legal cases in a court or tribunal in which a question of law arises that relates to the application of the Charter
- reporting on the operation of the Charter
- reviewing the compatibility of programs and practices with human rights on request of public authorities
- providing education about human rights and the Charter.⁹

Further discussion of the way the Charter has improved human rights compliance is below at Part 4 of the Commission's submission.

The Charter has been subject to two statutory reviews in 2011¹⁰ and 2015.¹¹ While the findings were clear that the Charter has had significant positive impacts, several reform recommendations were made in the reviews to improve the operation of the Charter. This included broadening the scope of rights and how they are enforced to better protect rights holders. The Commission agrees that there are opportunities to reform the Charter¹² and notes the recommendations from the two reviews have not been legislated to date.

⁵ Victorian Equal Opportunity and Human Rights Commission, Submission to Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (November 2019). See also annual reports from the Victorian Equal Opportunity and Human Rights Commission Reports on the operation of the Charter of Human Rights and Responsibilities. <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/charter-reports>>.

⁶ *Ibid* s 38.

⁷ *Ibid* s 28.

⁸ *Ibid* s 32(1).

⁹ Victorian Equal Opportunity and Human Rights Commission, *About the Charter* (Web Page), <<https://www.humanrights.vic.gov.au/legal-and-policy/victorias-human-rights-laws/the-charter>>.

¹⁰ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011).

¹¹ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, 1 September 2015).

¹² Victorian Equal Opportunity and Human Rights Commission, *'Improving the operation of the Charter'* (Web Page) <<https://www.humanrights.vic.gov.au/legal-and-policy/advocacy-and-law-reform/improving-the-operation-of-the-charter/>>.

Since the 2015 statutory review, Queensland's Human Rights Act was introduced and there have been extensive consultations and recommendations from the Australian Human Rights Commission's (AHRC) 'Free and Equal' project relating to a federal Human Rights Act. The Commission considers that both the Queensland Human Rights Act and the AHRC's 'Free and Equal' position paper contain further lessons that would make the Victorian Charter more effective and efficient.

Despite the potential for reform, the Victorian Charter has provided a framework for the government of the day to make new laws fairly, for courts to interpret existing laws compatibly with human rights, so far as possible, and for public authorities to exercise their duties while balancing and protecting the rights of people in Victoria.

Need for a national Human Rights Act

The Commission considers that the positive human rights outcomes seen in Victoria would be replicated with a national Human Rights Act.

In 2019, the Commission's submission to the AHRC's 'Free and Equal' consultation outlined that:

the effect of the Charter in Victoria illustrates the potential for federal human rights legislation to elevate and protect human rights – not just as a symbol, but as a real tool for delivering fairer laws, shaping decisions of government, and ensuring human rights are incorporated into our judicial system.¹³

The AHRC's 2023 'Free and Equal' position paper outlines a detailed plan for a national Human Rights Act which the Commission considers would be an effective mechanism to protect rights and freedoms. The proposed national Human Rights Act would bring communities together and help to ensure everyone is treated fairly. It would be a national statement of the inherent worth of all humans, affirming the democratic values of freedom, respect, equality and dignity – values crucial to wellbeing and our ability to live a fulfilling life.

A national Human Rights Act, as outlined by the AHRC, would be a critical foundational document, capturing the relationship between government and its people. The law would have the potential to improve the development of federal law and policy by requiring proactive consideration of human rights during design and implementation. It will also provide a framework to ensure government bodies and other public authorities consider human rights in their everyday business. Significantly, an enforceable act would create avenues for people to seek review of decisions or actions that unreasonably limit a person's human rights.

The implementation of a comprehensive and enforceable national Human Rights Act would also complement existing state and territory legislation to create greater consistency. Human rights laws work most effectively when coordinated across jurisdictions, meaning the existing patchwork of human rights laws across Australia stand to benefit. A national Human Rights Act will embed a consistent approach to the protection and promotion of human rights of all people throughout Australia. It will also fill existing gaps that are not covered by state or territory human rights protections.

¹³ Victorian Equal Opportunity and Human Rights Commission, Submission to Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (November 2019) 3.

A national Human Rights Act would apply to federal public authorities, while state and territory human rights laws would continue to apply to state/territory-based public authorities. This is important as people should have their rights and freedoms protected wherever they are in Australia, regardless of which government body they are dealing with.

These benefits have been experienced in comparable jurisdictions. For example, the United Kingdom's Equality and Human Rights Commission's 2009 'Human Rights Inquiry' noted that key benefits for public entities of a human rights act included:

- establishing some non-negotiable service standards that apply to everyone
- providing a framework for making better decisions
- helping to re-energise staff and re-connect them with core public service values
- managing organisational risk
- enhancing organisational reputation and distinctiveness
- strengthening advocacy.¹⁴

The Inquiry's report noted benefits in health and social care services, policing and criminal justice, and children and education, among other areas of public life. The report noted that 'the evidence shows that many public bodies regard the Human Rights Act as an ethical framework which guarantees greater fairness and respect for users of public services.'¹⁵

¹⁴ UK Equality and Human Rights Commission, *Human Rights Inquiry* (Report, June 2009) 37.

¹⁵ *Ibid* 84.

3 What elements should be included

The dialogue model

The Victorian Charter was crafted to anchor human rights in the ordinary interactions between government and individuals. This is referred to as a 'dialogue model' of rights – that is, the emphasis is on identifying, considering and applying rights in everyday practice so as to make them a fundamental framework for government thinking that will prevent breaches of rights occurring in the first place.¹⁶

Existing human rights models in the ACT, Victoria and Queensland are based on the dialogue model. The dialogue model incorporates three key mechanisms for achieving the purpose of the Act to respect and promote human rights:

- It creates obligations on public authorities to act compatibly with human rights and take human rights into account when making decisions. Obligations extend to non-government entities where they exercise functions of a public nature on behalf of the government.¹⁷
- It ensures that all new laws are scrutinised for compatibility with human rights.¹⁸
- It ensures courts interpret all existing laws compatibly with human rights, so far as possible.¹⁹

With respect to the first mechanism, unlike the ACT, the Victorian Charter does not provide for an opt-in mechanism allowing private and non-government organisations to be bound by the Victorian Charter. However, the Commission supports such a provision being included in a national Human Rights Act to ensure more organisations are accountable for upholding human rights.²⁰

The dialogue model strengthens the democratic process by ensuring there are checks on legal developments and decision-making, and by providing feedback to government.

The Commission observes that enactment of a dialogue model of human rights protection as part of a national Human Rights Act would enhance transparency, accountability, and trust in the arms of government.

Part 4 of this submission contains case studies demonstrating the dialogue model in action in Victoria.

¹⁶ Victorian Equal Opportunity and Human Rights Commission, *Submission to the Eight-Year Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, November 2019) 12.

¹⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

¹⁸ *Ibid* s 28.

¹⁹ *Ibid* s 32.

²⁰ This position is consistent with the AHRC's position in: Australian Human Rights Commission, *A Human Rights Act for Australia Position Paper: Free and Equal* (Report, December 2022) 150.

Recognition of impact of intersectionality

It is important to consider how people may experience barriers to rights because of the intersection of multiple attributes (for example, sex, disability or racial background). This is often described as intersectional discrimination. Intersectional discrimination is prohibited under international law. For instance, the preamble to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) condemns ‘discrimination against women in all its forms’,²¹ which includes an implicit protection from racial discrimination.²² The Convention on the Rights of the Child contains articles on children with disabilities,²³ race discrimination and refugee children.²⁴ The Convention on the Rights of Persons with Disabilities outlines that ‘States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms’.²⁵

The CEDAW General Recommendation 25 outlines that:

certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.²⁶

With respect to drafting a national Human Rights Act, consideration should be given to recognising these additional barriers to rights that people face by virtue of a characteristic or multiple intersecting characteristics. This recognition could be incorporated in a national Human Rights Act through a participation duty.

²¹ *United Nations Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc A/34/180 (adopted 18 December 1979, entered into force 3 September 1981) art 2.

²² Shulz P, ‘CEDAW and racism: Intersectionality of gender and racism’, Communication to the CEDAW Committee, Geneva, 8 October 2013.

²³ *United Nations Convention on the Rights of the Child*, UN Doc A/44/25 (adopted 20 November 1989) art 23.

²⁴ *United Nations Convention on the Rights of the Child*, UN Doc A/44/25 (adopted 20 November 1989) art 22.

²⁵ *United Nations Convention on the Rights of Persons with Disabilities*, UN Doc A/61/106 (adopted 13 December 2006) art 6(1).

²⁶ *United Nations Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc A/34/180 (adopted 18 December 1979, entered into force 3 September 1981) para 12.

Human rights to be protected

Australia is party to seven 'core' international human rights treaties – including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – and to various optional protocols to these treaties. While some of Australia's international human rights commitments have been enshrined in domestic law, many gaps remain. To address these gaps, a national Human Rights Act should be as comprehensive as possible to incorporate rights contained in international human rights treaties ratified by Australia.

A national Human Rights Act should reflect the interests and wishes of the Australian community by protecting the rights recognised as fundamental including civil and political rights and economic, social and cultural rights. As noted by the National Human Rights Consultation Committee in 2009, people generally do not delineate economic, cultural and social rights and civil and political rights in considering which rights they perceive as absolute.²⁷ The Commission broadly supports the 28 rights outlined by the AHRC in its 2022 position paper.²⁸

Civil and political rights

The ACT, Victoria and Queensland have based their Human Rights Acts largely on the civil and political rights contained in the ICCPR. The ICCPR requires that nations give immediate effect to the rights within the Covenant and to ensure that people have an effective remedy for rights violations.²⁹ Civil and political rights form the basis of most human rights regimes internationally, including in the United Kingdom, New Zealand and Canada.³⁰ Enshrining civil and political rights in domestic law through a national Human Rights Act would help bring Australia into compliance with our international treaty obligations.

Recognition of First Nations peoples

The right to self-determination is a foundational human right under international law, enshrined in several United Nations instruments, including the UN Charter, the ICCPR, the ICESCR and UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Self-determination is a right of peoples to freely determine their political status and freely pursue their economic, social and cultural development.³¹ In exercising their right to self-determination,

²⁷ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (Report, 2009).

²⁸ Australian Human Rights Commission, *A Human Rights Act for Australia Position paper: Free and Equal* (Report, December 2022) 18.

²⁹ Australian Government Attorney-General's Department *International Human Rights System* (Web Page) < <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/international-human-rights-system> >.

³⁰ Victorian Equal Opportunity and Human Rights Commission, Submission to Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (November 2019) 19.

³¹ *United Nations International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), (adopted 16 December 1966) art 1.

Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.³²

The United Nations Human Rights Committee has described the right to self-determination as ‘the essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.’³³ The committee explained that it was for this reason that the right to self-determination was set out ‘in a provision of positive law’ and placed at ‘article 1 apart from and before all of the other rights in the two Covenants’.³⁴

The Commission supports the approach put forward in ‘Free and Equal’ that a national Human Rights Act include protections for the rights of First Nations peoples, implementing key UNDRIP principles, and that, in combination with a national Human Rights Act, UNDRIP fulfilment should be pursued through multiple avenues such as through a national plan, reforms of parliamentary scrutiny, implementation of the Uluru Statement from the Heart, and improved anti-discrimination laws. The Commission supports the position that any steps undertaken to fulfil First Nations rights should be developed with the genuine participation of First Nations peoples.

The Victorian Charter specifically recognises the special importance of First Nations people, stating that ‘human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia’s first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters’.³⁵ The Charter includes specific protection of Aboriginal cultural rights.

The independent eight-year review of the Victorian Charter recommended that a right to self-determination be recognised in Victorian human rights law.³⁶ The Commission has long called for a legislated right to self-determination in Victoria and previously recommended that a right to self-determination also be included in a national Human Rights Act.³⁷

³² *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, (adopted 13 September 2007) art 5.

³³ Human Rights Committee, *CCPR General Comment 12: Article 1 (Right to Self-determination)*, *The Right to Self-determination of Peoples*, 21st sess, UN Doc HRI/GEN/1/Rev.1 at 12 (13 March 1994), para 1.

³⁴ Human Rights Committee, *CCPR General Comment 12: Article 1 (Right to Self-determination)*, *The Right to Self-determination of Peoples*, 21st sess, UN Doc HRI/GEN/1/Rev.1 at 12 (13 March 1994) para 1.

³⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) Preamble.

³⁶ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, 1 September 2015) 214.

³⁷ Victorian Equal Opportunity and Human Rights Commission, Submission to Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (November 2019) 4.

Economic, social and cultural rights

The Commission recommends that economic, social and cultural rights be included in a national Human Rights Act. This supports the AHRC's 'Free and Equal' position paper that has recommended that cultural rights, cultural rights of First Nations peoples, the right to health, the right to an adequate standard of living, the right to a healthy environment, the right to work and related work rights, and the right to social security be included in a national Human Rights Act.

Expressly recognising economic, social and cultural rights in a national Human Rights Act would strengthen and clarify protections, and honour Australia's international treaty obligations under the ICESCR. It would fill the gaps in existing legislation. For example, the objectives of the *Health Services Act 1988 (Vic)* 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'.³⁸ However, as a statutory objective in the Act, it is not enforceable as a protected human right. Similarly, the *Education and Training Reform Act 2006 (Vic)* provides for free education for students under the age of 20 'irrespective of the education and training institution they attend, where they live or their social and economic status, should have access to a high quality education'.³⁹ However, this section is framed as a principle that does not give rise to or be taken into account in any civil cause of action.⁴⁰

Obligations arising from economic, social and cultural rights are subject to 'progressive realisation'. This recognises that fully achieving economic, social and cultural rights will take time and will be dependent on the resources that a government has available. Article 2 of ICESCR requires signatories to the Covenant 'to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.⁴¹ Nonetheless, economic, social and cultural rights impose obligations on the state to progress expeditiously and effectively toward achieving goals and ensuring core obligations without discrimination. Unjustified regression, failure to allocate resources to meet core obligations and discrimination may lead to a breach of duties, along with other provisions of economic, social and cultural rights that capability of immediate application.⁴²

³⁸*Health Services Act 1988 (Vic)*, section 9

³⁹*Education and Training Reform Act 2006 (Vic)*, ss 1.2.1 (b).

⁴⁰*Ibid* ss 1.2.3.

⁴¹*International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (adopted 3 January 1976) art 2.

⁴²United Nations Committee on Economic Social and Cultural Rights, *General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)*, UN doc E/1991/23, (adopted 14 December 1990).

The right to a healthy environment

The Commission recommends consideration be given to inclusion of a right to a healthy environment in a national Human Rights Act. As the Commission said in our submission to the 'Free and Equal' Inquiry, the right is important for those who those who suffer most as a result of environmental harm: women, people from low socio-economic backgrounds, racial and ethnic minorities, and the young.⁴³ Diverse ecosystems and clean water, air, and soils are indispensable for human health and security.

The Commission supports the AHRC's 'Free and Equal' position paper that the right to a healthy environment should be introduced in a national Human Rights Act, as it brings together the environmental dimensions of civil, cultural, economic, political, and social rights, and protects the core elements of the natural environment that enable a life of dignity.

Rights under other international treaties

In addition to the rights listed above, the Commission supports the broadening of some rights to bring Australia in line with international laws:

- **Rights of the child** – broadening the notion of children's rights to recognise the right to participation commensurate with their age and maturity, in line with the Convention on the Rights of the Child.⁴⁴
- **Rights of women** – incorporating an acknowledgement of the women's rights contained in CEDAW in the objects of the Act.⁴⁵ This would add a gender-perspective to all protected rights.
- **Rights of people with disabilities** – specifically recognising the rights of people with disability in line with the Convention of the Rights of Persons with Disabilities. This should include respect for individual autonomy,⁴⁶ the right to enjoy legal capacity on an equal basis with others,⁴⁷ and protection of the integrity of the person.⁴⁸ Adding this to the objects of the Act to help inform the interpretation of the rest of the legislation.

⁴³ Victorian Equal Opportunity and Human Rights Commission, Submission to Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (November 2019) 25.

⁴⁴ *United Nations Convention on the Rights of the Child*, UN Doc A/44/25 (adopted 20 November 1989) art 12.

⁴⁵ *United Nations Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc A/34/180 (adopted 18 December 1979, entered into force 3 September 1981) art 2.

⁴⁶ *United Nations Convention on the Rights of Persons with Disabilities*, UN Doc A/61/106 (adopted 13 December 2006) art 1 and 3.

⁴⁷ *Ibid* art 12.

⁴⁸ *Ibid* art 17.

Balancing and limiting rights

International law recognises that most human rights are not absolute.⁴⁹ That is, most human rights can be limited if the limitation is lawful, reasonable, proportionate and demonstrably justified by government. This allows for consideration and balancing of competing interests such as public health, safety and the rights of others.

Existing state and territory human rights legislation provides that human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society.

In Victoria, section 7(2) of the Charter provides that all rights may be subject 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:

- 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.

A limit on a human right is 'compatible' with that right where it is a reasonable limit taking into account these factors. Section 7(2) incorporates a proportionality test and provides a clear and effective framework for considering the limits that may be placed on human rights, having regard to competing public interests and policy objectives.⁵⁰ The Victorian Charter also has internal limitations such as at section 15(3) freedom of expression.

For example, in 2022 Victoria banned the display of the Nazi Hakenkreuz (hook cross). The ban limited several rights, most notably freedom of expression. The Bill's statement of compatibility provided a detailed rationale for this, arguing it was reasonable and justifiable to protect the rights of others. These rights included the right to recognition and equality before the law (section 8), the right to freedom of thought, conscience, religion and belief (section 14) and cultural rights (section 19).⁵¹ Given the harm caused by the display of this symbol, especially to Jewish communities, the ban was considered reasonably proportionate to protect against the harm and distress caused by this symbol.

The Commission supports the AHRC's 'Free and Equal' proposal to include a 'limitations clause' that would provide clear guidance about what rights could be limited, as well as when and how they could be limited.⁵²

⁴⁹ Australian Government Attorney-General's Department Absolute rights Public Sector Guidance Sheet (Web Page) < [⁵⁰ *Charter of Human Rights and Responsibilities Act 2006* \(Vic\) s 7.](https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights#:~:text=International%20human%20rights%20law%20recognises,be%20limited%20for%20any%20reason.>.</p>
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⁵¹ Victoria, *Parliamentary Debates*, 12 May 2022, 1714 (Natalie Hutchins).

⁵² Australian Human Rights Commission, *A Human Rights Act for Australia: Free and Equal* (Position Paper, December 2022) 24.

Cause of action and complaints mechanisms

The Commission supports the position of the AHRC in 'Free and Equal' that a national Human Rights Act should provide a cause of action, a complain pathway and enforceable remedies. Accountability for human rights is an essential component of a workable human rights system that prevents and appropriately responds to human rights violations.

It is recognised at international law that effective remedies must be provided for violations of human rights. To be effective, a remedy must be accessible, affordable and timely. These principles should guide the development of a framework in a national Human Rights Act that ensures that people can raise concerns about the human rights conduct of duty holders.

The UN Human Rights Committee has stated that:

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.⁵³

In Victoria, there is currently no single body that can receive complaints about allegations of a human rights breach against all public authorities as defined in the Charter. Instead, Victorians must navigate a 'patchwork' of options for dealing with alleged human rights breaches. A complainant may:

- make a complaint directly to a public authority through **internal complaints mechanisms** (which may not relate specifically to Charter complaints)⁵⁴
- make a **complaint to the Victorian Ombudsman** who has the power to enquire into or investigate whether any administrative action is incompatible with a Charter right (including corrupt conduct referred from the Independent Broad-based Anti-corruption Commission (IBAC))⁵⁵ and is now able to undertake alternative dispute resolution in relation to most complaints⁵⁶
- make a **complaint to IBAC** who has the power to ensure Victoria Police officers have regard to Charter rights and to receive complaints about police personnel conduct (which IBAC may attempt to resolve by conciliation)⁵⁷
- attach a Charter claim to an existing cause of action in **legal proceedings**.⁵⁸

⁵³ United Nations Human Rights Committee, *General comment no. 31 (80): The nature of the general legal obligation imposed on States Parties to the Covenant: International Covenant on Civil and Political Rights*, 80th sess, UN DOC CCPR/C/21/Rev.1/Add.13 (29 March 2004) [15].

⁵⁴ In May 2017, the Department of Justice and Regulation released the 'Good Practice Guide: Managing Complaints Involving Human Rights'.

⁵⁵ *Ombudsman Act 1973* (Vic) ss 13(2) and ss13(AA). The Victorian Ombudsman also has the power under s 161 to refer complaints to a specified body (including the Commission) if the subject matter is relevant to that person or body's duties and functions and it would be more appropriate for them to deal with the complaint.

⁵⁶ Part IIIAC of the Ombudsman Act provides the Ombudsman with an alternative dispute resolution function in relation to certain complaints.

⁵⁷ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 15(3)(iii), 51-52 and s 64(2).

⁵⁸ Under the section 39 remedies provision of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The Commission is of the view that people should be able to seek redress when a public authority breaches their human rights in the same way they can challenge other types of government decision-making.

Often, vulnerable or disadvantaged people are interacting with government at the pointy end of human rights issues. The complexity of the complaints system can be difficult to navigate and, for many people, inaccessible. A national Human Rights Act should provide a streamlined, simplified complaints framework.

A national Human Rights Act should provide:

- 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.

Complaints mechanism and alternative dispute resolution

Alternative dispute resolution should be included in a national Human Rights Act as the first level of redress in any remedies provision. Alternative dispute resolution provides a quick, cheap, accessible, informal and easy to navigate method of redress outside the court system.

Alternative dispute resolution is a crucial alternative to going to court for complainants. This is because parties can resolve complaints quickly, at a low level and without the need for lawyers, and can negotiate an outcome that suits both parties and which can provide a personal remedy for the complainant to acknowledge any loss or hurt experienced by them. It is possible to achieve both individual and systemic outcomes through a dispute resolution framework.

The Commission considers that alternative dispute resolution:

- should be provided as early as possible
- should be appropriate to the nature of the dispute
- is fair to all parties
- is voluntary
- should be consistent with the objectives of the Act.

Parties can negotiate an outcome that is mutually acceptable and which can provide a personal remedy for the complainant, such as compensation or an apology, or systemic change such as changes to customer practices and procedures; changes to internal or staff practices and procedures; modification of facilities and/or premises; the introduction or review of policies; and provision of training.

The Commission supports the approach of 'Free and Equal' for the AHRC to have expanded complaint functions and be resourced to offer dispute resolution services in relation to all human rights complaints.

Independent causes of action

In order to establish a fair, just and accountable human rights system, a person who claims their rights have been violated should have the right to be heard and have their matter determined by an appropriate independent body. The ability to bring a direct cause of action for a breach of a national Human Rights Act would provide a clear, important avenue by which people can seek relief or remedy in respect of a public authority's decision that infringes human rights or fails to give proper consideration to human rights. It would also ensure that that person would have access to the breadth of remedies available in proceedings without needing to bring an additional ground of unlawfulness separate to the national Human Rights Act breach.

The Commission supports the position of the AHRC in 'Free and Equal' that a national Human Rights Act should give rise to a standalone direct cause of action.⁵⁹ The Commission also supports the AHRC position that principles of administrative law and administrative remedies should apply as usual to decisions that require adherence to a national Human Rights Act, including the right to seek judicial review of the decision through the courts.⁶⁰

The absence of clear, accessible and enforceable remedies attached to a national Human Rights Act would create unnecessary barriers for the development of a human rights culture. In Victoria, the Charter does not allow a person to bring an independent action against a public authority for a breach of the Charter. Instead, a person can only raise the Charter by joining or 'piggybacking' a claim to separate proceedings against a public authority. This significantly increases the complexity of bringing a claim under the Charter and reduces the ability for individuals to obtain effective relief. Queensland's Human Rights Act has a similar 'piggybacking' requirement, however it also allows for complaints to the Queensland Human Rights Commission (QHRC).

By contrast, human rights legislation in the ACT allows a person to bring a claim for a breach of a human right without the need to attach it to another claim.⁶¹ Under this model, a person whose human rights have been breached could either bring a proceeding using the direct cause of action, or rely on their rights in other legal proceedings.

A national Human Rights Act should make clear that a person who claims that a decision of a public authority is incompatible with human rights or was made without proper consideration of relevant human rights, can bring a claim for a breach of the national Human Rights Act through the courts. It should not be necessary to claim the conduct is unlawful on another ground, as is the case in Victoria and Queensland.

⁵⁹ Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework Submission 1* (May 2023) 26.

⁶⁰ *Ibid* 30.

⁶¹ See s 40(c) *Human Rights Act 2004* (ACT).⁶² Victorian Equal Opportunity and Human Rights Commission, Submission to Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (November 2019) 5.

Despite the obstacles imposed by Victoria's 'piggyback' approach, raising human rights in matters before courts and tribunals has resulted in important outcomes that would not have been achieved but for the Charter, such as:

- protection from medical treatment without full, free informed consent and equality before the law (*PBU & NJE v Mental Health Tribunal* [2018] VSC 564)
- ensuring the right to a fair hearing in the context of unrepresented litigants (*Roberts v Harkness* [2018] VSCA 215 (29 August 2018); *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61) and in situations where the parties have not been notified of, and are not present at, the proceedings (*AB & EF v CD* [2017] VSC 350; *AB v CD & EF* [2017] VSCA 338 (21 November 2017); *AB v CD; EF* [2018] HCA 58 (5 November 2018))
- upholding the right to equality before the law for people with a disability to access, and use common property of an owners corporation (*Owners Corporation v Black* [2018] VSC 337)
- applying the cultural rights of Aboriginal people to have their case heard in the Koori Court (*Cemino v Cannan & Ors* [2018] VSC 535)
- securing the best interests of the children where young people are being detained in a sectioned-off space within an adult male maximum-security prison (*Certain Children v Minister for Families and Children & Ors* (No 2) [2017] VSC 251).

Further case studies demonstrating the application of the Charter to courts and tribunals are included in Part 4 of this submission.

Representative complaints

The Commission considers there are likely to be multiple benefits in enabling the bringing of representative complaints under a national Human Rights Act to both the AHRC and the courts.

Firstly, this element could increase access to justice for individuals who have experienced a breach of their human rights but may not have the means to bring a complaint by themselves. Overall costs of bringing a complaint are likely to be borne by the representative organisation, which would be a significant benefit for individuals involved in the claim. Additionally, going through the complaints process alongside other individuals could lessen, even if it does not completely eliminate, some of the trauma associated with bringing a legal action for individual complainants.

An ability to bring representative complaints would also align with other potential elements of a national Human Rights Act, such as an independent cause of action. In many cases, it may be easier to identify and bring a representative complaint based solely on a breach of human rights, rather than bringing a representative human rights complaint as part of another legal proceeding.

Additionally, the ability to bring representative complaints may result in systemic change, more rapidly. Human rights cases brought by individuals can certainly establish significant precedent. This is demonstrated in the way the Victorian Charter has helped set important precedent through cases brought by individuals, such as the case of *DPP v SE*, discussed below. However, the very nature of representative complaints, which would involve a group or class of persons, would require consideration of how systems and processes may be having broader impacts on human rights.

The Commission recommends that if the ability to bring representative complaints is embedded within a national Human Rights Act, it should be accompanied by a requirement that individuals do not need to be named in a complaint. This is likely to greatly increase the incentive for individual complaints to bring a representative complaint.

Remedies

Compensation

The availability of a range of remedies under a national Human Rights Act is important to ensure the legislation is flexible and adaptable to the circumstances of a particular breach of human rights. Non-monetary orders may provide an effective remedy for a breach of human rights obligations by a public authority in many cases, but this will not always be the case. For example, an award of compensation may be the only effective remedy for a past breach of human rights.

As we recommended in our submission to the AHRC's 'Free and Equal' inquiry, the Commission considers that a person should be able to seek compensation for breach of a Human Rights Act when a court or tribunal determines that administrative action does not adequately address the harm the person has experienced.⁶²

A clear, accessible, and enforceable remedy such as compensation creates incentives for public authorities to comply with a national Human Rights Act – perhaps more so than non-monetary remedies.

A remedies clause could be carefully tailored to ensure that it enables the awarding of compensation where a court or tribunal has assessed that administrative action does not adequately address the harm the person has experienced. Other jurisdictions, such as the UK and NZ have flexible remedies clauses which enable compensation to be awarded. These clauses have not led to floods of claims of compensation for human rights breaches.

In the United Kingdom, where a court finds that any act or proposed act of a public authority is unlawful under the *Human Rights Act 1998* (UK) it 'may grant such relief or remedy, or make such an order, within its powers as it considers just and appropriate'.⁶³ This includes compensation (or damages), however only where the court is satisfied the award of damages 'is necessary to afford just satisfaction to the person in whose favour it is made'.⁶⁴

In New Zealand, the *Bill of Rights Act 1990* (NZ) does not set out available remedies for human rights breaches. However, New Zealand courts have found damages to be available for human rights infringements.⁶⁵ Former Chief Justice Dame Sian Elias has observed that the number of cases where damages have been sought against the State since 1994 is small 'suggesting that early predictions of a flood of claims to vex the administration of justice are well astray, as such predictions usually are'.⁶⁶

⁶² Victorian Equal Opportunity and Human Rights Commission, Submission to Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (November 2019) 5.

⁶³ *Human Rights Act 1998* (UK) s 8(1).

⁶⁴ *Ibid* s 8(3).

⁶⁵ *Simpson v Attorney General (Baigent's case)* (1994) 3 NZLR 667.

⁶⁶ *Attorney General v Chapman* (2011) NZSC 110, 5.

To bring Australia in line with other similar jurisdictions and to ensure appropriate relief, the Commission recommends the inclusion of a flexible remedies clause within a national Human Rights Act that enables the awarding of compensation.

Costs orders

The Commission considers that the government should ensure a national Human Rights Act adopts a model which provides for equal access to costs in human rights matters.

Adverse costs orders in which a claimant is ordered to pay the other party's legal costs if the claimant's litigation is unsuccessful is a significant barrier to pursuing legal action in cases of unlawful conduct under human rights laws. The risk of losing when pursuing litigation is high: cases can often be hard for claimants to prove, defendants may have disproportionate access to relevant information and control of key witnesses.⁶⁷

There are also significant power imbalances that deter people from making claims against well-resourced organisations.⁶⁸

In the federal jurisdiction, human rights complaints under a Human Rights Act will be likely to involve extremely well-resourced public authorities and other interested parties. This contrasts with individual claimants alleging breaches of human rights, such as Native Title claimants, people in detention, or people in custody subject to national security laws. Similarly, a no-costs model can lead to unjust outcomes, even when claims are successful. Victim survivors without access to free legal services who succeed in litigation under discrimination laws can end up incurring as much or more legal fees than they receive in compensation so that damages awards, may not be significant enough to cover legal costs.⁶⁹

An equal access model would assist to level the playing field, meaning that people who have experienced a breach of their human rights to recover their legal costs if successful and if unsuccessful, not be required to pay the other parties' costs, with limited exceptions like vexatious litigation.⁷⁰ It is appropriate for people to be able to litigate a claim with sufficient merit to be considered reasonable, to build accountability for human rights breaches.⁷¹ This can lead to more claims reaching hearing, educating duty holders and the public that breach of the law has consequences, and victim-survivors can obtain fair redress.⁷²

⁶⁷ Letter from National Legal Aid Secretariat to the Attorney-General's Department Review into an appropriate cost model for Commonwealth anti-discrimination laws, 14 April 2023, 4.

⁶⁸ Emerita Professor Margaret Thornton, Kieran Pender and Madeline Castles, 'Australian National University, Damages and Costs in Sexual Harassment Litigation A Doctrinal, Qualitative and Quantitative Study' (Submission, 24 October 2022) 77. <<https://www.ag.gov.au/sites/default/files/2022-12/damages-and-costs-in-sexual-harassment-litigation.pdf>>.

⁶⁹ Australian Government, Attorney-General's Department: *Review into an appropriate cost model for Commonwealth anti-discrimination laws* (Consultation Paper February 2023) 11.

⁷⁰ Power to Prevent Coalition, 'Time for equal access in discrimination claims' (Joint Statement, 14 April 2023) 1.

⁷¹ Letter from the National Legal Aid Secretariat to the Attorney-General's Department Review into an appropriate cost model for Commonwealth anti-discrimination laws, 14 April 2023, 9.

⁷² *Ibid* 5-7.

Scrutiny of legislation

Sufficient scrutiny of laws is essential to ensure compatibility with human rights principles. While there are already processes in place to scrutinise the human rights implications of laws at a federal level, there are extra safeguards that should be considered within the framework of a national Human Rights Act. The Victorian model can provide valuable lessons on such safeguards.

Victorian model of parliamentary scrutiny

The Charter requires human rights to be considered at every stage of the law-making process. All Bills introduced into parliament must be accompanied by a statement of compatibility, which provides an overview of any human rights impacted by the Bill, whether and why any proposed limitations are reasonable and justified.

The Charter requires the Victorian Parliament's Scrutiny of Acts and Regulations Committee (SARC) to consider any Bill introduced into parliament and report to parliament on whether the Bill is compatible with human rights, enabling relevant human rights to be considered and debated in parliament. SARC also reviews statutory rules and reports to parliament if it considers a statutory rule is incompatible with human rights.

The SARC scrutiny process is crucial to the effectiveness of the dialogue model and the successful operation of the Charter, particularly in circumstances where a statement of compatibility has not fully considered human rights implications.

The opportunity for organisations and individuals to provide submissions on particular Bills to SARC is a key mechanism to promote public accountability in the law-making process. Although some circumstances may justify urgency and a Bill's swift passage through parliament without scrutiny by SARC during the law-making process, the potential impact on consideration of human rights issues may be significant.³⁹

A federal model for scrutiny

The current federal system already provides for parliamentary oversight of legislation through the Parliamentary Joint Committee on Human Rights (PJCHR).⁷³ This has operated since 2012 and examines all Bills and legislative instruments for compatibility with human rights, reporting its findings to parliament.⁷⁴ It presently reports on the Committee's views regarding compatibility of legislation with the seven core human rights treaties Australia is party to.

⁷³ Parliament of Australia, '*Parliamentary Joint Committee on Human Rights*' (Web Page), <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights>.

⁷⁴ Australian Human Rights Commission, '*Parliamentary Joint Committee on Human Rights, Role and Mandate*' (Web Page) < <https://humanrights.gov.au/our-work/rights-and-freedoms/parliamentary-joint-committee-humanrights#:~:text=The%20Parliamentary%20Joint%20Committee%20on,of%20Parliament%20on%20its%20findings>>.

A national Human Rights Act must maintain strong scrutiny mechanisms.

The Commission considers that the PJCHR should consider the rights and freedoms in the proposed Human Rights Act, and also continue to consider the compatibility of legislation with the seven human rights treaties Australia is party and UNDRIP. The PJCHR should be sufficiently resourced, with members trained to identify human rights and provided with access to expert advice. The process of scrutiny of legislation should also build in time for public or private hearings and submissions on Bills raising significant human rights concerns.

The Commission considers that the federal model could learn from the challenges under the Victorian system and consider the implementation of additional measures to strengthen the parliamentary scrutiny process:

- In line with the AHRC's recommendation, House and Senate Standing Orders should be amended to require that Bills may not be passed until a final report of the PJCHR has been tabled in parliament, with limited exceptions for urgent matters. In the event that a Bill proceeds to enactment by exception, provision should be included for a later review of the legislation if the Bill relevantly engaged human rights.⁷⁵
- An appropriately resourced committee should be allowed to 'make special reports on any human rights issues which it may think fit to bring to the notice of parliament'.⁷⁶

The AHRC has also recently recommended in its submission to the Inquiry that matters to be addressed in a statement of compatibility should include consideration of rights and freedoms set out in the national Human Rights Act and the remaining obligations under international treaties not expressly included in the national Human Rights Act.⁷⁷

Role of the human rights regulator

The Commission considers that the AHRC is best placed to undertake the role of regulator under a national Human Rights Act.

The AHRC already has decades of experience in promoting and applying international human rights law across Australia. In the same way the Commission oversees the Victorian Charter, the AHRC already has the infrastructure in place for the complex education, oversight, reporting and dispute resolution functions necessary to implement a national Human Rights Act.

⁷⁵ Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework Submission 1* (May 2023) 83.

⁷⁶ Ibid.

⁷⁷ Ibid 84.

Education

Education and engagement are an essential part of embedding a human rights culture across the decisions and actions of government. As the human rights regulator in Victoria, a function of the Commission is to provide education about human rights and the Charter.⁷⁸

Case study: Supporting human rights decision-making – the Charter Education Project

The Victorian Charter Education Program (CEP) commenced in 2017 to support the Victorian public sector to make human rights part of the everyday business of government. The CEP has been highly successful and feedback has been overwhelmingly positive. Over the five years to 2021–22 the Commission has:

- trained over 11,600 public sector staff – with 86% having an increased understanding on how to apply the Charter (up from 71% in 2016)
- held 700 training sessions, with an 88% satisfaction rating
- delivered almost one quarter of face-to-face sessions to executives, managers or supervisors
- had 8,500 public sector workers access our online Charter e-learning module – with 87% agreeing or strongly agreeing the modules contributed to their understanding of their role to protect and promote human rights.⁷⁹

One senior leader who participated in the CEP described the program's impact on their work area:

We have seen our human rights practice evolve since the training was first rolled out several years ago. Human rights is now front of mind across our business unit. The way we consider human rights is automatic and built into our work processes and case management systems. Prior to the training we didn't think about human rights in this way.⁸⁰

The Commission is of the view that an appropriately resourced AHRC should have the statutory function, and be properly resourced, to build on its existing statutory functions in relation to public information and education.⁸¹

⁷⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 41(d).

⁷⁹ Victorian Equal Opportunity and Human Rights Commission, *2021-22 VEOHRC Annual Report* (Report, December 2022) 5.

⁸⁰ *Ibid* 23.

⁸¹ Australian Human Rights Commission, *A Human Rights Act for Australia: Free and Equal* (Position Paper, December 2022) 337.

Interventions

In Victoria, the Commission has the power to intervene in cases involving the Charter where a question of law arises about its application. This has added weight to human rights considerations in numerous cases, from the 'Lawyer X' case, a matter which eventually led to a Royal Commission into the Management of Police Informants,⁸² to when and how an appointed guardian can authorise the use of forcible physical restraint in order to administer medication to people under their guardianship.⁸³

AHRC currently has the power to intervene in cases involving human rights issues. Commissioners can also intervene in cases raising discrimination. Given the expertise already housed within the AHRC, these powers should also be available to intervene in cases that relate to the national Human Rights Act.

Reporting, reviews and oversight

In Victoria, the Commission has the power to review and report on the effect of statutory provisions and the common law on human rights when requested by the Attorney-General. When requested by a public authority, the Commission can also review that authority's programs and practices to determine their compatibility with human rights.

Similarly, the AHRC currently has the ability hold public inquiries and conduct consultations to address systemic human rights or unlawful discrimination issues of national importance.⁸⁴

The Commission considers that these powers should be extended to reporting on the operation of a national Human Rights Act.

Own-motion inquiries

The ability for the AHRC to conduct own-motion inquiries under a national Human Rights Act would strongly align with other elements being considered, such as a complaints mechanism within the AHRC. For example, a complaint made to the AHRC may reveal systemic breaches of human rights in a particular area that could then be further investigated by the AHRC exercising own-motion powers.

Additionally, the ability to conduct own-motion inquiries could also assist in bringing about systemic change more rapidly than individual complaints or court cases. The very nature of own-motion inquiries, which may be on a larger scale and more public than individual cases, means they can shed light on hidden, systemic issues and prompt greater compliance. In doing so, embedding an ability to conduct own-motion inquiries within a national Human Rights Act could enhance the effectiveness of a national human rights framework.

⁸² Victorian Equal Opportunity and Human Rights Commission, *AB & EF v CD - Feb 2019* (Web Page) < <https://www.humanrights.vic.gov.au/legal-interventions/ab-ef-v-cd-feb-2019>>.

⁸³ Victorian Equal Opportunity and Human Rights Commission, *G93966 - HYY (Guardianship) VCAT 97 - Jan 2022* (Web Page) < <https://www.humanrights.vic.gov.au/legal-interventions/intervention-in-g93966-hyy-guardianship-vcap-97-jan-2022>>.

⁸⁴ Australian Human Rights Commission, *A Human Rights Act for Australia: Free and Equal* (Position Paper, December 2022) 57.

However, the ability to conduct own-motion inquiries should be accompanied by appropriate enforcement mechanisms – both during and following an inquiry – to ensure the AHRC's role as a human rights regulator is effective.

In the national context, the AHRC has been provided with powers to issue compliance notices in the context of the new positive duty relating to sexual harassment. While this provision is yet to commence, it will give the President of the AHRC the power to issue a compliance notice if, after inquiring into a person's compliance with the positive duty relating to sex discrimination, the AHRC finds that the person is not compliant.⁸⁵ As such, the giving of such powers to the AHRC would not be novel.

An own-motion inquiry power accompanied by effective enforcement tools for the AHRC could be a powerful incentive for compliance with a national Human Rights Act, underscoring the seriousness of breaching human rights and creating systemic change on the occasions it is used.

⁸⁵ *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) s 35F; *Australian Human Rights Commission Act 1986* (Cth).

4 Effectiveness of Victoria's Charter

Since Victoria's Charter was enacted, the Commission has seen broad tangible evidence of an improvement in human rights outcomes for Victorians. These improvements can be seen in the increased quality of government services and decisions, a reduction in discrimination, resulting in fairer laws and policies being created, and the availability of new avenues for redress and remedies when rights are breached.⁸⁶ In this section, we outline the value of the three key elements of the dialogue model, and its operation in Victoria.

The 'dialogue model'

As discussed above, the Victorian Charter creates a 'dialogue model' – a constructive and continuous conversation about human rights between the arms of Government. The case studies set out below showcase the dialogue model in action in relation to (a) public authorities, (b) the Charter in law-making and (c) the Charter's use in court and tribunal proceedings.

The application of the Charter to public authorities

The Charter requires public authorities to put people and their rights at the centre of their work. For instance, section 38(1) of the Charter places obligations on public authorities to act compatibly with human rights and properly consider human rights when making decisions.

These obligations provide public authorities with an effective framework for driving human rights cultural change, by helping people who work in state government departments, agencies and local government consider how best to promote and protect human rights before decisions are made and when services, policy and programs are designed and delivered.

The s 38(1) obligation to give proper consideration to, and act compatibly with, human rights has some exceptions whereby the duty does not apply where:

- under another law a public authority could not reasonably have acted differently or made a different decision – for example, when giving effect to another statutory provision that is incompatible with a human right⁸⁷
- the act or decision is of a private nature⁸⁸
- the act or decision would impede or prevent a religious body from acting in conformity with religious doctrines, beliefs or principles.⁸⁹

⁸⁶ Victorian Equal Opportunity and Human Rights Commission, Submission to Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (November 2019) 11.

⁸⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(2).

⁸⁸ *Ibid* s 38(3).

⁸⁹ *Ibid* s 38(4).

Case study: The value of the Charter during the COVID-19 pandemic

The onset of the COVID-19 pandemic and associated public health measures was an unprecedented time for most Australians. In Victoria in particular, the prolonged and wide-ranging restrictions imposed to help curb the spread of COVID-19 brought into sharp relief the balance between the promotion and protection of the right to life, among others, and limitation of other human rights impacting many aspects of daily life that were otherwise taken for granted. During the pandemic, the Charter operated as a vital mechanism to frame concerns expressed by organisations and community members that public health measures unfairly limited their human rights.

It is significant and commendable that throughout 2020, the Charter continued to operate, even in the State of Emergency and the State of Disaster. This meant that the protections under the Charter continued to apply and that the Charter continued to provide a framework to ensure human rights were considered in government decision-making. It is a testament to the trust placed in the Charter as a framework for protecting and balancing rights that parliament did not seek to override the Charter's protections in framing its response to the pandemic.

Instead, Victoria set an extremely important precedent for protecting human rights during an emergency. The continued operation of the Charter during the pandemic protected human rights in three key ways:

- parliament continued to scrutinise legislation, including COVID-19 measures, for Charter compliance
- the ongoing operation of the Charter meant that people could complain to the Victorian Ombudsman, challenge government decisions in the courts on Charter grounds, and the Commission and other public authorities could closely monitor human rights impacts
- public authorities remained bound to consider human rights, and to act in accordance with human rights, in their decision-making.⁹⁰

The Charter required that public authorities considered and acted in accordance with human rights in decisions made by them to introduce and update public health measures, as well as in the implementation of public health orders. The Charter remained relevant to decisions by the Chief Health Officer about whether limitations on rights were necessary and proportionate when making public health orders. Furthermore, in 2021 the government introduced a new legal framework to manage pandemics – setting out how the Charter applies to the making of pandemic orders, with new checks and balances designed to further embed human rights considerations into government responses⁹¹ (see the effectiveness of the Charter in law-making, pages 33-37 for more information).

⁹⁰ Victorian Equal Opportunity and Human Rights Commission, *2021 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, September 2022) 13.

⁹¹ *Ibid* 29-33.

Case study: Putting the Charter into action in closed environments

Human rights play a vital role in corrections environments, where staff must carefully balance individual prisoners' right to freedom, respect, equality and dignity with the necessary limitations on freedom that are typical of closed environments. The Charter is a valuable tool for corrections staff – it gives a clear framework for making decisions and understanding the rights of individual prisoners.

In 2018, Mr Anthony Murphy, Operations Manager at Barwon Prison, worked closely with his team to embed the Charter in everyday decision-making at Barwon. Mr Murphy provided an example of the Charter operating in this setting where, one prisoner who was aware of his Charter rights, was refusing to give a urine sample. Instead, he was asking for his lunch and stating that it was a breach of his human rights for prison staff to deny his request.⁹²

'We identified that the prisoner's human rights were engaged – he was hungry and had the right to be treated with dignity as a person,' Mr Murphy said. 'However, in this situation, providing him lunch would compromise the process, and we would only be delaying his lunch for a short time.'

Mr Murphy used the Charter to frame his response to the prisoner, assuring him that prison staff had considered his rights but that they were justified in limiting them in these circumstances:

'The prison staff rang me later and they told me that they couldn't believe how willingly the prisoner accepted the decision after that had been communicated to him,' Mr Murphy said.

Mr Murphy reflected that actively considering the prisoner's human rights and articulating how the prison staff had reached their decision contributed to a positive outcome in this situation:

I've always been about fairness and equality anyway, as a person. But that gave me a real insight into what we are required to do under the Charter. The reality is that we work in an environment where we have to limit a prisoner's human rights from time to time.⁹³

The Charter and human rights in law-making

In Victoria, the Charter ensures human rights are considered at every stage of the law-making process. A minister or member of parliament must provide a statement of compatibility with any Bill introduced into parliament, which sets out how the Bill is compatible with human rights or, in some cases, the nature and extent of any incompatibility.⁹⁴ It is important to recognise that, while most Bills are compatible with human rights, there are instances where this is not the case. When a Bill includes a part or provision that is incompatible, the minister or member of parliament will explain the nature and extent of the incompatibility.⁹⁵ Members of parliament can review the statement of compatibility and express any concerns they may have in second reading debate on the Bill.

⁹² Victorian Equal Opportunity and Human Rights Commission, *2018 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, November 2019), 56.

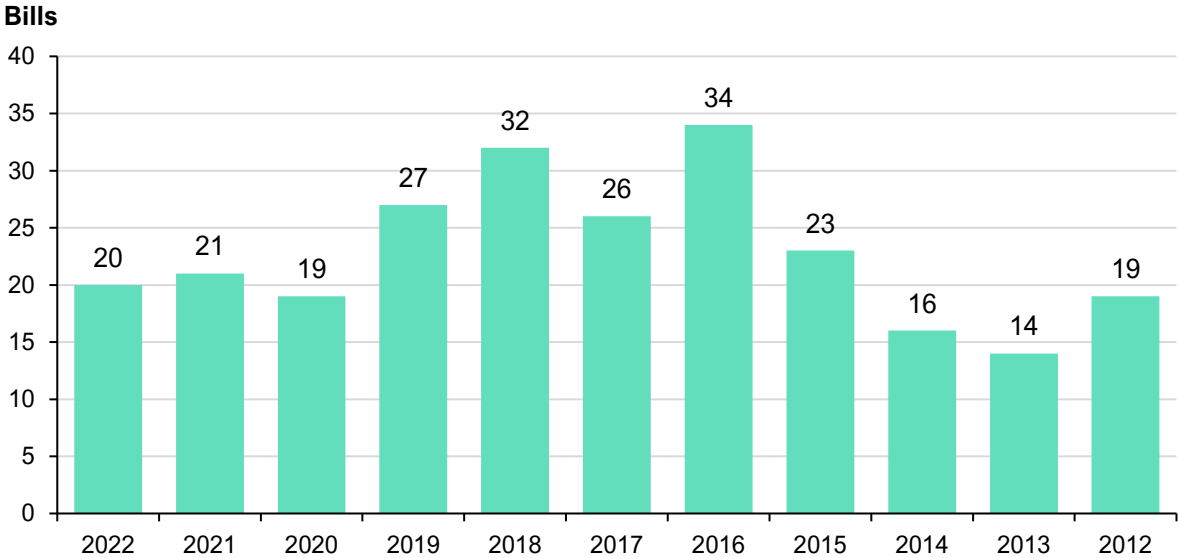
⁹³ Victorian Equal Opportunity and Human Rights Commission 2019 Submission to Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights. Australian Human Rights Commission Consultation* (November 2019) 16.

⁹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28(2).

⁹⁵ *Ibid* s 28(3).

The Charter also requires the SARC to assist with this process by preparing a report on any Bill tabled in parliament, highlighting whether SARC considers a Bill to be incompatible with human rights.⁹⁶ These reports are accessible in Alert Digests on SARC’s website. Public submissions may be made to SARC and these are also published on SARC’s website. In this way the dialogue model offers the opportunity for close contemplation of the human rights implications of proposed legislation through proper scrutiny.

Figure 1: Number of Bills in which SARC reported on human rights



The Charter permits parliament in exceptional circumstances to declare that a law or part of a law has effect despite being incompatible with human rights. This is known as an ‘override declaration’. The override declaration signals to courts, public authorities and the community that the relevant legislation does not have to be interpreted in accordance with the Charter and that public authorities do not need to act compatibly with human rights when implementing it.

A member of parliament introducing a Bill containing an override must make a statement explaining the exceptional circumstances that justifies inclusion.⁹⁷

⁹⁶ Ibid s 30.

⁹⁷ Ibid s 31(3).

The Commission considers that an override should not be included in a national Human Rights Act. The Commission's submission to the Eight-Year Review of the Charter recommended that section 31 of the Charter is unnecessary and should be repealed. The Commission observed that if a clause was retained, resorting to an override should only occur in extreme situations, particularly where there is an evidence-base and urgent serious risk to public security or a state of emergency.⁹⁸ The Michael Brett-Young report on the Eight-Year Review of the Charter in 2015 recommended repealing overrides. This report noted that neither the ACT's Human Rights Act, nor the New Zealand Bill of Rights Act contain provisions for override declarations.⁹⁹

The QHRC has also made submissions on a 2023 override that the override provision suppresses the judiciary's contribution to the dialogue model by preventing courts from commenting on the scope of protected rights, the justifiability of any limitation on rights, the interpretation of the law compatibly with the rights in the Charter and the need for a declaration of inconsistent interpretation. QHRC expressed support for the option of the Government relying on statements of compatibility (noting any incompatibility) which provides a transparent process to identify how laws may be incompatible with human rights.¹⁰⁰

Resort to an override provision in practice

The original rationale for an override clause was that the Human Rights Consultation Committee thought there was value in indicating to parliament that the power to override human rights should be exercised only in exceptional circumstances.¹⁰¹

There are a number of justifications for the use of overrides in exceptional circumstances:

- According to the Explanatory Memorandum to the Charter, overrides were intended 'when Parliament is introducing new legislation and exceptional circumstances exist which require Parliament to depart from the Charter in a specific manner and for a fixed period of time.'¹⁰²
- 'Exceptional circumstances' was framed as being threats to national security or a state of emergency which threaten the safety, security and welfare of the people of Victoria.¹⁰³
- The Second Reading Speech confirmed that 'it is the intention of the government that this override power should only be used in such circumstances where it can be shown that the public interest will be best served by doing so.'¹⁰⁴

⁹⁸ Victorian Equal Opportunity and Human Rights Commission, *Eight Review of the Charter* (Report, 14 September 2011) 86. Note that the Commission did not make detailed submissions or recommendations on overrides in the submission to the Four Year Review of the Charter – at that stage, no overrides had been used in Victoria.

⁹⁹ Matthew Brett-Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities* (Report, September 2015) 14, 196. The Brett-Young Report observed that under a dialogue model, the Government has supremacy and can pass legislation that is incompatible with human rights.

¹⁰⁰ Queensland Human Rights Commission, Submission to Economics and Governance Committee *Strengthening Community Safety Bill 2023* (24 February 2023) 12.

¹⁰¹ Matthew Brett-Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities* (Report, September 2015) 197, citing: Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee (2005) 75.

¹⁰² Explanatory Memorandum, 21: *Charter of Human Rights and Responsibilities Bill 2006* (Vic), clause 31.

¹⁰³ *Ibid.* This aligns with the requirement at international law (ICCPR Article 4) that Governments should only act incompatibly with the Charter in times of public emergency which threaten the life of the nation.

¹⁰⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1292 (Rob Hulls).

In practice, however, overrides have operated differently in Victoria, as well as Queensland:

- No overrides made in Victoria have involved exceptional circumstances like a serious threat to national security or a state of emergency. These declarations have related to the application of uniform laws relating to the legal profession and restrictions on the granting of parole to prisoners convicted of killing police officers and the convicted mass murderer, Julian Knight.¹⁰⁵
- The overrides relating to the Victorian *Corrections Act 1986* allow them to operate indefinitely rather than for a fixed period because they state in each case that the override will not expire after five years.¹⁰⁶
- The Queensland override relates to legislation making it an offence for children to breach a condition of their bail undertaking.¹⁰⁷

Overrides may raise a red flag about law that is set to be overridden, however in the long term, they hinder the mechanisms for scrutiny and accountability and reduce transparent oversight of overridden law.

The effectiveness of the Charter in law-making

Case study: Transparency about limitations placed on human rights during pandemic responses – Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021

The Charter performed a key role in the development of Victoria's new pandemic legislation, and as a result human rights protected under the Charter will be central to future pandemic responses in Victoria under legislation passed by the Victorian Parliament in 2021. In December 2021 the Victorian Government introduced specific legislation to respond to pandemics, including COVID-19 – the first legislation of its kind in Australia. This Bill introduced a pandemic specific framework in the *Public Health and Wellbeing Act 2008* (Vic) (PHWA) to assist in the prevention and management of public health risks posed by pandemics. The amended legislative framework improves upon the State of Emergency framework under the PHWA which was used to manage and respond to the first 21 months of the COVID-19 pandemic in Victoria.

¹⁰⁵ *Legal Profession Uniform Law Application Act 2014* (Vic); *Corrections Amendment (Parole) Bill 2014* (Vic) and *Corrections Amendment (Parole) Act 2018* (Vic) amending *Corrections Act 1986* (Vic).

¹⁰⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2014, 746 (Kim Wells); Victoria, *Parliamentary Debates*, Legislative Assembly, 24 July 2018, 2236 (Lisa Neville).

¹⁰⁷ *Strengthening Community Safety Act 2023* (Qld), amending the *Bail Act 1980* (Qld) s 29(3). The override will expire five years after commencement. The QHRC Commission made submissions on the Bill expressing concern about the significant and disproportionate limitations it places on the rights of children: Queensland Human Rights Commission, Submission to Economics and Governance Committee *Strengthening Community Safety Bill 2023* (24 February 2023).

Under the new framework, when making a pandemic order, if the Minister for Health (Minister) is of the opinion that the making, variation or extension of an order does limit human rights, they will need to publish an assessment of any human rights that are limited by the pandemic orders including an explanation of:

- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.¹⁰⁸

Victoria's dialogue model of human rights was demonstrated during SARC's engagement with the Minister and parliament's consideration of community stakeholder feedback during debate on the *Pandemic Management Bill 2021*. SARC referred several human rights questions to the Minister before the Bill passed, including whether:

- the minister's powers in the Act are limited to areas where the pandemic declaration applies and public health risks arising from the disease to which a public health direction relates
- pandemic orders must be interpreted in a way that is compatible with human rights and whether it is unlawful for the minister to fail to give proper consideration to a Charter right
- the Independent Pandemic Management Advisory Committee is a public authority.¹⁰⁹

The Minister's response to SARC observed that pandemic orders can only be used in relation to the relevant pandemic disease or disease of pandemic potential for which a declaration has been made. The Minister also confirmed that pandemic orders made under the Act are likely to be instruments of a legislative character and therefore, they must be interpreted in a way that is compatible with human rights in accordance with section 32 of the Charter.¹¹⁰

In response to the question of whether section 38 of the Charter applies to making pandemic orders, the Minister noted that the obligation to properly consider and to act compatibly with human rights is practically fulfilled by provisions that ensure that relevant Charter rights are thoroughly considered in the making of pandemic orders which must not unjustifiably limit human rights.¹¹¹

The Commission and other stakeholders worked with government and other members of parliament on the Charter impacts of the Bill. This resulted in stronger safeguards against the abuse of extraordinary powers than those previously used under the State of Emergency declaration within the *Public Health and Wellbeing Act 2008* (Vic) and the State of Disaster declaration made under the *Emergency Management Act 1986* (Vic).

¹⁰⁸ *Public Health and Wellbeing Act 2008* (Vic) ss 165AP(2)(c)-(d).

¹⁰⁹ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 15 of 2021, November 2021).¹¹⁰ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 2 of 2022, February 2022) 5.

¹¹⁰ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 2 of 2022, February 2022) 5.

¹¹¹ *Ibid.*¹¹² Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2021, 4463 (Matthew Guy); Victoria, *Parliamentary Debates*, Legislative Council, 16 November 2021, 4463, (Dr Catherine Cumming), 4379 (Fiona Patten); Victoria, *Parliamentary Debates*, Legislative Council, 16 November 2021, 4463 (Dr Catherine Cumming), 4379 (Fiona Patten).

For example, during the passage of the Bill through parliament, members of parliament referred to feedback from the legal community and bodies including the Law Institute of Victoria, the Human Rights Law Centre, Liberty Victoria and the Victorian Ombudsman that raised points of concern during the Bill's development, including:¹¹²

- the need to ensure the framework clearly set out how the Charter would apply once a pandemic declaration was in place
- the proposed introduction of increased penalties for aggravated non-compliance with pandemic orders and the lack of appropriate safeguards for these offences
- the lack of an outer limit on the total duration of a pandemic declaration once made
- the lack of external review of detention orders and the ability of the minister to make orders applying to specific people or classes of people.¹¹³

The Victorian Government's amendments to the Bill addressed many of these issues:

- They ensured the Charter would continue to apply and operate during a pandemic.
- They removed the proposed introduction of increased penalties for aggravated non-compliance with pandemic orders entirely.
- They ensured that, while there is no limit on the number of times a pandemic declaration may be extended, the Premier must be satisfied on reasonable grounds that there continues to be a serious risk to public health arising from a pandemic or disease of pandemic potential to make a pandemic declaration. Further, there is a requirement that the Premier must revoke a pandemic declaration as soon as they are satisfied that the circumstances giving rise to the declaration are no longer a serious risk to public health.
- They introduced changes to the review of detention orders.¹¹⁴

Throughout the COVID-19 pandemic, the Commission recognised that introducing public health measures designed to safeguard human life while upholding human rights is a delicate balancing act. The Charter played an important role in shaping the pandemic framework to ensure that human rights are protected to the fullest extent possible in future responses to pandemics.

¹¹² Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2021, 4463 (Matthew Guy); Victoria, *Parliamentary Debates*, Legislative Council, 16 November 2021, 4463, (Dr Catherine Cumming), 4379 (Fiona Patten); Victoria, *Parliamentary Debates*, Legislative Council, 16 November 2021, 4463 (Dr Catherine Cumming), 4379 (Fiona Patten).

¹¹³ See, for example, Human Rights Law Centre, 'Explainer: Victoria's proposed new pandemic law' Human Rights Law Centre (Webpage, 10 November 2021). <<https://www.hrlc.org.au/factsheets/2021/11/10/explainer-victorias-proposed-newpandemic-law>>; Liberty Victoria, 'Liberty Victoria Comment on the Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021' Liberty Victoria (Webpage, 3 November 2021) <<https://libertyvictoria.org.au/content/libertyvictoria-comment-public-health-andwellbeing-amendment-pandemicmanagement-bill-2021>>.

¹¹⁴ Victorian Equal Opportunity and Human Rights Commission, *2021 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, September 2022) 27.¹¹⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(1).

Case study: Embedding cultural rights of Aboriginal People – Advancing the Treaty Process with Aboriginal Victorians Bill 2018

In response to the Uluru Statement from the Heart the Victorian Government introduced the *Advancing the Treaty Process with Aboriginal Victorians Bill 2018* (Vic) to:

- facilitate treaty-making between Aboriginal Victorians and the Victorian Government
- provide for the government to recognise the Aboriginal Representative Body as the sole representative of Aboriginal Victorians for the purpose of treaty negotiations.

Cultural rights are protected under the Charter, including 'Aboriginal persons distinct cultural rights'¹¹⁵ to enjoy identity and culture, maintain and use language, maintain kinship ties and maintain their distinctive spiritual, material and economic relationship with the land and water and other resources with which they have a connection under traditional laws and customs.

When examining the Bill, SARC raised concerns regarding the cultural rights of Aboriginal people.¹¹⁶ The SARC report noted that the Bill did not require that the members of the Aboriginal Representative Body must be Aboriginal Victorians or that they hold cultural authority to represent Aboriginal Victorians:

the choice of representatives may be an expression of cultural identity or it could be considered to be a cultural practice. Because certain representatives carry authority within Aboriginal culture, such as elders, allowing those elders to represent the community in establishing the treaty process may allow the expression of that cultural identity and respect that cultural practice.¹¹⁷

During parliamentary debate, members referred to the SARC discussion of the Bill's potential impact on Aboriginal Victorians' cultural rights in relation to representation in support for the treaty negotiation process and the Aboriginal Representative Body.¹¹⁸ The government responded to this issue by tabling a house amendment providing that, among other things, only traditional owners can be on the Aboriginal Representative Body.¹¹⁹ This change recognised that mandating Aboriginal representation in establishing the treaty process will promote the expression of cultural identity and practice required under the Charter – demonstrating the Charter's effectiveness in promoting dialogue on human rights that resulted in meaningful change for rights holders.

¹¹⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(1).

¹¹⁶ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (No 5 of 2018, 1 May 2018) 4.

¹¹⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 June 2018, 1727 (Lidia Thorpe).

¹¹⁸ Victoria, *Parliamentary Debates*, Legislative Council, 19 June 2018, 2764 (Georgie Crozier) and 21 June 2018, 2908 (Georgie Crozier).

¹¹⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, 1847.

Case study: Balancing human rights – Voluntary Assisted Dying Bill 2017

In 2017, Victoria became the first Australian state to legislate voluntary assisted dying by a self-administered lethal dose of medication for Victorian adults with decision-making capacity suffering from a serious incurable condition. The legislation aimed to promote the right to privacy and the right to liberty and security of person by allowing Victorians suffering a terminal illness in very limited circumstances to choose to end their life according to their own preferences.¹²⁰

The Bill and the human rights issues it raised were passionately debated in parliament. Members in favour of the Bill argued that supporting voluntary assisted dying allows people the choice to die with dignity, under the safest and most rigorous framework possible.¹²¹ Others expressed reservations regarding safeguards in the Bill.

It was emphasised in parliamentary debate that SARC had observed that the statement of compatibility did not expressly discuss whether the Bill limited the ‘right not to be arbitrarily deprived of life’ and that the deprivation of life by assisted dying may be ‘arbitrary’ if the person’s consent is the result of outside pressure, irrationality or depression.¹²²

The Charter provided a human-rights lens through which to consider this important values-based issue. As a result of SARC and parliament consideration of the Charter impacts, the legislation balanced competing rights and interests.¹²³

Case study: Charter driven legislative improvement – Justice Legislation Amendment (Body-worn Cameras and Other Matters) Bill 2017

The *Justice Legislation Amendment (Body-worn Cameras and Other Matters) Bill 2017* permitted body-worn cameras to be used by Victoria Police and other emergency service personnel (for example paramedics).

SARC queried whether the Bill would permit communication of public information from body-worn cameras for investigations, prosecutions and police complaints and observed that, if the Bill prohibited most communication of information captured by the cameras, it could engage the right to freedom of expression, security of the person and right to a fair hearing. For example, if a person alleging police violence is prevented from obtaining information from a body-worn camera, this could limit the person’s ability to seek a court remedy for police violence or defend themselves in a criminal prosecution.¹²⁴

As a result of SARC’s scrutiny, a house amendment was passed to clarify that information obtained via body-worn cameras can be used in prosecutions, as evidence at internal disciplinary proceedings and for training purposes. This again demonstrates the value of the dialogue model in bringing discussion of rights under the Charter to the fore and contributing to legislation that better balances human rights.

¹²⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 2945 (Jill Hennessy).

¹²¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2017, 3115 (Ros Spence).

¹²² Victoria, *Parliamentary Debates*, Legislative Council, 14 November 2017, 5826 (Richard Dalla Riva).

¹²³ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 2945 (Jill Hennessy).

¹²⁴ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (No 11 of 2017, 22 August 2017) 10-11.

The Charter and human rights in courts and tribunals

Charter litigation provides an important mechanism for individuals and groups to assert their human rights, obtain remedies and achieve more rights-compliant outcomes across an increasingly broad range of issues. As well as being an important way for people and groups to assert their human rights, section 40 of the Charter also allows the Commission to intervene in legal proceedings where a question of law arises about the application of the Charter or the interpretation of another law in light of the Charter.

The Charter also requires that courts and tribunals themselves must interpret Victorian laws in line, or 'compatibly' with human rights (so far as it is possible to do so consistently with the law's purpose).¹²⁵ There is also a requirement that administrative functions of the court (including the issuing of warrants, listing cases for hearing and conducting committal proceedings) be performed compatibly with human rights.¹²⁶

Case study: Certain Children v Minister for Families and Children (No 2) [2017] VSC 251 ('Certain Children No 2')

Certain Children No 2 is one of the most significant Charter cases in recent years. It demonstrates the power of the Charter to protect children, even in circumstances involving emergencies and complex policy challenges for the state and provides the Victorian Government with practical guidance on the human rights legal standards in relation to children.

This case was part of a series of litigation considering the legality of detaining young people within a section of an adult maximum-security prison. It makes clear that when public authorities deal with children in urgent or 'emergency' situations, the state must be particularly mindful of its human rights obligations under the Charter. In the words of Justice Dixon, 'giving lip-service to the Charter whilst working towards a pre-determined outcome does not amount to proper consideration'.¹²⁷

Background

In late 2016 children being lawfully held at the purpose-built Parkville Youth Justice Precinct caused damage resulting in reduced infrastructure capacity at the facility. In response, orders made by the Governor in Council established part of Barwon Prison (Barwon), an adult maximum-security prison, as a youth justice facility.¹²⁸ The state announced that children would be temporarily transferred to what was known as the Grevillea unit (Grevillea) within Barwon while repairs were undertaken at Parkville. Litigation was subsequently brought on behalf of children held at Grevillea and in December 2016, Justice Garde found against the state.¹²⁹ The state unsuccessfully appealed the decision to the Victorian Court of Appeal, which

¹²⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.

¹²⁶ *Ibid* s 4(j).

¹²⁷ *Certain Children v Minister for Families and Children (No 2)* (2017) VSC 251.

¹²⁸ Victorian Equal Opportunity and Human Rights Commission, *2017 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, August 2018) 35.

¹²⁹ *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* (2016) VSC 796.

confirmed Justice Garde's decision that the Orders in Council were invalid and ordering that the children be released from Grevillea.¹³⁰

Soon after in December 2017, on the state's recommendation, the Governor in Council made revised Orders (Grevillea orders), again establishing Grevillea as a youth justice centre, enabling the state to continue detaining children at Grevillea. Further litigation was brought against the state – the plaintiffs in *Certain Children No 2* were children and young people aged between 15 and 18 who were detained within Grevillea. Their claim required the court to consider whether the state had given proper consideration to human rights when deciding to transfer each child to the adult maximum-security prison and in making the Grevillia orders. The case also considered whether any limitation on the human rights of the children was reasonable and justified.

Findings and impact

The court found that two rights under the Charter were engaged and breached:

- a child's right to protection in best interests (s 17(2))
- a detainee's right to humane treatment with respect for dignity (s 22(1)).¹³¹

Justice Dixon outlined the main limitations on the plaintiffs' human rights included:

- 'the impact of Grevillea's built environment on youths who are children detained there which was, and remains, immutably, that of a maximum security adult gaol
- the extensive incidence of isolation by lockdown for substantial periods of the day, extending up to 23 hours, in cells designed for occupation by adult men. These conditions existed at the time of the relevant decisions and continued well into February 2017
- the continuing use, to the time of trial, of handcuffing in order to move detainees between one wing of Grevillea and the outdoor exercise area, through an unused area of the adult prison
- a failure to consider the heightened risk of detainees developing mental health problems, directly relating to the environment at Grevillea including depression, anxiety conditions, cognitive problems, hypersensitivity, and paranoia, or exacerbation of existing mental health problems
- the limitations on the developmental needs of detainees, specifically their physical, social, emotional, intellectual, and spiritual needs, that were affected by the use of Grevillea as a Youth Justice Precinct.¹³²

Ultimately, the court found that the state had not given proper consideration to the children's human rights in making its decision, and that the limitations on the children's rights were not justified.¹³³ The judgment also suggested that robust evidence of these considerations must be presented for the courts to consider it as a reasonable limitation under section 7(2) of the Charter.

¹³⁰ *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* (2016) VSCA 343.

¹³¹ *Certain Children v Minister for Families and Children (No 2)* (2017) VSC 251.

¹³² Supreme Court of Victoria, 'Detention of children in youth justice facility within Barwon Prison found to be unlawful' (Media Release, 11 May 2017) < <https://www.supremecourt.vic.gov.au/for-the-media/media-releases/detention-of-children-in-youth-justice-facility-within-barwon-prison> >.

¹³³ *Certain Children v Minister for Families and Children (No 2)* (2017) VSC 251 [23].

The case demonstrated the power of the Charter to protect children, even in circumstances involving emergencies and complex policy challenges for the state. In doing so, the case is one of the most significant Charter cases in several years and provides the government with useful and practical guidance on the human rights legal standards expected to be met when dealing with children.¹³⁴

Case study: Coronial inquest into the death of Veronica Nelson

The inquest into the death of Veronica Nelson (Nelson inquest) is a significant case highlighting the vital role of the Charter in responding to human rights issues in closed environments and the tragic consequences that can arise when public authorities do not give proper consideration to human rights.

Background

Veronica Nelson was a proud Gunditjmarra, Dja Dja Warrung, Wiradjuri and Yorta Yorta woman. In December 2019, after being arrested for shoplifting-related offences and refused bail, Veronica was remanded to the Dame Phyllis Frost Centre, Victoria's maximum-security women's prison.

During her time in custody, Veronica was suffering from opioid withdrawal and an undiagnosed medical condition. Despite repeatedly asking for help, her requests were often ignored and her level of care was not escalated. Veronica died in custody within three days of her arrest.¹³⁵ Veronica's treatment and death in custody became the subject of a Coronial Inquest launched in 2022, with Coroner Simon McGregor's findings delivered in January 2023.

The Commission intervened in the Nelson inquest and made submissions to assist the coroner to apply the Charter to the facts before him when making findings and recommendations. This included considering the scope of Veronica's rights under the Charter including:

- the right to recognition and equality before the law (s 8) the right to life (including an effective investigation of a death) (s 9)
- the right to protection from torture and cruel, inhuman or degrading treatment (s 10)
- cultural rights (s 19)
- the right to liberty and security of person (s 21)
- the right to humane treatment when deprived of liberty (s 22).¹³⁶

The Commission also made submissions on the extent to which Victorian public authorities such as Corrections Victoria and Victoria Police met their obligations under the Charter.

Among other things, the inquest examined the adequacy of healthcare provided to Veronica in prison, the effect of stigma and discrimination on Veronica's treatment and how Victoria's bail laws operate to disproportionately incarcerate Aboriginal women.

¹³⁴ Victorian Equal Opportunity and Human Rights Commission, *2017 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, August 2018) 35.

¹³⁵ Inquest into the passing of Veronica Nelson (Coroners Court of Victoria, Coroner Simon McGregor, 30 January 2023).

¹³⁶ Victorian Equal Opportunity and Human Rights Commission Submission to the Inquest into the passing of Veronica Nelson (17 June 2022).

Findings and impact

Coroner McGregor agreed with the Commission that all the above Charter rights were engaged variously during Veronica's arrest and remand, provision of healthcare and her custodial management. He noted the Commission's role and involvement in the hearing,¹³⁷ and the Charter features prominently throughout the written findings and recommendations, which aligned closely with the Commission's submissions. Ultimately His Honour found Veronica's death was preventable.¹³⁸

Some notable findings in the coroner's report that demonstrated how Veronica's rights under the Charter were impacted, including that:

- the police bail decision maker was empowered to grant Veronica bail and failed to give proper consideration, including adequate consideration of Veronica's vulnerability in custody as an Aboriginal woman, and this infringed her Charter rights¹³⁹
- the relevant public authority's Opioid Substitution Therapy Program Guidelines infringe prisoners' rights to be treated humanely while deprived of liberty and their right to life given the greater risk of fatal overdose upon release, contrary to sections 22 and 9 of the Charter¹⁴⁰
- the treatment available to Veronica for her opioid dependence, by virtue of the relevant public authority's Opioid Substitution Program Policy, was inadequate to treat her withdrawal, this as well as Veronica's treatment by some prison officers on the morning of her death constituted cruel and inhumane treatment, contrary to section 10 of the Charter¹⁴¹
- sections of the *Bail Act 1977* (Vic) are incompatible with the Charter and have a discriminatory effect on Aboriginal people, in particular Aboriginal women.¹⁴²

The Charter provided an invaluable framework for the coroner to consider the impacts on Veronica's human rights during her time in custody and the extent to which public authorities met their human rights obligations, which significantly shaped his findings.

The Nelson inquest informed reforms announced by the Victorian Government to amend the state's bail laws to ensure they do not disproportionately affect minor offenders and marginalised groups, including Aboriginal people. The coroner's recommendations have also been influential in the government's commitment to ensuring custodial health services are delivered in a manner consistent with the Charter.¹⁴³

¹³⁷ Inquest into the passing of Veronica Nelson (Coroners Court of Victoria, Coroner Simon McGregor, 30 January 2023) 22.

¹³⁸ Ibid 286.

¹³⁹ Ibid 94.

¹⁴⁰ Ibid 148.

¹⁴¹ Ibid 149.

¹⁴² Ibid Appendix B 2.

¹⁴³ Victorian Government, *Response to the Coroner's Recommendations* (Report, 28 April 2023) <https://www.coronerscourt.vic.gov.au/sites/default/files/2023-05/2020%200021%20Response%20to%20recommendations%20from%20The%20Attorney-General%20Jaclyn%20Symes%20and%20The%20Victorian%20Government_NELSON_Redacted.pdf>.

Among the 39 recommendations made by Coroner McGregor was that within 12 months of the findings, the relevant public authorities request, under section 41(c) of the Charter, the Commission to conduct a review of any improvements to programs, practices and facilities made in response to the recommendations.¹⁴⁴ The Commission is currently scoping this review and working with the relevant department to develop an implementation framework that will be used to monitor progress on outcomes intended by the coroner's recommendations. This review work will continue the role of the Charter in ensuring that public authorities act in accordance with human rights, including in closed environments.

Case study: HYY (Guardianship) [2022] VCAT 97

This case, brought in the Victorian Civil and Administrative Tribunal (VCAT), raised important human rights questions about whether and in what circumstances a guardian can authorise the use of restraint against a person to administer medication. The Commission intervened in this case due to the significant human rights implications.

It was important that this issue be approached with a human rights lens to ensure that people who are subject to guardianship orders have their human rights adequately protected, that restrictive practices are only authorised in limited circumstances and with the appropriate safeguards in place.¹⁴⁵

Background

The case was brought by the Office of the Public Advocate (OPA) in VCAT under the *Guardianship and Administration Act 2019* (Vic). The case involved HYY, an older woman who was appointed a guardian from the OPA. HYY was voluntarily admitted to hospital for treatment of psychological and physical health conditions and needed daily anticoagulant medication to reduce a serious risk of stroke. However, sometimes HYY refused to take the anticoagulant medication. The hospital asked HYY's guardian whether the treating medical staff could physically restrain HYY to administer the medication. In response, OPA sought advice from VCAT about the scope and extent of its powers to authorise restraint.

VCAT invited the Commission, the Attorney-General and the Secretary of the Department of Health to make submissions in the case because of the potentially far-reaching consequences of a decision.

The Commission submitted that this issue engaged several Charter rights including:

- the right to protection from cruel, inhuman or degrading treatment (s 10)
- from being subjected to medical or scientific experimentation or treatment without full, free and informed consent (s 10)
- the right to liberty and security of person (s 21).

The Commission submitted, amongst other things, that only VCAT can empower a guardian to authorise the use of restrictive practices and must impose appropriate safeguards on the use of restrictive practices that would best protect the person subject to the guardianship orders.

¹⁴⁴ Inquest into the passing of Veronica Nelson (Coroners Court of Victoria, Coroner Simon McGregor, 30 January 2023) Appendix C 19.

¹⁴⁵ Victorian Equal Opportunity and Human Rights Commission, *G93966 – HYY (Guardianship) VCAT 97 - Jan 2022* (Web Page) < <https://www.humanrights.vic.gov.au/legal-interventions/intervention-in-g93966-hyy-guardianship-vcat-97-jan-2022>>.

Through its submissions, the Commission emphasised the role of the OPA and VCAT as public authorities and was able to assist VCAT to understand and perform its obligations as a public authority to properly consider and act compatibly with human rights under the Charter.¹⁴⁶

Findings and impact

VCAT accepted all of the Commission's submissions on the questions about which OPA requested advice. VCAT found that a guardian's power to make decisions about medical treatment does not extend to decisions authorising forcible physical restraint to overcome resistance to medical treatment. If such restraint is required, then an appointed guardian must seek an order from VCAT.

This case clearly highlights one arm of the dialogue model – the role of the Charter in decision-making of public authorities. Moreover, it demonstrated the role of the Charter in everyday decisions and actions, such as the administration of medication for people in vulnerable circumstances. Through its application of the Charter, the case has since provided invaluable guidance on when physical restraint – a significant limitation on a person's human rights – can be authorised.

Case study: DPP v SE [2017] VSC 13

This case raised issues about the procedure for courts hearing and determining applications for bail by an Aboriginal child and demonstrated the significant role that the Charter can have in the courts. Significantly, it also considered the circumstances in which courts must directly apply the Charter to proceedings, rather than simply ensuring that it applies the law in a way that is compatible with the Charter.

Background

The applicant was a 17-year-old Aboriginal person, known in the case by the pseudonym SE, with an intellectual disability who applied for bail while waiting for a sentencing hearing. SE was arrested in December 2016 in relation to alleged offending and was held for two days in detention on remand in a remand centre.

Findings and impact

The Supreme Court found that several Charter rights were directly applicable to the court in the way it heard and determined bail application hearings for children. This included the right to equality, the right of a child to protection in its best interests, the rights of children within the criminal process, the right to humane treatment when deprived of liberty and cultural rights. In practice, this included taking into account the applicant's age, Aboriginality and intellectual disability.

The Supreme Court made directions regarding the applicant's hearing requiring that they were not to be handcuffed or detained with adult prisoners, could sit with counsel and their support persons, the judge and counsel would not robe, they would speak in understandable language, they would explain what was going on at all times and they would ensure that SE familiarised themselves with the surroundings.

¹⁴⁶ Victorian Equal Opportunity and Human Rights Commission, *2021 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, September 2022) 38.

In his ruling, Justice Bell illustrated the significant role the Charter can have in the courts:

The obligation of the court under s 6(2)(b) of the Charter to apply human rights has a particular salience in relation to the custody at court of children applying for bail and the procedures to be followed when hearing and determining such applications. The hearing and determination of an application for bail by a child is often the first point of contact between the court and a child in the criminal process. Where so, it marks the commencement of the court's obligation to ensure the child's human rights, including the right to be detained separately from adult prisoners at court and to a procedure that takes account of his or her age, vulnerability and need for rehabilitation, as well as the right effectively to participate in a legal proceeding.¹⁴⁷

Case study: Coronial Inquest into the death of Tanya Day

The coronial inquest into the death of Yorta Yorta woman Tanya Day broke new ground as the first inquest to consider whether systemic racism contributed to the cause and circumstances of a death. The inquest demonstrates how rights protected under the Victorian Charter can inform the scope of a coronial process.

Background

On 5 December 2017, Aboriginal woman Tanya Day was removed from a regional train operated by V/Line (a public authority), and arrested for public drunkenness, an offence that has been abolished in most Australian states because of its discriminatory impact on First Nations peoples. Tanya was taken into police custody, where she fell and hit her head multiple times in the holding cell, causing a brain haemorrhage. Tanya was eventually transferred to hospital and underwent surgery but did not regain consciousness. She died in hospital on 22 December 2017. A coronial inquest was held into her death in police custody in 2019.¹⁴⁸

The Commission intervened in the inquest, submitting that the Charter required the coroner to investigate whether systemic racism was a cause or circumstance of Tanya's death. The Commission argued that the Coroners Court is bound by the Charter to act compatibly with human rights and to consider human rights when making decisions. In order to give effect to the right to life, the coronial process must ensure a comprehensive and effective investigation into Tanya's death. This includes scrutinising not only the immediate causes of Tanya's death, but also the broader systemic causes at play.¹⁴⁹

¹⁴⁷ *DPP v SE* (2017) VSC 13 [14].

¹⁴⁸ Victorian Equal Opportunity and Human Rights Commission, *2019 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, September 2022) 26-27.

¹⁴⁹ Victorian Equal Opportunity and Human Rights Commission, 'Outline of the Submission of the Victorian Equal Opportunity and Human Rights Commission', Submission in Inquest into the Death of Tanya Day (Coroners Court of Victoria, Coroner English, 17 April 2019) <https://www.humanrights.vic.gov.au/static/c0d45956cc1d81687658e9d26ed72f89/Intervention-Tanya_Day_Inquest-Submissions-Apr_2019.pdf>.

Findings and impact

In a landmark decision, Deputy State Coroner English accepted the submissions from Tanya's family and the Commission, ruling that for the first time a coroner would consider whether systemic racism played a part in a death in custody. She found that to conduct a comprehensive and effective investigation, she would assess the evidence through the lens of systemic racism.

Coroner English's made a number of findings related to Tanya's treatment by public authorities:

- The V/Line officer's treatment of Tanya was influenced by her Aboriginality and affected by unconscious bias. The V/Line officer considered Tanya to be 'unruly' despite her being asleep and it took him less than a minute to call for police. Deputy State Coroner English confirmed that Tanya's right to freedom of movement, protected under the Charter, was engaged by the V/Line officer's decision to call for police.
- The police did not adequately check on Tanya in her cell, as required by their own guidelines and standard operating procedures. The police also did not treat Tanya humanely or with dignity in the cell, as required by the Charter.¹⁵⁰

This case demonstrates the Charter's effectiveness in informing the considerations of the courts in respect to human rights and in providing a lens through which to view the treatment of all people, especially vulnerable people, by civic institutions. The inquest was instrumental to the Victorian Government committing to abolishing the offence of public drunkenness and to replace it with a health-based approach that will promote therapeutic and culturally safe pathways to assist alcohol-affected people in public. Legislation giving effect to this commitment passed the parliament in 2022.

¹⁵⁰ Ibid.



Victorian Equal Opportunity & Human Rights Commission

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