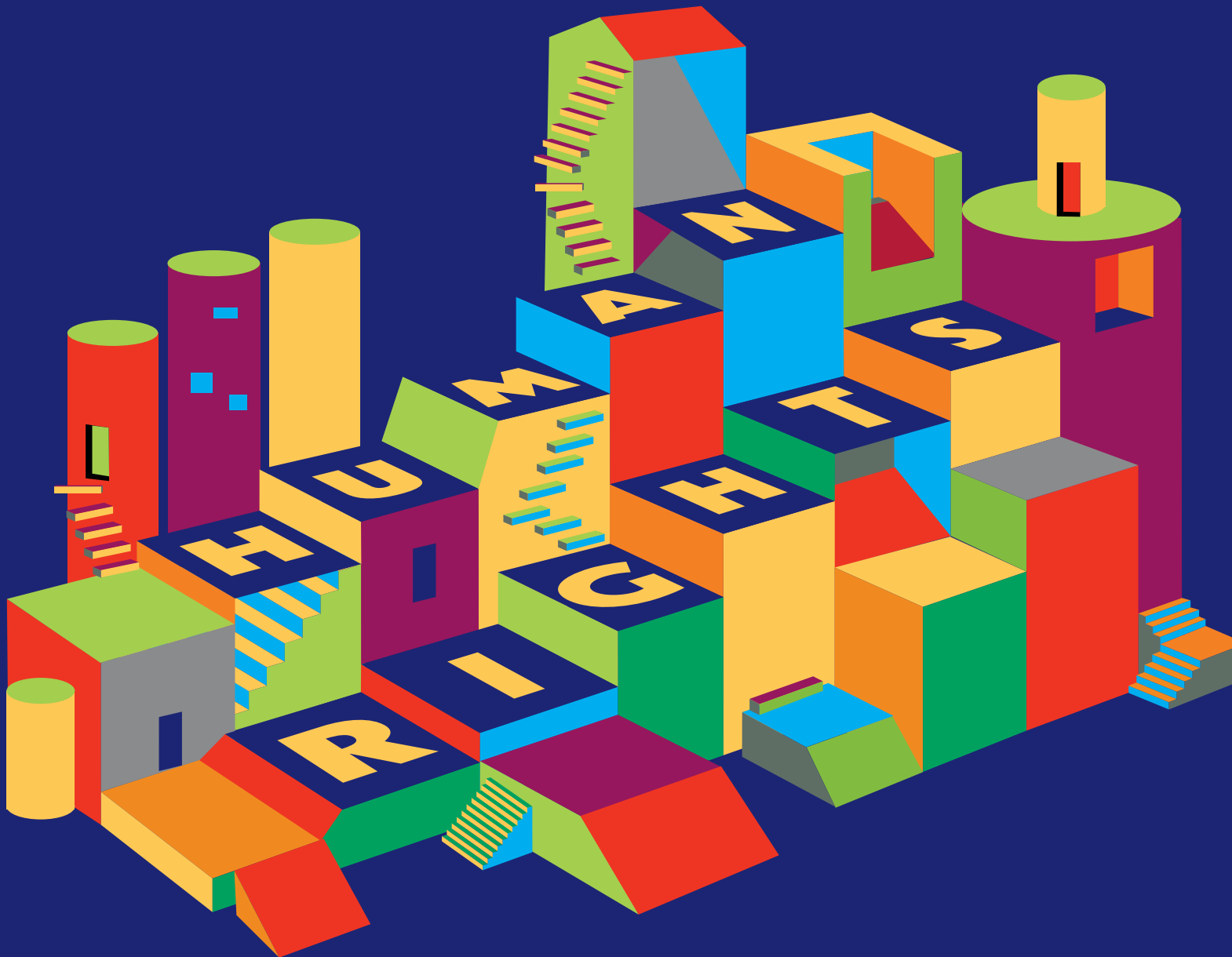




Victorian Equal Opportunity  
& Human Rights Commission



## 2015 report on the operation of the Charter of Human Rights and Responsibilities



## Victorian Equal Opportunity & Human Rights Commission

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### 2015 report on the operation of the Charter of Human Rights and Responsibilities

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# Foreword

The Victorian Equal Opportunity and Human Rights Commission (the Commission) is pleased to present the 2015 report on the operation of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

The 2015 report focuses on the protection and promotion of four fundamental rights under the Charter: the right to equality, the right to protection of families and children, cultural rights, and the right to liberty and security.

Human rights belong to all Victorians. However, the importance of having human rights protections is often of particular significance for the most vulnerable in our community. Protecting human rights not only leads to better outcomes for individuals, it strengthens the Victorian community for everyone.

The 2015 reporting year coincided with the Eight Year Review of the Charter, enabling deeper reflection about the effectiveness and operation of the Charter. In the past few years, the Commission has observed a declining investment in human rights education and the development of a human rights culture within government.

We know that there is more that can be done to ensure that the Charter is embedded into government policies, programs and practices. We also know that there is more to be done to make Victorians aware of their rights and how to exercise them. The Commission will continue to work closely with public authorities and the community to increase the use and understanding of the Charter, and to ensure that human rights drive systemic outcomes.

This report highlights a number of troubling human rights concerns in Victoria in 2015. Many of these issues are not new. They are systemic issues that have a significant and ongoing impact on the rights of everyday Victorians, including children and young people, women, people with disabilities, LGBTI Victorians and Aboriginal and Torres Strait Islander Victorians.

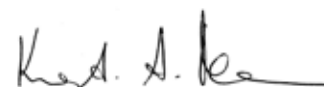
Strong human rights leadership and a sustained commitment to change are critical to tackle many of these complex human rights issues. While it is disheartening to hear the same issues from year-to-year, the report profiles the important contributions of community organisations in shining a light on human rights issues, and the diverse work by public authorities to promote and respond to human rights in Victoria.

There have been some great examples of leadership in advancing gender equality across government: Victoria Police commissioned an independent review into sex discrimination and sexual harassment, including predatory behaviour, within the organisation; the Department of Environment, Land, Water and Planning demonstrated a genuine commitment to flexible work practices; and the Victorian Government appointed Victoria's first Gender and Sexuality Commissioner and established an LGBTI taskforce.

We would like to thank everyone who contributed to this important report, including state government departments and statutory agencies, local councils, courts and tribunals, and community organisations.



**John Searle**  
Chairperson



**Kristen Hilton**  
Commissioner

# Introduction

## About this report

The *Charter of Human Rights and Responsibilities Act 2006* (the Charter) aims to protect and promote human rights for all Victorians. It recognises that:

- human rights are essential in a democratic and inclusive society
- human rights belong to all people without discrimination
- the diversity of the people of Victoria enhances our community
- human rights come with responsibilities
- human rights have a special importance for Aboriginal Victorians.<sup>1</sup>

This is the Commission's ninth annual report on the operation of the Charter to the Victorian Attorney-General. The Commission's report on the Charter must examine:

- the operation of the Charter, including its interaction with other laws
- any declarations of inconsistent interpretation made by the courts
- any override declarations made by the Victorian Parliament.<sup>2</sup>

This report examines the operation of the Charter in the 2015 calendar year. It reflects the way the Charter has been operating in the courts and tribunals, in parliament, in the work of public authorities and in the community.

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<sup>1</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), preamble.

<sup>2</sup> *Ibid* s 41(a).

## Overview

The 2015 Charter Report includes the following chapters:

- **Chapter one** considers the use and interpretation of the Charter in Victorian courts and tribunals in 2015.
- **Chapter two** considers the role of the Charter in law-making, including consideration of the Scrutiny of Acts and Regulations Committee process.
- **Chapter three** considers human rights oversight and accountability, human rights complaints, and human rights resources and education.
- **Chapter four** considers the right to equality.
- **Chapter five** considers the right to protection of families and children.
- **Chapter six** considers cultural rights (including Aboriginal cultural rights).
- **Chapter seven** considers the right to liberty and security (as well as the right to humane treatment when deprived of liberty).

## Consultation

As with previous reporting years, the Commission consulted with all Victorian government departments, Victorian courts and tribunals, and selected statutory agencies and community organisations to inform the content of the report.

This year, we also asked all local councils to provide contributions for the main report. A standalone report on the operation of the Charter in local government in 2013 and 2014 can be found on the Commission's website.

We also gave relevant government departments and agencies an opportunity to respond to specific human rights concerns that were raised by community organisations and statutory agencies

in consultation for the report. These responses are reflected in chapters one to four of this report.

Appendix A includes a full list of organisations we consulted with. The Commission thanks these organisations for their ongoing contribution to this report.

We note that it is beyond the capacity of this report to undertake a comprehensive survey of the experience of the community in using the Charter. We acknowledge that the report does not capture the work of all community organisations and we look forward to ongoing engagement with a broad range of organisations.

## About the Charter

Public authorities, the Victorian Parliament, and courts and tribunals, all have a significant role to play in protecting and promoting rights under the Charter.

### Public authorities under the Charter include:

- public officials
- ministers of Parliament
- local councils, including councillors and council staff
- Victoria Police
- statutory entities that have functions of a public nature
- entities that carry out functions of a public nature on behalf of a public authority
- courts and tribunals when they are acting in an administrative capacity.

The Charter provides that:

- public authorities must act compatibly with human rights and properly consider human rights when they make decisions<sup>3</sup>
- all Bills presented to the Victorian Parliament must be accompanied by a statement of compatibility with human rights<sup>4</sup>
- all legislation must be assessed for compatibility with human rights by the bipartisan Scrutiny of Acts and Regulations Committee<sup>5</sup>
- courts and tribunals must interpret legislation consistently with human rights, and may have regard to international, regional and comparative domestic human rights law<sup>6</sup>

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

4 *Ibid* s 28.

5 *Ibid* s 30.

6 *Ibid* s 32.

- the Supreme Court has the power to declare that a law is inconsistent with human rights but does not have the power to strike it down.<sup>7</sup>

### There are 20 fundamental rights recognised in the Charter:

- the right to recognition and equality before the law (section 8)
- the right to life (section 9)
- the right to protection from torture and cruel, inhuman or degrading treatment (section 10)
- the right to freedom from forced work (section 11)
- the right to freedom of movement (section 12)
- the right to privacy and reputation (section 13)
- the right to freedom of thought, conscience, religion and belief (section 14)
- the right to freedom of expression (section 15)
- the right to peaceful assembly and freedom of association (section 16)
- the right to protection of families and children (section 17)
- the right to take part in public life (section 18)
- cultural rights (including Aboriginal cultural rights) (section 19)
- property rights (section 20)
- the right to liberty and security of person (section 21)
- the right to humane treatment when deprived of liberty (section 22)
- rights of children in the criminal process (section 23)
- the right to a fair hearing (section 24)
- rights in criminal proceedings (section 25)
- the right to not be tried or punished more than once (section 26)
- the right to protection from retrospective criminal laws (section 27).

7 *Ibid* s 36.

## 2015 review of the Charter

The Charter requires the Attorney-General to arrange for a review of the Charter after four years of operation (in 2011) and eight years of operation (in 2015).

The 2015 review of the Charter was led by Mr Michael Brett Young and considered ways to enhance the effectiveness of the Charter and improve its operation.

The resulting report, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, was tabled in Parliament on 17 September 2015 and was the result of eight open public forums, 60 meetings across the state and more than 100 submissions by interested individuals and organisations.

The Commission had a statutory role to assist in the review, and provided support to the community consultation, as well as a detailed submission to the review.

## The Commission's work

The Commission is an independent statutory body with functions that include:

- providing education about human rights and the Charter
- intervening in court cases that raise the Charter
- conducting reviews of public authorities' programs and practices on request
- reporting annually to the government about the operation of the Charter.<sup>8</sup>

These functions sit alongside our responsibilities under the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic).

The Commission's key work with the Charter in 2015 included:

- reporting on the **Independent review** into sex discrimination and sexual harassment including predatory behaviour, in Victoria Police
- making a comprehensive submission and recommendations to the **2015 review of the Charter**, as well as facilitating community consultations
- hosting two expert panel discussions related to the 2015 review of the Charter as part of our **VPS Human Rights Network**
- publishing our report on **local government** and the operation of the Charter during 2013/14
- launching a **guideline** on transgender people and sport
- delivering human rights **training** to rights holders and duty holders
- launching an **Easy English resource** on reporting crime in partnership with Victoria Police
- completing the first phase of our **Aboriginal cultural rights project**
- progressing our research project on **Auslan interpreters in Victorian hospitals**
- producing **human rights resources**, including the Human Rights Ready Reckoner and the Pocket Guide to the Charter
- launching a **video tool** on the Charter in local government planning
- undertaking **Charter reviews**, including into Monash Health's policy about the provision of same-gender healthcare
- **intervening** in cases before courts and tribunals that raise the Charter
- completing our pilot project for Australia's first ever third-party reporting mechanism for the Aboriginal community, **Report Racism**
- making policy submissions and appearances to government inquiries and reviews, such as the **Royal Commission into Family Violence**.

<sup>8</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 41.



# Chapter 1: The Charter in courts and tribunals

## Part one: The Charter in court and tribunal decisions

Court and tribunal decisions on the Charter establish precedents that affect how the Charter is interpreted and how it applies to protect human rights in Victoria.

The Attorney-General of Victoria and the Commission have a right to intervene in any case before a court or tribunal where there is a question about how the Charter applies or a question about how a law should be interpreted to best protect the human rights in the Charter. Interventions in 2015 are outlined at page 16.

### Public authorities and the charter

The Charter provides that it is unlawful for a public authority to act in a way that is incompatible with a human right and to fail to give proper consideration to a relevant human right when making a decision (section 38).

#### Limiting human rights

The Charter recognises that human rights are not absolute and may be subject under law to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

A limit on a human right is 'compatible' with that right under section 38 where it is a reasonable limit taking into account all relevant factors, including those set out in section 7(2) of the Charter.

### When is a non-government body a public authority?

Private and non-government entities are public authorities under the Charter when they perform functions of a public nature on behalf of government or a public authority.

In *Goode v Common Equity Housing Limited*,<sup>9</sup> the Victorian Civil and Administrative Tribunal (VCAT) declared that the community housing organisation, Common Equity Housing (CEHL), is a public authority under section 4(1)(c) of the Charter when it provides affordable social or community housing for low income tenants and when regulated under the *Housing Act 1983*.

VCAT made this declaration after finding that the provision of social housing to low income tenants is a function of a public nature. Even though CEHL has no contractual relationship with the government to provide social housing, VCAT found that it was a function performed on behalf of the government because of the regulatory regime that applies under the Housing Act.

<sup>9</sup> (Human Rights) [2015] VCAT 269.

## Background: *Goode v Common Equity Housing Limited*

*Goode v Common Equity Housing Limited* involved claims by Ms Goode that CEHL's conduct in the management of her tenancy was discriminatory on the grounds of her disability (Post Traumatic Stress Disorder) in breach of the Equal Opportunity Act. Ms Goode also claimed that CEHL had breached her Charter rights to equality, privacy, protection from torture and freedom of expression.

Because the Charter does not create a standalone cause of action a person can only seek a remedy for a breach of Charter rights in legal proceedings where a person is seeking a remedy for a breach of another law.

In 2013, VCAT dismissed Ms Goode's claims that CEHL had acted unlawfully under the Equal Opportunity Act and ruled that VCAT did not have the power to consider whether there had been a breach of Charter rights because the legal proceedings relating to the Equal Opportunity Act had been dismissed.

The Supreme Court overturned this decision and said that VCAT does have the power to consider whether there has been a Charter breach even where the non-Charter part of the proceeding is unsuccessful.<sup>10</sup>

In 2015, the case returned to VCAT for consideration of whether CEHL had acted unlawfully under the Charter.

The first question for VCAT to determine was whether CEHL was acting as a functional public authority bound by Charter obligations when it provides social housing to low income tenants. VCAT found that it was, however it dismissed the proceeding after concluding that CEHL had not acted incompatibly with Ms Goode's human rights nor failed to give proper consideration to them.

The Commission intervened in this case to submit that Common Equity Housing is a public authority under section 4(1)(c) of the Charter to which the Charter's obligations apply.

The decision in *Goode v Common Equity Housing Limited* may affect the conduct of other community housing associations regulated under the Housing Act, by confirming they are public authorities when providing affordable social housing to low income tenants.

Victoria Legal Aid (VLA) reported that in 2015 it continued to see community housing 'no reason' eviction notices by community housing associations to long-standing and vulnerable tenants. VLA said that it has raised the Charter in efforts to assist tenants in these situations.

For example, VLA obtained an injunction from the Supreme Court to prevent a community housing association from applying for a possession warrant in the case of a tenant faced with eviction after nine years. One of the grounds for the injunction was that the warrant would breach the tenant's right to non-arbitrary interference with his home. The Court ordered mediation, following which the housing association undertook not to evict the tenant.

## Charter obligations of public authorities

In the highly anticipated decision of *Bare v IBAC*,<sup>11</sup> the Court of Appeal considered the application of sections 38 (conduct of public authorities) and 39 (legal proceedings) and what the result should be when the Court finds a public authority has breached its Charter obligations.

### Background: *Bare v IBAC*

In 2010, Nassir Bare complained to the Office of Police Integrity (OPI) that he was capsicum sprayed by Victoria Police officers while handcuffed, had his teeth chipped on the gutter during his arrest and was racially abused by officers.

Mr Bare complained that the conduct breached his right not to be treated in a cruel, inhuman or degrading way (section 10(b)) and his right to equal protection of the law without discrimination (section 8). Lawyers for Mr Bare argued that there was an implied right in section 10(b) of the Charter to have an effective investigation of his complaint conducted independently to Victoria Police.

OPI decided not to investigate the complaint and offered to refer it to Victoria Police for investigation instead. Mr Bare refused the offer and challenged OPI's decision in the Supreme Court. In 2013, the Supreme Court dismissed Mr Bare's challenge of OPI's decision and upheld OPI's decision.

<sup>10</sup> See *Goode v Common Equity Housing* [2014] VSC 585.

<sup>11</sup> [2015] VSCA 197. IBAC is the Independent Broad-based Anti-corruption Commission.

Mr Bare appealed the Supreme Court's decision to the Court of Appeal. The appeal turned on whether OPI gave proper consideration to relevant human rights. In 2015, the Court of Appeal declared that OPI had failed to give proper consideration to Mr Bare's right to protection from cruel, inhuman or degrading treatment and his right to equality before the law, making OPI's decision unlawful.<sup>12</sup>

The Court of Appeal ordered that the Independent Broad-based Anti-corruption Commission (IBAC) (which replaced OPI) reconsider the course for dealing with Mr Bare's complaint of cruel, inhuman or degrading treatment by Victoria Police.<sup>13</sup>

The Commission intervened in this case (see discussion at pages 8 and 12).

## Giving proper consideration to relevant rights

In *Bare v IBAC*, the Court of Appeal found that OPI had breached section 38 of the Charter by failing to give proper consideration to Mr Bare's right to protection from cruel, inhuman and degrading treatment and his right to equality. These rights were relevant for OPI to consider because of Mr Bare's allegations of serious and repeated mistreatment by police, and the suggestion that the conduct was racially motivated and a systemic issue.

Three judges of the Court of Appeal made separate findings but agreed with the approach to the 'proper consideration' obligation in the earlier case of *Castles v Secretary of the Department of Justice*.<sup>14</sup> Applying this approach, the Court found that proper consideration requires a decision-maker to:

- understand which rights may be relevant
- understand how those rights will be interfered with by the decision
- seriously think about the possible impact on human rights and how this may affect the person
- identify other interests or obligations
- balance all competing interests.<sup>15</sup>

<sup>12</sup> Ibid.

<sup>13</sup> IBAC reported that it has now concluded its investigation into the matter. IBAC published the *Operation Darby Special Report* in May 2016, finding that there was insufficient evidence to substantiate Mr Bare's allegations regarding excessive use of force and racial discrimination.

<sup>14</sup> (2010) 28 VR 141, [184], [185]–[186].

<sup>15</sup> [2015] VSCA 197, [221] (Warren CJ), [279], [288]–[289] (Tate JA), [535]–[536], [538] (Santamaria JA).

The Court of Appeal took the same approach in *Hoskin v Greater Bendigo City Council* (discussed at page 14).<sup>16</sup>

### ***Bayley v Nixon and Victoria Legal Aid***

*Bayley v Nixon and Victoria Legal Aid* considers VLA's Charter obligations to act compatibly with human rights and to give proper consideration to relevant rights.<sup>17</sup>

Mr Bayley had separately been convicted and was already serving a life sentence for the highly publicised murder and rape of Gillian Meagher.

VLA had refused to grant Mr Bayley legal assistance for the appeals of convictions in relation to three other women. An independent reviewer confirmed this decision. The independent reviewer considered it likely that appeals against some of those offences would be successful, and if so, the convictions would be quashed. Nevertheless, according to the independent reviewer, there was an important public interest in ensuring public confidence in the stewardship of legal aid funds, such that it was not reasonable to provide Mr Bayley with legal assistance for the appeals.

Mr Bayley challenged the decisions not to grant him legal assistance.

The Supreme Court found that it was not lawful to reject an application for legal assistance upon the sole ground that the person is a notorious and unpopular individual who has already been convicted of and sentenced for heinous crimes. The Court went on to find that the decision to refuse to grant legal assistance was legally unreasonable. The decision was set aside for reconsideration.

The Supreme Court did not reach this finding because of the Charter. Nevertheless, the decision states that legal aid is 'closely connected' with human rights, including rights in criminal proceedings and the right to equality. The Supreme Court noted that VLA and the independent reviewer were public authorities, and so must act compatibly with and make decisions giving proper consideration to Charter rights.

<sup>16</sup> [2015] VSCA 350, [35]–[36] (Warren CJ, Osborn and Santamaria JJA).

<sup>17</sup> [2015] VSC 744.

## Result of a failure to give proper consideration to relevant rights

In *Bare v IBAC*, the Commission argued that where a public authority's decision contravenes section 38 of the Charter, the decision should be found to amount to 'jurisdictional error', meaning that the decision is necessarily invalid and of no effect. Some early Charter cases had treated a breach of section 38 in this way.<sup>18</sup>

The Attorney-General and IBAC opposed this argument.

The Court of Appeal did not settle the question of whether a failure to give proper consideration to human rights in making a decision is jurisdictional error. Chief Justice Warren (the minority) found that it was not. Justices Tate and Santamaria (the majority) considered that this issue was unnecessary to decide.

However, the Court did find that a breach of section 38 could amount to a 'non-jurisdictional error of law on the face of the record'. In this case, the record was OPI's written reasons. Because OPI's failure to give proper consideration to Mr Bare's relevant human rights was an error of law on the face of the record, the majority of the Court of Appeal allowed Mr Bare's appeal.

### ***Burgess v Director of Housing***

In *Burgess v Director of Housing*, in 2014, the Supreme Court found that the Director of Housing had failed to give proper consideration to the right to protection of families and children when deciding to evict a public housing tenant.<sup>19</sup> In 2015, the Supreme Court made orders to give effect to its finding. The Court ordered that the Director's decision to apply to VCAT for a warrant to possess the tenant's home was unlawful because it did not give proper consideration to the human rights of the tenant and her son. As a result, the Court set aside the warrant of possession.

## The ongoing impact of Burgess in practice

Justice Connect Homeless Law has observed that while the Burgess decision has been extremely helpful in articulating the Director's obligations to consider human rights in making eviction decisions, another result of the decision is that there is only a narrow window where a person can seek judicial review of the eviction decisions of social landlords.<sup>20</sup>

The Tenants Union of Victoria reported an example in 2015 that demonstrates that the *Burgess v Director of Housing* decision has affected how the Director of Housing engages with tenants and considers Charter rights in decision-making.

The matter involved a young man who was a tenant of the Director with long-term poly-substance abuse. In 2014, he was admitted involuntarily into a psychiatric ward. He informed the Director of being away. The tenant used the temporary absence of leave form but the absence was not covered by the Director's temporary absence of leave policy. As a result, no reduced rent was granted.

As part of obtaining support, the tenant frequently returned home overseas to see his family. The tenant's treatment had adverse affects on his health, which resulted in irregular Centrelink and rent payments. The tenant authorised a friend to make payments on his behalf, however, the Director required the tenant's attendance.

Following rent arrears of \$1000 resulting from a rental rebate cancellation, the tenant was served a notice to vacate. The Director then applied to VCAT for a possession order, which was granted with no rent owing. The tenant did not attend and was not represented. The tenant sought a review, which a friend attended on behalf of the tenant. The director sought a warrant to possess the premises.

<sup>18</sup> See, for example, *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328 (overturned on appeal, but not on this point).

<sup>19</sup> *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648.

<sup>20</sup> See 2014 Report on the Operation of the Charter, 72: '[A] person must either start Supreme Court proceedings before VCAT considers whether to make a possession order (losing the ability to exhaust the no-cost avenue of VCAT), or wait until after the Director has applied for a warrant of possession (risking eviction, in some cases into homelessness, before they can do so)'.



The Tenants Union reports that the Director did not execute the warrant in light of the decision in *Burgess v Director of Housing*. Once the Director and tenant engaged in communication, the matter was resolved by agreement. This example highlights the importance of the Director giving proper consideration to relevant rights and engaging with tenants or relevant social support agencies to reach just resolutions.

## When can a breach of Charter obligations be challenged in legal proceedings?

The Charter does not create a standalone cause of action or remedy for a breach of the Charter's obligations (section 39).

Court and tribunal decisions continue to give guidance on when a breach of Charter obligations can be challenged in legal proceedings.

### ***RW v State of Victoria***

In *RW v State of Victoria*, VCAT confirmed that an applicant is unable to challenge conduct on the basis that it was unlawful under the Charter where the same conduct is not challenged as unlawful on a non-Charter basis.<sup>21</sup>

At the time of the hearing this issue was unsettled. However, before the issue was decided by VCAT, the Supreme Court ruled that a person can only bring a legal challenge to an act or decision as being a breach of the Charter where the same act or decision is challenged because it contravenes a law other than the Charter.<sup>22</sup>

### **Background: *RW v State of Victoria***

*RW v State of Victoria* was a proceeding brought by a parent on behalf of her son (HL) against the Department of Education and Training and a school principal. HL was diagnosed with autism spectrum disorder and a moderate intellectual disability. HL had been a student at a dual model school for students with a mild intellectual disability and students with a moderate to profound intellectual disability.

RW complained that the department and the principal had contravened the Equal Opportunity Act by failing to make reasonable adjustments that would enable her son to benefit from his education.

Particular adjustments sought were a full-time dedicated aide, a formal communication method and use of a personalised token board. VCAT found that there had been no contravention of the Equal Opportunity Act.

RW also complained that the department and the principal had breached the Charter, with allegations that HL had been subject to physical force, restraint, isolation and seclusion, unreasonably limiting his rights to equality, protection from cruel inhuman or degrading treatment, freedom of movement, protection of a child in their best interests, and liberty.

VCAT found that it was unable to consider or determine whether there had been a Charter breach because there was no corresponding challenge to the lawfulness of the alleged physical force, restraint, isolation and seclusion under the Equal Opportunity Act.

The Commission intervened in this case under the Equal Opportunity Act and the Charter.<sup>23</sup>

### ***Djime v Kearnes***

In *Djime v Kearnes*, VCAT ruled that the applicant's allegations that conduct was unlawful under the Charter could not proceed where the allegations that the same conduct was unlawful under the Equal Opportunity Act were dismissed for lacking in substance.<sup>24</sup>

Mr Djime made allegations against Victoria Police arising from incidents over a number of years from 2008. Mr Djime raised the Charter in one incident, alleging that during an interaction with police when he was dancing in the street, the police had discriminated against him contrary to the Equal Opportunity Act, racially vilified him contrary to the Racial and Religious Tolerance Act and breached his rights to freedom of expression and freedom of movement under the Charter.

VCAT summarily dismissed the allegations of discrimination and racial vilification related to this incident under section 75(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* on the basis they were lacking in substance. VCAT ruled that claims of a breach of Charter rights could not proceed where the non-Charter claims were unable to proceed. VCAT noted that in any event there was no basis on which it could be said Mr Djime's rights had been breached and dismissed the Charter claim for lacking in substance.

21 (Human Rights) [2015] VCAT 266.

22 *Goode v CEHL* [2014] VSC 585.

23 This was a 2014 intervention reported in the 2014 Charter Report.

24 (Human Rights) [2015] VCAT 941.

## **McKay v Taylor**

In *McKay v Taylor*, the County Court ruled that it could not consider whether a police officer had failed to give proper consideration to relevant human rights in contravention of the Charter because there was no corresponding claim that the police officer's conduct was unlawful on a non-Charter ground.<sup>25</sup>

Mr McKay was subject to a roadside breath test. After it returned positive, the police officer asked Mr McKay to accompany him to the nearest police station for a breath test, about 30 km away. Mr McKay did not and was convicted for refusing to comply with the police requirement. Mr McKay appealed to the County Court.

Mr McKay said he suffered from sciatica, which would have made it extremely uncomfortable and painful to travel to the station in the back of a police van. However, Mr McKay had not told the officer of his disability. The officer said that, had he known, he could have requested a sedan.

Mr McKay argued that the officer failed to give proper consideration to the Charter right to protection from degrading treatment. He said the requirement to travel in the back of the police van was degrading and the officer could have enquired as to whether he had any problem with doing so.

The Attorney-General intervened and submitted that as the preliminary breath test had been positive, the police officer was obliged to require Mr McKay to accompany him and section 38(2) of the Charter applied. Section 38(2) provides an exception that it is not unlawful to fail to give proper consideration to relevant human rights where the public authority could not reasonably have made a different decision. The Attorney-General also made submissions on the effect of any unlawfulness under the Charter (see *Bare v IBAC* at page 128).

The County Court dismissed the appeal. The Court did not make a decision on the operation of section 38(2). However, the Court did find that it was unable to consider whether there had been a Charter contravention because Mr McKay had not sought any relief or remedy under another law. In any event, the Court expressed the view that the police officer had not failed to give proper consideration to relevant human rights, and even if he had, invalidity would not follow as a consequence.

## **Interpretation of laws compatibly with human rights**

The Charter requires courts and tribunals to interpret all Victorian laws in a way that is compatible with human rights, so far as it is possible to do so (section 32).

There were three Court of Appeal and Supreme Court cases in 2015 which considered the application of section 32 of the Charter.

### **Carolan v The Queen**

In *Carolan v The Queen*,<sup>26</sup> Mr Carolan was a convicted sex offender subject to an indefinite sentence of imprisonment under the *Sentencing Act 1991* as a form of preventative detention. The Director of Public Prosecutions applied for a review of that sentence.

Section 5(2BD) of the Sentencing Act states that in sentencing an offender, the court must not have regard to any possibility or likelihood of an application being made under a different preventative detention scheme – namely, for a supervision or detention order under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (SSODS Act). A question of interpretation arose as to whether 'sentencing an offender' as referred to in section 5(2BD) captured a 'review' of the sentence.

The SSODS Act provides for supervision or detention of serious sex offenders, but does not provide for indefinite sentence. Mr Carolan argued that the indefinite sentence should be discharged. He argued that the availability of the *SSODS Act* provided sufficient protection so that upon discharge of the indefinite sentence, he would not be a serious danger to the community.

Mr Carolan submitted that the Sentencing Act should be interpreted in a way that least impinged on his right to liberty. The Director argued that indefinite sentences were compatible with the right to liberty, and the existence of a separate scheme for detention or supervision did not make the scheme under the Sentencing Act arbitrary or unlawful.

The Court of Appeal considered that if the Sentencing Act was unclear, the Court would give that Act the meaning that 'best accords' with Mr Carolan's right to liberty. Therefore, section 5(2BD) should not be interpreted as preventing a court which is reviewing an indefinite sentence from having regard to the scheme under the SSODS Act.

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<sup>25</sup> (Unreported, County Court of Victoria, Judge Wilmoth, 26 November 2015).

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<sup>26</sup> [2015] VSCA 167.

## **Bare v IBAC**

In *Bare v IBAC*,<sup>27</sup> one of the issues considered by the Court of Appeal was whether Mr Bare was prevented from bringing judicial review proceedings against the decision by the Director of OPI not to investigate Mr Bare's complaint (but rather to refer it to Victoria Police for investigation).

Section 109 of the *Police Integrity Act 2008* provided that a protected person (including the Director of the OPI and a member of staff) is not liable to any civil or criminal proceedings to which they would otherwise have been liable, for an act purported to be done under the Police Integrity Act unless that act is done in bad faith. This kind of section is commonly known as a 'privative clause'.

Mr Bare argued that section 32 required an interpretation of section 109 which would not prevent the court from considering Mr Bare's claims of breach of section 38 of the Charter, but this argument was rejected by the trial judge in the Supreme Court.

However on appeal, the majority of the Court of Appeal found that section 109 did not preclude the court from reviewing the decision. Justices Tate and Santamaria reached this conclusion by applying other principles of statutory interpretation. Justice Tate observed that this interpretation was compatible with human rights, especially the right to a fair hearing which includes the right of access to the courts.

The majority of the Court of Appeal found that there had been an error of law on the face of the record and set aside the trial judge's orders refusing judicial review, and ordered that a fresh decision be made by IBAC.

## **Kuyken v Chief Commissioner of Police**

*Kuyken v Chief Commissioner of Police* was an appeal of a VCAT decision in relation to 16 applications by Victoria Police members alleging direct discrimination by the Chief Commissioner of Police.<sup>28</sup>

In 2012, laws were passed that authorised the Chief Commissioner to make 'standards of grooming' for the police force and specifically allowing discrimination. The Chief Commissioner made grooming standards that required men to be clean shaven (or only have a moustache) and have short hair. These grooming standards were in force six months prior to the laws being passed.

VCAT found the applicants had been directly discriminated against on the basis of their physical features in the area of employment, through the enforcement of the grooming standards. However,

the Chief Commissioner's conduct was authorised by section 5(2)(c) of the *Police Regulation Act 1952*, introduced by the 2012 laws. As a result, the Chief Commissioner was covered by the general exception in section 75 of the Equal Opportunity Act, and the conduct was not unlawful under that Act.

In 2015, on appeal, Mr Kuyken raised a new argument. He argued that the reference to 'standards of grooming' in section 5(2)(c) should be interpreted to preserve human rights and deny the Chief Commissioner power to determine a grooming standard requiring the removal of physical features such as facial hair. Mr Kuyken raised the right to equality under section 8(3) of the Charter.

The Supreme Court proceeded on the basis that section 8(3) was engaged. The Court found that the 2012 laws were intended to ratify and validate the grooming standards previously made by the Chief Commissioner, even if they were discriminatory under the Equal Opportunity Act or infringed the right to equality under section 8(3) of the Charter. There was no ambiguity or reasonably available alternative construction that would be more compatible with the right to equality. The limitation on that right was expressly authorised by Parliament.

The appeal was dismissed, including on other grounds raised by Mr Kuyken.

## **Other proceedings**

Section 32 was also raised by parties in other court proceedings decided in 2015, but those Charter arguments were either not pursued or not addressed in the decisions.<sup>29</sup>

VCAT considered how section 32 of the Charter applied to the interpretation of the *Guardianship and Administration Act 1986* in the case of *NLA*<sup>30</sup> and the Equal Opportunity Act in *Ingram v QBE Insurance*<sup>31</sup> and *Collins v Smith*.<sup>32</sup>

## **NLA**

In the case of *NLA*, VCAT rejected the section 32 argument that a guardian's power in the *Guardianship and Administration Act* 'to decide where the represented person is to live, whether permanently or temporarily' should be interpreted to exclude the possibility of a decision that he live

27 [2015] VSCA 197.

28 [2015] VSC 204.

29 For example, in the cases of *Fertility Control Clinic v Melbourne City Council* [2015] VSC 424 (see page 15); *R & Anor v IBAC* [2015] VSC 374; *Yoxon v Secretary to the Department of Justice*; *Yoxon v Adult Parole Board* [2015] VSC 124; and *C v Children's Court of Victoria & Anor* [2015] VSC 40.

30 (Guardianship) [2015] VCAT 1104.

31 (Human Rights) [2015] VCAT 1936.

32 (Human Rights) [2015] VCAT 1992.

in a locked facility so as to be compatible with his human right to liberty.

NLA was a 70-year-old man subject to a guardianship order, with Parkinson's disease, a cognitive disability and other mental disorders. The Public Advocate was appointed as NLA's guardian by VCAT to make decisions for him, including about accommodation.

The Public Advocate consented to NLA's admission to a locked facility and asked that he only be allowed to leave with an escort. NLA argued that the Public Advocate was not empowered to detain him and that he should be allowed out during the day when he wished. The Public Advocate sought VCAT's advice about its authority to make this decision.

VCAT accepted that if the Guardianship and Administration Act was capable of more than one meaning it should apply section 32 to give it the meaning that best accords with human rights. However, VCAT found that it was not capable of more than one meaning. VCAT considered that NLA's interpretation would qualify the power in the Act to deciding 'where a person lives, provided he can come and go as he pleases', and found it was not required to read this qualification into the Act. It said that while the other interpretation limited the right to liberty, the limit was not unreasonable and unjustified under section 7(2) of the Charter.

VCAT went on to consider the Public Advocate's decision. It found that while the limitation on NLA's right to liberty was serious, the Public Advocate had acted within its power since its decision was to ensure that NLA received proper care, had his medication supervised, had fewer falls in public and had people to assist him when he does fall. However, VCAT requested the Public Advocate to explore less restrictive options for NLA.

The Public Advocate commented that:

*While VCAT found that the power given to the guardian to decide that a represented person live in a locked facility which they may only leave under supervision is compatible with the Charter provided that the limitation was reasonable and justified, the matter ... provides a timely reminder of the extraordinary authority of guardianship and the role of the Charter to ensure that rights not be impermissibly restricted.*

## Declarations of inconsistent interpretation

Where it is not possible to interpret a law in a way that is compatible with human rights, the Supreme Court can make a 'declaration of inconsistent interpretation' under the Charter (section 36).

The Supreme Court made no declarations of inconsistent interpretation in 2015. To date, there

has only been one declaration of inconsistent interpretation.<sup>33</sup>

## Use of international and overseas human rights law

The rights in the Charter are modelled on the rights set out in the International Covenant on Civil and Political Rights. A number of overseas jurisdictions have incorporated international human rights law into domestic law, for example, the United Kingdom and New Zealand.

In light of this, section 32(2) of the Charter provides that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

### **Bare v IBAC**

In *Bare v IBAC*, Mr Bare argued that there was an implied right to an effective and independent investigation of allegations of cruel, inhuman and degrading treatment under the right to protection from cruel, inhuman and degrading treatment. He argued that Victoria Police could not provide an effective and independent investigation.

The Attorney-General and IBAC opposed this argument.

The Commission argued that the Charter recognises already existing human rights at international law that Parliament seeks to protect and promote. The Court must therefore look to other jurisdictions to understand the true content of the human rights under the Charter.

The Commission argued that similar rights were recognised by the International Convention on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms. The Commission pointed to the case law under those international treaties, and the United Kingdom *Human Rights Act 1998*, which had established such an implied right.

However, the Court of Appeal referred to observations made by the High Court in *Momcilovic v The Queen*<sup>34</sup> particularly that of Chief Justice French, that caution should be exercised and foreign and international judgments should be consulted with care. The Court of Appeal found that there was no implied right under the Charter to an effective investigation independent of Victoria Police. This was based on several differences identified by the Court of Appeal between the Charter and the international treaties and overseas human rights law.

33 *R v Momcilovic* (2010) 25 VR 436 (the declaration of inconsistent interpretation was set aside on appeal).

34 (2011) 245 CLR 1.



## Key areas of consideration in 2015

### The right to equality

The right to equality in section 8 of the Charter has influenced VCAT's interpretation of the Equal Opportunity Act.

#### ***Ingram v QBE Insurance (Australia) Limited***

In *Ingram v QBE Insurance (Australia) Limited*, VCAT interpreted the Equal Opportunity Act having regard to the Charter's right to equality, in its decision that an insurer had discriminated against a policy holder on the basis of her disability.<sup>35</sup>

In 2011, Ms Ingram purchased an insurance policy for an overseas study trip. In early 2012 she was diagnosed with a depressive illness and cancelled her trip on medical advice. The insurance company denied her claim for cancellation costs, relying on a clause that excluded claims caused by a mental illness.

VLA assisted Ms Ingram with a complaint to VCAT that the policy was discriminatory and the insurance company had discriminated against her on the basis of disability, namely her mental illness, in contravention of the Equal Opportunity Act.

The insurance company argued that Ms Ingram's claim could not succeed because she did not have a mental illness when the policy was issued and as such did not have the protected attribute of a 'disability' at that time.

VCAT rejected this argument and found that the insurance company had discriminated against Ms Ingram because of her disability. VCAT considered that an interpretation of 'disability' in the Equal Opportunity Act compatible with the right to equality in section 8 of the Charter includes 'a disability that may exist in the future'. This was in keeping with the purpose of the Equal Opportunity Act to eliminate discrimination to the greatest possible extent by ensuring that all persons with disabilities, past, current or future, may rely on its protections.

VLA commented that this case is a positive example of the Charter encouraging a human rights interpretation of legislation.

#### ***Collins v Smith***

In *Collins v Smith*,<sup>36</sup> VCAT found that an employer had sexually harassed an employee in contravention of the Equal Opportunity Act.

VCAT can make a number of orders where a person contravenes the Equal Opportunity Act, including that a person pay 'an amount VCAT thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the contravention'.

<sup>35</sup> (Human Rights) [2015] VCAT 1936.

<sup>36</sup> *Collins v Smith* (Human Rights) [2015] VCAT 1029.

In December 2015, VCAT rejected the employer's argument that workplace accident compensation laws had the effect of limiting the remedies VCAT could award for a contravention of anti-discrimination laws in the workplace.<sup>37</sup>

VCAT considered the requirement in section 32 of the Charter to give the words of a statute, where capable of more than one meaning, the meaning that best accords with relevant human rights.<sup>38</sup> VCAT found that it should not prefer an interpretation of the laws that limited available remedies under the Equal Opportunity Act because that would undermine the human right to equal and effective protection from discrimination in section 8 of the Charter.

VCAT ordered the employer pay the employee compensation for the contraventions of \$332,280.

### Equality for people with disabilities

In *ZEH*,<sup>39</sup> the parents of a 25-year-old woman with an intellectual disability applied for consent for her to undergo permanent contraception (sterilisation). Due to her disability, ZEH lacked capacity to give consent to this 'special procedure'. Under the Guardianship and Administration Act, VCAT could consent if the special procedure would be in ZEH's best interests.

ZEH's parents wished to avoid the possibility of her becoming pregnant. ZEH was already taking the oral contraceptive pill.

VCAT identified that the right to equality in section 8(3) of the Charter was engaged (as was the right to protection from medical treatment without full, free and informed consent in section 10(c)). ZEH had the right to be treated equally before the law, as did every 25-year-old woman.

VCAT found that when making the decision about treatment, it must ask the question: can the decision be justified under the Charter? VCAT took into account the United Nations *Convention on the Rights of Persons with Disabilities* which provides that every person with a disability has a right to respect for their physical and mental integrity on an equal basis with others, and measures should be taken to ensure that persons with disabilities retain their fertility on an equal basis with others.

VCAT found that permanent contraception was not the least restrictive option and not in ZEH's best interests. ZEH could continue to take the oral contraceptive pill. VCAT did not consent to the special procedure.

<sup>37</sup> *Collins v Smith* (Human Rights) [2015] VCAT 1992.

The Commission intervened in this proceeding under the *Equal Opportunity Act 2010* (Vic).

<sup>38</sup> *Collins v Smith* (Human Rights) [2015] VCAT 1992, [100]–[103].

<sup>39</sup> (Guardianship) [2015] VCAT 2051.

## ***Matsoukatidou v Yarra Ranges Council***

The Supreme Court heard and reserved a decision involving the right to equality.

This case raised a question about whether the County Court was obliged to comply with the right to equality and the right to a fair hearing, in conducting a hearing of applications made by a mother and daughter. The applications were for orders setting aside the striking out of their appeals. The case also raised the question of whether, and how, the County Court was obliged to conduct the hearing, in a manner that took into account they were self-represented.

## **Right to freedom of religion in planning decisions**

*Hoskin v Greater Bendigo CC*<sup>40</sup> concerned an application by the Australian Islamic Mission Incorporated to the Greater Bendigo City Council for a planning permit to develop a mosque, sports hall and associated facilities.

The Council granted a permit. A number of objectors applied to VCAT for a review of the Council's decision, one of the grounds being that it would have significant adverse social effects. VCAT considered that there was no evidence for the objectors' concerns and upheld the Council's decision to grant the permit.

In doing so, VCAT accepted that both the Council and VCAT were public authorities under the Charter in making the decision and, as such, were required to give proper consideration to relevant Charter rights to freedom of religion (including worship)<sup>41</sup> and the right to practice religion.<sup>42</sup>

In weighing the matters before it, VCAT considered both the Charter rights of the persons who would use the mosque and the rights of objectors to participate in the permit application process.

VCAT referred to relevant cases which said that, in the interest of preserving the freedom to exercise religious beliefs, persons should not be prevented from practising their religion at the place where they wish to do so. The objectors challenged VCAT's decision, however the Court of Appeal

agreed with VCAT's decision and refused the appeal. The Court of Appeal considered that the rights to freedom of religion and to practice religion informed the interpretation of planning laws.<sup>43</sup> The Court observed that the objectives of planning laws embrace the development and provision of appropriate facilities for worship by those holding Islamic beliefs. The objectors could not object to a form of religious worship in itself.

## **Liberty and security**

### ***Balancing the right to liberty with other rights***

In the case of *Re Melissa*, the Department of Health and Human Services (DHHS) applied to the Supreme Court for interim orders authorising it to place a young person, Melissa (a pseudonym) in a residence that could be locked to detain her when Melissa was at immediate risk of harm to herself or others.

A court order was required because Victorian law does not authorise the placement of a child in a secure residence for a period longer than 21 days, or 42 days in exceptional circumstances.

A question arose whether DHHS could lock the doors of the young person's residence in a way that was compatible with her human rights, namely her right to liberty and against arbitrary detention.<sup>44</sup>

The Commission intervened and made submissions on the rights to liberty and the right of a child to such protection as is in his or her best interests. The Commission said that the orders could be compatible with Melissa's human rights if they were in her best interests, only used as a measure of last resort, and subject to independent oversight by the Commission for Children and Young People.

The Commission emphasised the importance of independent legal representation for a child in this kind of application and the guidance in international human rights law that a child's views must be given appropriate weight with regard to their circumstances when determining what is in the best interests of that child.

The Supreme Court, in its *parens patriae* jurisdiction, made interim orders in July 2015 and extended the interim orders in November 2015. In March 2016, the orders ended after DHHS applied to the Court to have the orders revoked on the basis they were no longer necessary or in Melissa's best interests.

The Supreme Court's reasons for its decisions will be published in 2016.

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40 [2015] VCAT 1124.

41 Section 14 of the Charter protects the right to freedom of thought, conscience, religion and belief, including a person's freedom to demonstrate their religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

42 Section 19(1) of the Charter provides that persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practice his or her religion and to use his or her language.

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43 *Hoskin v Greater Bendigo City Council* [2015] VSCA 350.

44 This is similar to the Charter question raised in the cases of *Re Beth* [2013] VSC 189 and *Re Beth (No 3)* [2014] VSC 121, in which the Commission intervened.

## **Right to humane treatment when deprived of liberty**

In *De Bruyn v Victorian Institute of Forensic Mental Health*<sup>45</sup>, the Supreme Court considered the Charter right that ‘all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person’.

The case involves Mr De Bruyn, a person deprived of his liberty under a custodial supervision order at Thomas Embling Hospital. He challenged the decision of the Victorian Institute of Forensic Mental Health to implement a Smoke Free Policy at the Hospital. Mr De Bruyn argued that the Smoke Free Policy engaged his right to humane treatment because, among other things, it would cause deterioration to his mental state.

The Institute argued that the Smoke Free Policy does not engage the right to humane treatment, submitting that the concerns were not based on expert or medical opinion and that the Policy was to be attended by support to patients in the form of nicotine replacement options, counselling and other support services. The Attorney-General also intervened and submitted that the adverse consequences identified by Mr De Bruyn did not amount to treatment that lacked humanity.

Mr De Bruyn’s challenge to the Smoke Free Policy, which was heard in 2015 and decided in 2016, was unsuccessful.

The decision in *De Bruyn v Victorian Institute of Forensic Mental Health* highlights that what may not be inhumane or an affront to the dignity of a person who is free to return to his home ‘may be one or both of those things’ to a person who suffers from a mental illness and is deprived of their liberty by residing in an institution.<sup>46</sup>

The Supreme Court decided that the Institute had not failed to give proper consideration to human rights, after finding that there had been a comprehensive consideration of the matters relevant to the decision to limit people’s choice to smoke at the hospital including any potential impact on human rights.

It also decided that the Policy did not engage the right to humane treatment. This is because the smoking ban was properly considered and only adopted after extensive consultation with patients. Although it was likely to cause some distress to Mr De Bruyn, it was for the purpose of protecting patients, staff and visitors from the known harmful effects of smoking and the Court did not consider it to be inhumane to hospital patients.

The Court considered whether the Victorian Institute of Forensic Mental Health, in imposing

the Smoke Free Policy, had acted unlawfully under the Charter by failing to give proper consideration to relevant human rights, including the rights to property, not to be subjected to medical treatment without consent, and to be treated with humanity and dignity when deprived of liberty.

## **Right to security**

The Police Registration and Services Board (Board) considered Charter rights, including the right to security, as a relevant public interest consideration in making a decision about whether to publish a decision under the *Victoria Police Act 2013*.

The Board’s decision related to its review of a decision to dismiss a member of Victoria Police because of misconduct of a sexual nature involving a member of the public. There was concern that publication of the decision might identify the complainant or witnesses.

The Commission made submissions in this matter (on invitation from the Board). The Commission’s submissions drew attention to its *Independent Review into Sex Discrimination and Sexual Harassment including Predatory Behaviour in Victoria Police* to demonstrate the potential adverse impacts of publication, including that there was a real risk of causing further harm and detriment to complainants and witnesses who had been targets of sexual harassment and of deterring future complaints.

The Commission also identified Charter rights that the Board should consider and balance when making a decision on the publication of identifying details, including the right to privacy, the right to security and the right to a fair hearing. The Board was satisfied the evidence identified by the Commission had relevance to this matter, which concerned misconduct of a sexual nature affecting members of the public and considered relevant human rights in making its decision.

The Board’s decision on publication, *Review Decision A72/2015*, identified that the right to security in section 21(1) of the Charter includes a person’s physical and mental health and its positive protection from interference by other persons where that security is threatened.<sup>47</sup>

The Board made an order prohibiting the publication of information capable of identifying persons affected and prohibiting the publication of its reasons for decision.

In reaching its decision that the publication of reasons in the matter would not be in the public interest, the Board took into account that the

45 [2016] VSC 111.

46 *Ibid* [127].

47 *Review Decision A72/2015* (decision on publication) (Police Registration and Services Board, Review Decision, Lester P and Members Frame and Walsh, 22 January 2015).

case involved matters of a highly sensitive and personal nature which, if made public, may have a significant detrimental impact on the privacy, health and security of the witnesses involved.

## Protest and the right to freedom of expression

### *Fertility Control Clinic v Melbourne City Council*

In *Fertility Control Clinic v Melbourne City Council*,<sup>48</sup> the Supreme Court considered whether the activities of anti-abortion protesters outside an East Melbourne fertility clinic providing family planning and reproductive services amounted to a 'nuisance' that Melbourne City Council was required to remedy under the *Public Health and Wellbeing Act 2008*.

The Fertility Control Clinic sought relief from the Supreme Court for the Council to take steps to stop the protestors' activity outside the clinic on the basis it was a nuisance. The Council raised the Charter to argue that extending the meaning of 'nuisance' from private nuisance to public nuisance would be incompatible with protestors' Charter rights to freedom of expression and peaceful assembly.

The Commission intervened under the Charter. The Commission argued that the meaning of 'nuisance' in the Act included both public and private nuisances. The Commission highlighted that the right of protestors to freedom of expression and peaceful assembly can be limited where necessary to protect the rights of patients and Clinic staff to privacy and with the public interest to protect public order and public health.

The Court's decision did not address the Charter argument because it was not pursued by the Council at the hearing. Without reference to the Charter, the Supreme Court found that 'nuisance' encompassed both public and private nuisances. The Court determined that the Council had not failed to exercise its powers to remedy the alleged nuisance caused by the activities of the protestors.

However, while the Supreme Court did not compel the Council to remove protestors from outside the fertility clinic, shortly after the case was decided the Victorian Government announced the creation of safe access zones around fertility control clinics to allow women to access terminations without harassment and intimidation (see page 26).<sup>49</sup>

### *Fraser v Walker*

In *Fraser v Walker*, the County Court considered the interpretation of the offence of displaying an obscene figure in a public place under the *Summary Offences Act 1966*.<sup>50</sup>

Ms Fraser had been convicted in the Magistrates' Court of one count of displaying an obscene figure in a public place after she displayed A3 placards with photographs of dead fetuses on the footpath outside the East Melbourne Fertility Clinic.

In seeking to appeal the conviction, Ms Fraser argued that the offence should be interpreted in a way that preserves her right to display the figures she did as part of her right to freedom of expression and freedom of conscience and religion.

The Office of Public Prosecutions argued that the role of the offence was not to prevent the display of figures that some may prefer not to be displayed, but to prevent the display of figures of such a disgusting nature as to be inconsistent with good public order. The Court agreed and was of the opinion the figures displayed in this case were 'so far beyond what should appropriately be displayed in public as to render them obscene within the meaning of the offence'. The Court did not accept that the display of obscene figures was a part of religion or in furtherance of religion or protected by the right to freedom of expression and it found the offence proven.

At the time of writing, Ms Fraser had initiated a Supreme Court challenge to the decision.

## Interventions in Charter cases

A party to a proceeding in the Supreme Court or County Court must give notice to the Attorney-General and the Commission where the Charter is an issue in the proceedings. The Attorney-General and the Commission have the right to intervene in any court cases in Victoria that raise Charter issues.

Through its interventions, the Commission aims to contribute to building a body of case law that clarifies the Charter's operation, the meaning of the rights in the Charter, and when limitations on rights can be justified.

## Notifications and interventions in 2015

Section 35 notices	19
Commission interventions	3
Attorney-General interventions	4

48 [2015] VSC 424.

49 Public Health and Wellbeing Amendment (Safe Access) Bill 2015.

50 [2015] VCC 1911.



## Interventions by the Commission

In 2015, the Commission received notification under section 35 of the Charter in 19 cases. The Commission intervened in one of these:

- *Melissa's case* (Supreme Court) – see page 14.

The Commission also intervened in two cases where notification under section 35 was not received (because notification was not required in those jurisdictions):

- *Goode v Common Equity Housing Limited* (VCAT) – see page 6
- In the matter of ABC and the Chief Commissioner of Police (Police Registration and Services Board) – see page 15.

The Commission was also involved in two ongoing interventions in 2015:

- *Fertility Control Clinic v Melbourne City Council* (Supreme Court) – see page 16
- *Bare v IBAC* (Court of Appeal) – see pages 8 and 12.

## Interventions by the Attorney-General

The Attorney-General intervened in four cases in 2015:

- *De Bruyn v Victorian Institute of Forensic Mental Health* (Supreme Court) – see page 15
- *Matsoukatidou v Yarra Ranges Council* (Supreme Court) – see page 14
- *McKay v Taylor* (County Court) – see page 10
- *Bayley v Nixon and Victoria Legal Aid* (Supreme Court) – see page 7.

The Attorney-General was also involved in one other ongoing intervention in 2015:

- *C v Children's Court* (Supreme Court) (discussed below).

*C v Children's Court* was a judicial review of a Children's Court Magistrate's decision to uplift serious sexual offence charges against a child to be heard in the County Court.

VLA argued on behalf of the child that the decision had disregarded the child's rights to be tried as quickly as possible in section 23(2) and to a procedure taking into account age and the desirability of rehabilitation in section 25(3).

The Attorney-General argued that although specialist courts may be best adapted to respect children's rights, nothing precludes a child from being tried indictably by jury, provided the procedure is suitably modified to ensure the child can understand and participate effectively in the proceeding.

The Supreme Court considered that the child's right to be tried as quickly as possible is not inconsistent with the power of the Children's Court to uplift charges in an appropriate case and not inconsistent with the right to an appropriate procedure, which could be given effect to in a higher court. As such the Supreme Court did not accept the Charter argument. However it overturned the uplift decision on other grounds.

# Part two: Promoting the right to a fair hearing in courts and tribunals

Victorian courts and tribunals are public authorities for the purposes of the Charter when they act in an administrative (rather than judicial) capacity.

This part considers initiatives by courts and tribunals in their administrative capacity to protect and promote the right to a fair hearing under section 24 of the Charter.

## The right to a fair hearing

Section 24 of the Charter states that a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 25(2)(c) of the Charter also provides that a person charged with a criminal offence has the right to have their trial heard without unreasonable delay.

## Supreme Court reforms

The Supreme Court of Victoria introduced a number of key reforms in 2015 with the goal of providing timely access to the Court, including:

- a new Common Law Division specialist list structure
- new processes in the Personal Injury and Dust Diseases Lists with a new registry support model, which have measurably reduced the number of court events in these matters
- new processes and staff structures for civil appeals in 2014, which have dramatically reduced the time between commencement and disposition of civil appeals for 2014/15
- a new Commercial Court Registry structure, which has assisted in significantly increasing the number of finalised matters in 2015
- increasing the number of judicial mediations conducted through the appointment of judicial registrars.

The Supreme Court reported however that due to a substantial number of lengthy criminal trials, timeliness in matters in the Criminal Division declined in 2015. The Court has developed new strategies in response, including new listing

protocols and case conferencing options. The Court said that implementation of these measures is dependent on the availability of resources.

## County Court reforms

The County Court Criminal Division reported that it is continually reviewing and improving systems and processes to ensure that it is operating efficiently and effectively and upholding fair hearing rights. The Court noted that:

*Recently, there has been significant focus on optimising listings and ensuring that matters are finalised in a timely fashion. As a result, there have been significant reductions in delay. In the past year, the time to trial for all trial durations ... has been reduced, particularly in relation to custody trials.*

*In addition, the Division has continued to leverage technology to reduce delay by recording evidence in a format which allows it to be played upon any re-trial to avoid the costs and inconvenience of having witnesses attend court for a second time.*

## Update on the impact of 'tough on crime' reforms and prisoner transportation

In the Commission's 2014 Charter report, community organisations raised concerns about the human rights impacts of law and order reforms introduced by the previous Victorian Government. The Magistrates' Court reported that it experienced prisoner transportation issues due to pressure on the custody system, resulting in a number of accused/offenders not being brought before the Court. This can have an impact on prisoner's rights, including the right to a fair hearing, rights in criminal proceedings, the right to equality, and the right to liberty and security.

In 2015, the Magistrates' Court, together with Corrections Victoria, implemented a modernised video conferencing infrastructure to provide flexible options for people to access the Court. The Court and Corrections Victoria are seeking to expand this modernised infrastructure to video conferencing between court and prisons.

The Court expects these procedures to minimise the need to physically transport accused persons to Court, and reduce the impact on accused persons in travelling to Court, particularly if the hearing is to be adjourned to a later date.

## Self-represented litigants

In 2015, a number of initiatives were developed to assist self-represented litigants:

- The Supreme Court of Victoria reported that it significantly increased the amount of information available to assist self-represented litigants on its website, particularly on Probate. The Probate Registry, which allows those seeking to obtain probate of a deceased small estate to seek formal assistance from the registrar in preparing the necessary documents, saw an 86 per cent increase, due to changes in threshold, in the number of grants of assistance in 2014/15.
- The County Court of Victoria reported two recent initiatives:
  - Firstly, the allocation of proceedings to a single County Court judge, his Honour Judge Saccardo, to manage proceedings involving self-represented litigants. This process is designed to case manage self-represented litigants by the Judge providing initial information to litigants and setting out what is required of them in preparing for trial under relevant laws and rules. The Judge will only be involved in pre-trial steps in proceedings involving those litigants, and will not conduct the trials.
  - Secondly, the County Court is in the early stages of investigating a Solicitor Pro-Bono assistance scheme for self-represented litigants.
- The Coroners Court of Victoria initiated discussions with Justice Connect about offering pro bono legal advice to unrepresented families, where there is an objection to an autopsy or dispute of release of a body. The Court noted that, in a recent case, a mother had objected to an autopsy of her two-day-old baby partly based on religious grounds. English was not the mother's first language. The Court arranged for independent legal advice to assist the mother with understanding the coronial process, and the matter was resolved.

# Chapter 2: The Charter in law-making

## Overview

In 2015, a number of new laws were introduced to better protect human rights in Victoria such as changes to adoption laws giving couples the right to adopt regardless of their sexual orientation or gender identity.

Only one Bill was accompanied by a potential statement of partial incompatibility in 2015, despite a number of Bills potentially having significant human rights impacts.

Overall, the Scrutiny of Acts and Regulations Committee made a vital contribution to the human rights analysis of Bills, with some inconsistency.

## The role of the Charter

In Victoria, good law making is underpinned by the Charter. The Charter requires scrutiny of legislation to ensure that all Bills are assessed for compatibility with human rights. A Minister or Member of Parliament introducing a Bill must provide a statement of compatibility at the same time as tabling the Bill setting out how a Bill is compatible with human rights, or alternatively, the extent of any incompatibility. Statements of compatibility are intended to convey whether and how human rights are limited by the Bill and if so, whether that limitation is reasonable.

The 2015 Review of the Charter emphasised that:

*The preparation of statements of compatibility can have a significant impact on policy development. A well-considered statement informs Parliamentary debate and facilitates greater human rights scrutiny of legislation, both by SARC [the Scrutiny of Acts and Regulations Committee] and the Parliament.<sup>51</sup>*

Considering the Charter at the start of the legislative process can also lead to better human rights outcomes. As explained by the Department of Environment, Land, Water and Planning (DELWP):

*The consideration of Charter rights and any potential limitation of those rights is a core consideration when developing legislative proposals ... There is a need for identification at an early stage of Charter rights that may be impacted. If on analysis a Charter right impact is identified, adjustment of the particular policy position is then considered in order to try and better account for the impacted Charter rights. Consideration of both strategies for minimisation of identified impacts and justification for particular policy positions is also required at an early stage.*

### Quick facts – in 2015:

- 97 Bills were introduced into Parliament
- 104 Bills and statements of compatibility were debated in Parliament
- There was one formal statement of partial incompatibility
- There were no override declarations

<sup>51</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights & Responsibilities Act 2006* (Report, State of Victoria, September 2015) 186.



# Part one: Positive law reform

A range of Bills were introduced in 2015 aiming to promote and protect human rights. This section highlights some important examples.

## Bills promoting the human rights of the LGBTI community

### Adoption reforms

In 2015, stakeholders welcomed the introduction and passage of the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015*. This reform has given couples the right to adopt, regardless of their sexual orientation or gender identity. As explained in the statement of compatibility, the amendments promote the right to equality and the protection of families and children under the Charter.

The adoption reforms are also discussed in Chapter 4.

### Relationship registration

The *Relationships Amendment Act 2015* amends the relationships registration scheme to only require one partner in a relationship to live in Victoria. Relationships under equivalent interstate and international laws (including jurisdictions that provide for same-sex marriages) will also be automatically recognised as registered domestic relationships in Victoria.

The Department of Justice and Regulation (DJR) explained that:

*The Act makes relationship recognition easier in Victoria. As such, the Act promotes the right to equality in the Charter, including for couples who cannot currently marry under Australian law because of their sex, sexual orientation or gender identity. It enables more people who want the dignity of formal recognition of their loving relationship to register it, or have recognised a relationship that has been formalised in another jurisdiction.*

DJR noted that the Act was developed in consultation with the Victorian Gay & Lesbian Rights Lobby, the Rainbow Families Council, the Human Rights Law Centre and the Law Institute of Victoria.

## Bills promoting Aboriginal cultural rights

### Celebrating Aboriginal cultural heritage

The *Aboriginal Heritage Amendment Act 2015* will introduce significant reforms to further protect Aboriginal cultural heritage in Victoria, including expanding the scope of Aboriginal cultural heritage protection to include 'Aboriginal intangible heritage'.

The second reading speech for the Bill explained that:

*Aboriginal cultural heritage in Victoria is remarkable indeed. However, Aboriginal cultural heritage is not just the physical remnants of past lives. It is Aboriginal language and stories, ritual, art, traditional knowledge and relationships with the natural environment. Traditional owners in Victoria live their cultural heritage. As a constant element of their identity it is inherent in traditional owner interactions with and contributions to our 21<sup>st</sup> century society and culture. It is a part of their very being, and as such, it is a part of all Victorians.<sup>52</sup>*

The statement of compatibility noted that the central purpose of the Bill is to protect the distinct cultural rights of Aboriginal peoples under section 19(2) of the Charter. It does this by improving 'the protection and management of Aboriginal cultural heritage in accordance with the wishes of traditional owners'.

### Aboriginal title over land

The *Crown Land Legislation Amendment (Canadian Regional Park and Other Matters) Act 2015* will promote Aboriginal cultural rights by creating Hepburn Regional Park to enable Aboriginal title over the land to be granted to the Dja Dja Wurrung Clans Aboriginal Corporation in accordance with the Recognition and Settlement Agreement made under the *Traditional Owner Settlement Act 2010*.

### Aboriginal Principal Officers

Section 18 of the *Children, Youth and Families Act* was introduced in 2005 to empower Aboriginal agencies to have responsibility for the care and protection of Aboriginal children subject to protection orders. The intention of section 18 was to provide for the Secretary of the Department of Health and Human Services (DHHS) to authorise a principal officer of an Aboriginal agency to perform specified powers and functions in relation to a

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<sup>52</sup> Victoria, *Parliamentary Debates*, Assembly, 11 November 2015, 4312 (Natalie Hutchins).

protection order for an Aboriginal child. However, the wording of the provision presented a number of barriers to implementing an authorisation under section 18.<sup>53</sup>

The *Children, Youth and Families Amendment (Aboriginal Principal Officers) Act 2015* amended section 18 to promote Aboriginal cultural rights under the Charter by:

*addressing limitations that currently impede authorisations to a principal officer of an Aboriginal agency under section 18 of the Act. Authorisations under section 18 will support self-determination and the delivery of culturally appropriate services, by allowing a principal officer to perform specified functions and powers in respect of an Aboriginal child on a child protection order.*<sup>54</sup>

The second reading speech for the Bill noted that:

*It is acknowledged that the history and past actions of government and non-government agencies have negatively impacted on Aboriginal families and this has resulted in continued trauma for Aboriginal communities. Policies that support self-management and self-determination provide healing opportunities and increase the capacity of Aboriginal communities to care for their children.*

*The Bill is a powerful symbol of the Labor government's commitment to developing a service system based on the principles of self-determination and reform that will improve outcomes and the cultural connectedness of vulnerable Aboriginal children.*

## Enhancing human rights in law and order Bills

### Repeal of move-on laws

The *Summary Offences Amendment (Move-on Laws) Act 2015* repealed move-on laws introduced by the *Summary Offences and Sentencing Amendment Act 2014*.

DJR noted that:

*The Act's purpose was to implement the Labor Government's commitment to repeal the previous Government's amendments to Victoria's 'move on' laws ... Those amendments had increased the scope of the move-on laws by listing further circumstances in which a police officer or protective services officer could direct a person to move-on from a public place. The amendments also reduced the scope of*

*the 'protest exemption', which stated that move-on laws do not apply to protestors or picketers, so that it did not apply in certain circumstances.*

The Department explained that:

*Several Charter rights were enhanced by the 2015 repeal Act. These included freedom of movement, peaceful assembly, freedom of association and freedom of expression. The statement of compatibility recognised that the earlier amendments to move-on powers had limited those rights and that the repeal of the previous amendments created a more appropriate balance between the use of move-on powers to maintain public order and safety, and the protection of the rights and freedoms of all Victorians recognised under the Charter.*

The 2015 amendment was welcomed by stakeholders including the Law Institute of Victoria<sup>55</sup> and the United Nations Special Rapporteur Maina Kiai who noted that:

*public space must be made available for individuals and groups in order for them to exercise their fundamental freedoms.*<sup>56</sup>

### Repeal of offence discriminating against people with HIV

The *Crimes Amendment (Repeal of Section 19A) Act 2015* repealed an offence provision of the *Crimes Act 1958* discriminating against people with HIV. The law applied a harsher penalty for transmission of HIV compared with other similar offences. Singling out the transmission of HIV for a higher penalty stigmatised people living with HIV by reinforcing a misunderstanding that HIV infection is a 'death sentence'.<sup>57</sup> Parliamentary debate noted that the amendment promoted equal treatment and protection by the law of people living with HIV.<sup>58</sup>

The Department of Premier and Cabinet (DPC) reported that the repeal had reduced the stigma faced by Victorians living with HIV.

55 Law Institute of Victoria, 'LIV welcomes repeal of move on laws and exclusion orders', (Media Release, 10 February 2015).

56 United Nations Officer of the High Commissioner for Human Rights, 'Australia: UN rights expert welcomes Victoria State's moves to repeal restrictive laws on protest', (Media Release, 4 March 2015).

57 Victoria, *Parliamentary Debates*, Assembly, 15 April 2015, 954 (Martin Pakula Attorney-General).

58 Victoria, *Parliamentary Debates*, Council, 28 May 2015, 1541–2 (Colleen Hartland).

53 Victoria, *Parliamentary Debates*, Assembly, 16 September 2015, 3288–3289 (Natalie Hutchins)

54 Ibid 3287.

## Reform of bail laws for children

The *Bail Amendment Act 2016* introduced tailored bail provisions for children to exempt children from the offence of failing to comply with a bail condition and to impose a presumption to proceed by way of summons rather than by arrest. VCOSS welcomed the reforms as comprehensive, addressing concerns about a steep increase in the number of children arrested and held on remand for breach of bail conditions.<sup>59</sup>

There was strong support for the reform expressed in the Legislative Assembly that the presumption in favour of initiating criminal proceedings by summons would align with Victoria Police best practice and counter the large increase of children on remand in recent years.<sup>60</sup> Youthlaw also expressed support for this reform.<sup>61</sup>

## Part two: Bills raising significant human rights issues

A number of Bills in 2015 raised significant human rights issues. However, only one Bill was accompanied by a potential statement of partial incompatibility.

### Wrongs Amendment (Prisoner Related Compensation) Act 2015

The *Wrongs Amendment (Prisoner Related Compensation) Act 2015* amended the *Wrongs Act 1958* to require a jury or court to reduce an award of damages for non-economic loss for mental harm caused by the death or injury of a prisoner where the claimant has criminal convictions (including a reduction of at least 90 per cent where the claimant has been convicted of a 'profit-motivated' offence).

The amendments operate retrospectively to apply to any claims that were already on foot but not yet determined before the amendments commenced.

### *Double jeopardy and retrospective penalties*

The statement of compatibility noted that the Bill may be partially incompatible with the Charter because it potentially limits sections 26 and 27(2) of the Charter:

- Section 26 of the Charter provides that a person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with the law (which reflects the common law principle of 'double jeopardy').
- Section 27(2) of the Charter provides that a penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

Although there is no relevant definition of 'penalty' under the Charter or other Victorian legislation, the Attorney-General preferred the view that the Bill does not impose a 'penalty' within the meaning of section 27(2) of the Charter, noting that:

*a reduction in an award of damages in accordance with the bill will not be a penalty imposed for an offence, but will be a further consequence of conviction for an offence, in a separate civil proceeding.*

In relation to section 26, the statement acknowledged that there was disagreement in different jurisdictions about the interpretation of the term 'punishment'. On one hand, a narrow interpretation restricts the application of the double jeopardy right to criminal matters. On the other hand, a broad interpretation focuses on the legal classification of the proceeding and the nature of the offence, the repressive or deterrent character of the penalty, and the nature and severity of the applicable penalty.

Although the statement recognised that it was uncertain whether the reduction of damages for a person who has been convicted of an offence would constitute a 'punishment', the Attorney-General preferred the narrow interpretation.

59 Victorian Council of Social Services, 'Divert Young People from the Justice System' (Blog, 18 January 2016).

60 Victoria, *Parliamentary Debates*, Assembly, 9 December 2015, 5484–5485 (Sam Hibbins).

61 Youthlaw, '2015 in Review' (Media Release, 21 December 2015).

The statement concluded that even if sections 26 and 27(2) are limited by the Bill:

*I consider that the object of the bill justifies its enactment. In particular, I consider that it would be unjust and contrary to the public interest for the Victorian community, which has suffered as a result of a claimant's prior actions, to have to compensate such a claimant in the same way that it would compensate any other claimant. The government considers that this is an important public purpose and that the bill's provisions are sufficiently targeted to achieve that purpose [the bill applies to a very narrow class of claimants and, within that class, to a very narrow class of claims].*

#### Scrutiny of Acts and Regulations Committee – Charter report

SARC referred a number of questions to Parliament for its consideration, including:

- 1: Whether extending a mandatory limitation on a highly unusual class of civil claims to current claims before Victoria's courts, limits the Charter rights of those current claimants who are profit-motivated offenders to have those claims decided by a court.
- 2: Whether the Bill, in its application to claimants who committed profit-motivated offences before the Bill commenced, regardless of any link between the earlier offending and the civil claim, limits the Charter rights of those offenders not to be punished twice or retrospectively for their crimes.
- 3: Whether the Bill, which largely restricts the compensation a profit-motivated offender can receive from anyone who has unlawfully caused a prisoner's death or injury to any financial costs to the offender resulting from that death or injury, are reasonable limits to achieve the purpose of reducing the liability of the state to certain claimants who have previously wronged the state.

#### Response to the bill

In parliamentary debate, the Greens raised concerns about the Bill, including that the Bill discriminates against a certain class of people who have

previously committed offences and the fact that it requires a mandatory reduction in damages:<sup>62</sup>

Mandating that damages be reduced where the claimant has a criminal conviction undermines the fact that the threat of liability of damages, including exemplary and aggravated damages, is a very powerful mechanism for ensuring that prisoners and prison officials have adequate regard for recommendations from reviews and royal commissions into deaths in custody and harm to prisoners in custody.<sup>63</sup>

Flemington & Kensington Community Legal Centre's Police Accountability Project commented that the Bill, if passed, would:

*restrict the amount of compensation a person with a criminal record can receive for psychiatric injury sustained as a result of their family member being injured or dying in prison. This is a gross injustice. The State owes a duty of care to ensure the safety of people in their custody in Victorian prisons. Victorian prisoners have a right to be treated humanely while in the custody and care of the State and not to be arbitrarily deprived of their life. Their families have a right to expect this.<sup>64</sup>*

## A statement of incompatibility is a human rights flag

A statement of incompatibility is a vital flag to ensure close public scrutiny of a Bill raising serious human rights issues. It is therefore essential for Bills with significant human rights impacts to be accompanied by a detailed analysis of the nature and extent of any incompatibility with human rights.

In 2015, a number of Bills had potentially far reaching human rights impacts but were not the subject of a statement of partial incompatibility.

62 Victoria, *Parliamentary Debates*, Council, 11 June 2015, 1795 (Sue Pennicuik).

63 Ibid [1793].

64 Flemington & Kensington Community Legal Centre, 'Victorian Government moves to restrict compensation claims brought against state and private prison operators' (Media Release, 11 June 2015).



## A Bill with extraordinary human rights impacts

The *Terrorism (Community Protection) Amendment Bill 2015* included amendments to provide for the remote entry of premises to access electronic equipment for the purpose of covert search warrants and to extend the operation of preventative detention orders (PDO) and prohibited contact orders. The Bill was described in Parliamentary debate as extraordinary:

*Significant periods of detention without charge lie beyond the bounds of what would normally be considered reasonable in a liberal democracy and is a power more commonly found in undemocratic regimes lacking basic rights.*<sup>65</sup>

The statement of compatibility for the Bill indicated that although there were strong grounds for concluding that the operation of the PDO and covert search warrant provisions were compatible with the Charter, the Bill may be partially incompatible with the Charter. It acknowledged that a PDO could impose a highly restrictive form of detention especially for young people or people with intellectual disability or mental illness. Although not strictly ‘incommunicado’, the restrictions would effectively amount to solitary confinement. The statement noted that provisions also have implications for the right to a fair hearing, due to difficulties associated with claiming legal privilege or challenging lawfulness of evidence obtained during a covert search.

SARC commented that the statement of compatibility’s treatment of the covert search warrant and preventative detention provisions of the Bill could amount to a statement of partial incompatibility.<sup>66</sup> Notwithstanding the statement’s consideration of partial incompatibility, the Minister’s response to SARC stated that all the provisions were compatible with the Charter. The Minister noted that the statement acknowledged that others may take a different view given some serious impacts upon human rights, and that the Charter analysis was finely balanced.<sup>67</sup>

65 Victoria, *Parliamentary Debates*, Council, 26 November 2015, 4983 (Sue Pennicuik).

66 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No. 14* (2015) 20–21.

67 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No.15* (2015) 27.

## The Criminal Organisations Control Amendment (Unlawful Associations) Act

The *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* will create a new criminal offence of ‘unlawful association’ designed to prevent the commission of offences. This will allow Victoria Police to issue a notice to a person warning them not to associate with another person because at least one of them has been convicted of a serious offence. A breach of the notice on three or more occasions within a three-month period or on six or more occasions within a 12-month period is a criminal offence subject to a maximum penalty of three years imprisonment or 360 penalty units (currently \$54,600).

The scheme was challenged in Parliament as potentially breaching the Charter and fundamentally attacking human rights—people being free to associate and to only come before courts of law when they have been convicted of an offence.<sup>68</sup> It was noted that the offence provision imposed a substantial penalty with no requirement for evidence that that association was for an illegal purpose. It could capture innocent people with no criminal history and guilty of no offence.<sup>69</sup>

Concern was also expressed about a lack of clarity regarding the nature of evidence required to show the commission of an offence likely to be prevented by people being stopped from associating.<sup>70</sup> In NSW under a similar scheme, Aboriginal people had been disproportionately issued with warning notices.<sup>71</sup>

SARC observed that the scheme may engage the right to freedom of expression, observing that the statement of compatibility did not address the impact on freedom of expression of a prohibition on communication extended to group electronic communications like social media.<sup>72</sup>

68 For example, Victoria, Hansard, Legislative Council, 8 October 2015, 3535 (Fiona Patten).

69 Victoria, *Parliamentary Debates*, Council, 8 October 2015, 3528–3530 (Sue Pennicuik).

70 Victoria, *Parliamentary Debates*, Council, 8 October 2015, 3533 (Fiona Patten).

71 Victoria, *Parliamentary Debates*, Council, 8 October 2015, 3528–3530 (Sue Pennicuik).

72 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No. 11* (2015) 5.

# Part three: The work of Parliament in debating and analysing human rights

The Victorian Parliament plays an important role in analysing and debating the human rights impacts of proposed laws. The following example demonstrates the important work of balancing competing rights under the Charter.

## Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015

In response to legal proceedings in the Supreme Court,<sup>73</sup> a Private Member's Bill was introduced to amend the *Public Health and Wellbeing Act 2008* to create safe access zones around premises offering reproductive health services, to support women to access these services in a safe and confidential way.

The Department of Health and Human Services noted that:

*Anti-abortion protest activity has regularly occurred outside such services for many years, including the display of anti-abortion signs and placards, handing out anti-abortion material to patients, and speaking to women attempting to access the service to try to dissuade them from having an abortion.*

The department explained that while the government supported the policy intent of the Bill, it decided to develop a more tightly focused Bill. The resulting *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* provides for 150m safe access zones around premises where abortions are provided and prohibited publication and distribution of recordings of people accessing or leaving such premises. It also restricts a range of other coercive behaviours in the zone.

The statement of compatibility for the Bill indicated that these restrictions on freedom of expression were necessary to respect the welfare, rights and reputation

of people accessing the services and staff. The aim of the restrictions promoted people's privacy, protecting them from intimidation or being recorded with the explicit or implicit threat of public exposure.

The department noted that:

*The human rights implications of the proposed legislation were considered in detail. It was identified that relevant rights included privacy and freedom of movement (in respect of those accessing health services), and freedom of expression, peaceful assembly and freedom of religion (in respect of those protesting).*

*The Bill was carefully designed to strike an appropriate balance between those rights. A clause was inserted to set out guiding principles, to make the intent of the Bill explicit. The offence provisions were drafted to target specific behaviours aimed at deterring people from accessing or providing legal medical services or preventing them from doing so in a safe and private manner, without unduly impacting on the rights of protestors. For example, communication about abortions within the safe access zone is only prohibited if 'reasonably likely to cause distress or anxiety'.*

The Act has been praised as promoting a suitable balance between competing sets of rights, to privacy, safety and non-discrimination of patients and staff seeking to access clinics providing abortion services and the rights to freedom of expression and assembly of those seeking to express their views on the issue of abortion. The right to freedom of expression and assembly are not absolute and must be balanced against the right of women to safely and privately access healthcare.<sup>74</sup>

<sup>73</sup> *Fertility Control Clinic v Melbourne City Council* [2015] VSC 424. This matter is considered in detail in Chapter 1.

<sup>74</sup> Human Rights Law Centre, Submission to the Scrutiny of Acts and Regulations Committee on the Public Health and Wellbeing (Safe Access Zones) Bill 2015, 5 November 2015 2.

## Human rights analysis of House Amendments

In 2015, several House Amendments were made to Bills following Parliamentary debate. Under the Charter, there is no requirement for a statement of compatibility to be prepared or updated for House Amendments. However, in some cases, House Amendments raise significant human rights issues. Failing to analyse the human rights impacts of House Amendments may undermine public accountability.

For example, the Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 as introduced included an amendment to the *Equal Opportunity Act 2010*, which would have prevented a religious body that provides adoption services from relying on a religious exception to discrimination in the provision of those services. The proposed amendment was removed from the Bill by a House Amendment, meaning that faith-based adoption services may still discriminate against same-sex couples based on religious belief. Despite this change to the substance of the Bill, the statement of compatibility for the Bill was not updated.

## Part four: The Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee (SARC), a bipartisan parliamentary committee, has an important human rights scrutiny function. It must consider any Bill introduced into Parliament and report to Parliament on whether the Bill is incompatible with Charter rights.<sup>75</sup> SARC's Alert Digests tabled in Parliament for each sitting week report on the compatibility of Bills with human rights. This allows Members of Parliament to take note and to refer to these issues in Parliamentary debate. SARC posts public submissions on its website.

<sup>75</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 30.

### Quick facts – in 2015:

SARC identified 23 Bills that it considered were incompatible with Charter rights.<sup>76</sup> When SARC identifies possible incompatibilities, it normally refers questions to the Minister or to Parliament for a response.

House amendments were made to three Bills as a result of questions raised by SARC about human rights issues.<sup>77</sup>

SARC received 14 submissions from organisations about four Bills.<sup>78</sup>

### Scrutiny by SARC promotes public accountability

SARC's scrutiny of Bills and reporting adds accountability to the process when statements of compatibility have not adequately addressed human rights issues in Bills. In 2015, SARC made a vital contribution to the human rights analysis of a number of Bills. Some of these appear in the discussion above.<sup>79</sup>

### Scrutiny of the Bail Amendment Bill

The Bail Amendment Act reversed the presumption in favour of bail for people charged with terrorism offences including intentionally providing documents or information to facilitate a terrorist act and obstructing, hindering or disobeying police exercising special police powers to combat terrorism. In these circumstances, an accused must demonstrate exceptional circumstances justifying bail.

- <sup>76</sup> Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No. 16* (2015) 45.
- <sup>77</sup> Justice Legislation Amendment Bill 2015, Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015, Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015.
- <sup>78</sup> These were the Assisted Reproductive Treatment Amendment Bill 2015, the Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015, the Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015, and the Public Health and Wellbeing Amendment (No Jab, No Play) Bill 2015, Accessible via: <http://www.parliament.vic.gov.au/sarc/article/916>.
- <sup>79</sup> For example, the Terrorism (Community Protection) Amendment Bill 2015, the Criminal Organisations Control Amendment (Unlawful Associations) Bill 2015, the Justice Legislation Amendment (Police Custody Officers) Bill 2015 and the Justice Legislation Amendment Bill 2015.

### *Automatic detention of people awaiting trial*

SARC raised the question of whether this provision reasonably limits the Charter right of persons awaiting trial to not be automatically detained. The Committee observed that the effect of the provision is that most people charged with obstructing or hindering the exercise of special police powers will be detained until that charge comes to trial.<sup>80</sup>

The statement of compatibility noted that the inclusion of terrorism related offences in the list of offences that require an accused to show exceptional circumstances is a reasonable limitation on the right to liberty, as it is required to protect the community. However, SARC observed that the offence of obstructing or hindering special police powers 'does not require proof of any connection to terrorism or any risk to community safety'.

SARC also noted that the Victorian law barring bail except in exceptional circumstances covered murder and other serious offences punishable by either life imprisonment or 25 years imprisonment. By contrast, the offence of obstructing, hindering or disobeying police exercising special police powers is a summary offence punishable by a maximum of two years imprisonment.

In response, the Attorney-General noted that:

*Obstructing, hindering or disobeying police officers in such high risk circumstances poses a clear risk to community safety. It is not the seriousness of the offending that places the accused in the exceptional circumstances category, but the high risk circumstances and the accused's attempts to frustrate the special operation which justifies the inclusion of [the provision].<sup>81</sup>*

The Attorney-General also noted that a person charged under this provision will not be automatically detained. Rather, 'the court retains discretion to consider whether the person's circumstances are exceptional and may grant bail where justified'.

### *Public support for a terrorist act or organisation*

The Act also provides that a court, in assessing whether or not there is an unacceptable risk that an accused will fail to surrender, commit a further offence, endanger public safety or obstruct the course of justice if released on bail, must have regard to whether or not the accused has expressed publicly support for a terrorist act or a terrorist organisation, or the provision of resources to a terrorist organisation.

The Committee noted that the effect of this provision may be to make it more likely that a person charged with any criminal offence will be detained until their trial if they have made a public statement in support of a terrorist act or organisation, potentially including political statements, statements about acts that are lawful under the international law of war, and statements supporting the provision of humanitarian aid or legal services to a terrorist organisation.<sup>82</sup>

The Committee wrote to the Attorney-General seeking further information as to whether or not there are less restrictive alternatives reasonably available to achieve the purpose of this clause. The Committee observed that a similar provision in New South Wales requires that bail authorities consider 'whether the accused person has made statements or carried out activities advocating support for terrorist acts'.

The Attorney-General replied that the Bail Act includes a non-exhaustive list of matters that the court may have regard to in deciding whether an accused poses an unacceptable risk. The new factor confirms that links to terrorism may be relevant, without limiting the existing discretion. By contrast, the New South Wales provision provides an exhaustive list, so required a specific provision to allow a court to take into account where an accused person has advocated support of a terrorist attack.

The Attorney-General also noted that the new factor is intended to be interpreted broadly and may encompass statements made as part of public political debate. However, the court retains a broad discretion to assess the relevance and weight to be placed on such statement.

80 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No. 16* (2015) 45.

81 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No.1* (2016) 49.

82 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No.16* (2015) 45.



A further example of SARC's consideration of human rights issues in 2015 was its analysis of the Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Bill 2015. SARC observed that the statement of compatibility for this Bill did not address the fact that the Bill permitted wards predominantly utilised for the care of people treated for a mental illness to be staffed with fewer nurses per patient than wards predominantly utilised for the care of people with other illness, and excluded mental illness wards from the enforcement provisions. This raised equality rights.

### Liability for new police custody officers

The *Justice Legislation Amendment (Police Custody Officers) Act 2015* established a statutory framework for police custody officers (PCOs) to manage and operate police jails and supervise and transport persons in custody.

The Act provides that a PCO may, where necessary, use reasonable force to compel a person the PCO is supervising, transporting or managing to obey an order.

The statement of compatibility noted that:

*The power to use reasonable force to compel an offender to obey a direction and apply instruments of restraints will necessarily involve the physical restraint or apprehension of a person, which may constitute an interference with an offenders rights to life, freedom of movement, bodily privacy, security of person, humane treatment when deprived of liberty and protection from cruel, inhuman or degrading treatment.*

*The use of force may reasonably limit these rights provided it occurs within the framework of the law and with the objective of protecting public order, people's lives or property. Human rights principles require that the law and policies governing the use of force protect life to the greatest extent possible and safeguard the circumstances in which force is used. Any use of force must be no more than absolutely necessary and strictly proportionate to achieving a clearly-defined lawful purpose.<sup>83</sup>*

The Act also provides that a PCO who uses reasonable force is not liable for injury or damage caused by the use of that force. However, the statement of compatibility did not consider the compatibility of this provision with the Charter.

The statement of compatibility remarked that 'PCOs will be subject to a range of internal and external measures to ensure appropriate oversight, discipline and management, including being ... subject to the obligations of public authorities under section 38 of the Charter, including the requirement to act in a way that is compatible with human rights, and in making a decision, to give proper consideration to relevant human rights'.

However, the Committee observed that the Victorian Court of Appeal has recently found that a 'privative clause' of this kind may effectively bar courts from hearing and determining an injured person's claim that the use of reasonable force is contrary to the obligation under section 38 of the Charter for public authorities to act compatibly with and give proper consideration to human rights.<sup>84</sup>

The Committee wrote to the Minister for Police seeking further information. The Minister replied that:

*I can advise that the Bill does not contain a privative clause. Its provisions are not intended to operate to prevent a court from hearing any actions. The Bill therefore provides no barrier to a court hearing and determining according to law any claim brought by a person injured in the course of a police custody officer's duties. This includes claims for declarations that a police custody officer's use of reasonable force is contrary to a person's Charter rights. It would, of course, be a matter for a court to determine any matter according to law and the specific circumstances of any particular case.*

83 Victoria, *Parliamentary Debates*, Assembly, 7 October 2015, 3561 (Wade Noonan).

84 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No.13 (2015) 11, referring to *Bare v IBAC* [2015] VSCA 197.

In Parliamentary debate, the Greens also expressed concern about the exclusion of liability, noting that:

*Victoria Police and government departments should be just as liable as any other organisation for breaches of duty of care resulting in injury or damage ... the threat of litigation is necessary to ensure that there is appropriate management and supervision of prisoners.<sup>85</sup>*

## Human rights scrutiny of the Back to Work Bill 2014

The State Revenue Office (SRO) reported that SARC asked the Treasurer for further information about clause 37(2) of the Back to Work Bill 2014, which authorised the Commission of State Revenue to impose a penalty if satisfied that a Back to Work payment was paid as a result of a claimant's dishonesty. SARC sought to establish whether this imposed a criminal penalty and if so, whether it engaged Charter rights in relation to the presumption of innocence and criminal proceedings.

SRO explained that the legislative framework for the Back to Work scheme – including the penalty provision – was modelled on the *First Home Owner Grant Act 2000* which, like the Bill, establishes a regime for the payment of grants to eligible applicants. SRO reported that SARC accepted the Treasurer's explanation that in the context of the administration of the legislation, the provision was appropriately treated as an administrative penalty and that the statement of compatibility had consequently been prepared on the basis that the rights to be presumed innocent and not to be tried or punished more than once had not been engaged.

## The need for further scrutiny

SARC's reports to Parliament on the Charter compatibility of Bills provide essential oversight, which can inform Parliamentary debate and enhance public accountability.

In 2015, SARC did not provide a detailed analysis of the Charter compatibility of a number of significant reforms that engaged human rights. For example:

- The *Corrections Legislation Amendment Act 2015* made amendments to parole and custody provisions. SARC commented on provisions allowing parole to be automatically cancelled in cases when a person is sentenced to imprisonment in non-Australian jurisdictions.<sup>86</sup> SARC did not address the human rights implications of clauses setting out that the right to a fair hearing would not apply to Adult Parole Board meetings and allowing a prison governor to order a prisoner to be fitted with an electronic monitoring device to constantly monitor them in custody.
- The *Mental Health Amendment Act 2015*, provides that informed consent of a young person for ECT must be personal and not that of a substitute decision maker. SARC did not make substantive comment about positive areas of reform to enhance human rights within the Bill or take note of any matters of ongoing concern, for example, the issue of use of ECT on children, which was raised in Parliamentary debate.<sup>87</sup>

<sup>85</sup> Victoria, *Parliamentary Debates*, Assembly, 21 October 2015, 3938 (Sam Hibbins).

<sup>86</sup> Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No. 8* (2015) 4–5.

<sup>87</sup> Victoria, *Parliamentary Debates*, Assembly, 14 April 2015, 918 (Sam Hibbins).

## 2015 Review of the Charter – recommendations about SARC

The 2015 Review of the Charter made recommendations to enhance SARC’s human rights scrutiny of Bills and public engagement in the process.<sup>88</sup>

Previous Charter reports have noted the challenge faced by community organisations lacking funding and time to engage in the SARC reporting process. The 2014 Charter Report observed that community organisations were concerned that SARC did not generally reflect on the content of submissions in Alert Digests despite submission drafting taking considerable time and effort.<sup>89</sup>

A responsive and inclusive scrutiny process would facilitate SARC’s consideration of submissions in Alert Digests. In 2015, few Bills reported on by SARC were the subject of submissions by community organisations. It is unclear whether there is a connection between the small number of submissions provided by organisations to SARC in 2015 and a lack of engagement with the process.

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88 Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights & Responsibilities Act 2006* (Report, State of Victoria, September 2015) 185, 186, 190, recommendations 37(b) & (c), 40, 43.

89 Victoria Equal Opportunity and Human Rights Commission, *2014 Report on the Charter of Human Rights and Responsibilities* (2015) 64.

# Chapter 3: Human rights oversight, education and complaint-handling

## Part one: Oversight and accountability

In Victoria, a number of statutory agencies provide oversight of the operations of government. In doing so, they often use a human rights framework to approach their work and to address community enquiries and complaints that raise human rights.

### The Victorian Ombudsman – Human rights oversight

*Human rights principles have always been central to Ombudsman work; and since my appointment in 2014, I have focused on the express articulation of Charter language and ideas in the work that I do, making explicit what has always been implicit. By looking at public administration through the lens of human rights, my office is able to encourage a culture of human rights compliance across the public sector – Deborah Glass, Victorian Ombudsman*

In 2015, the Victorian Ombudsman tabled a number of reports with a ‘human rights dimension’, including:

- *Councils and complaints – A report on current practice and issues.* The report is about local government complaint handling and includes a good practice guide. It reinforces councils’ obligation to act compatibly with the Charter.
- *Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight.* The report acknowledged the vital protection the Charter provides for people with a disability in Victoria, and commented that safeguards for

fundamental human rights must be at the core of a national system.

- *Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting.* The report explores the relevance of the Charter to the reporting framework.
- *Investigation into the rehabilitation and reintegration of prisoners in Victoria.* The report had a focus on women, Aboriginal and Torres Strait Islander people, and young prisoners.

The Victorian Ombudsman reported that the vast majority of matters considered by her office, including those involving human rights issues, are dealt with using informal means of dispute resolution. The office may make enquiries with a relevant authority to determine whether an action or decision is incompatible with the Charter.

### The Office of the Public Advocate

In 2015, the Office of the Public Advocate (OPA) reported that it:

- updated its guardianship management action plan to include considerations when decisions limit a person’s human rights
- updated its best interests checklist to include ‘have you considered the person’s human rights under the Charter?’
- commenced development of standard operating procedures for guardianship to include Charter rights and responsibilities.

### The Disability Services Commissioner

The Disability Services Commissioner (DSC) reported that 13 per cent of complaints received in 2015 were allegations of abuse, including allegations of staff to client assault, neglect and client-to-client assault. Through complaints received, DSC also identified:

- concerns about the rights of people with a disability to privacy and reputation, to liberty and security of person, and to recognition and equality before the law
- an increase in complaints that related to the incompatibility of people living together in a group home, and the impact this has on people and their rights to quiet enjoyment of their home and to feel safe and be free from abuse at home.

To address these issues, DSC undertook a number of initiatives in 2015:

- appointing a Senior Quality Analyst to conduct investigations into complaints against disability service providers
- reviewing its complaints resolution practices to enhance accessibility for people wanting to make a complaint
- partnering with the Independent Broad-based Anti-corruption Commission for secondment of a Principal Investigator to assist with the development of DSC's approach to conducting investigations
- engaging with the Priority Communities Division of Victoria Police to establish a partnership arrangement between Victoria Police and DSC.

DSC continues to focus on delivering information to people with a disability and their families about their rights.

## The Commission for Children and Young People

We apply a human rights lens to our advocacy and policy work. We remind those exercising public functions of their obligations under the Charter ... In addition, we draw upon and reference other human rights instruments including the United Nations Convention on the Rights of the Child and the Declaration on the Rights of Indigenous Peoples.<sup>90</sup>

In 2015, the Commission for Children and Young People (CCYP) continued to actively safeguard and promote the rights of children and young people in Victoria.

For example, CCYP:

- co-chaired Taskforce 1000 with DHHS to address the overrepresentation of Victorian Aboriginal children and young people in out-of-home care
- initiated and progressed inquiries into the circumstances of particular vulnerable children,

as well as the sexual abuse of children in residential care

- worked with DHHS to develop culturally appropriate practice advice for child protection practitioners about how best to ask families and children about their Aboriginal status
- advocated for reform to the Bail Act, including to remove the offence of breach of bail for children and to insert a requirement that factors specific to children be considered in the bail hearing process
- contributed to the work of Change the Record, a national collaboration of legal and human rights organisations to address over-imprisonment of Aboriginal children and adults
- maintained its independent Visitor Program and initiated a pilot visitor program to children in residential care.

## The Office of the Health Services Commissioner

The Office of the Health Services Commissioner (OHSC) reported that 'being a complaints-driven organisation, our contribution to human rights issues is made primarily through the resolution of individual complaints using an alternative dispute resolution model'. The major issues that the OHSC resolves for consumers are:

- healthcare treatment issues (right to life via access to quality healthcare)
- communication issues (dignity or informed consent)
- access and correction of health information (right to privacy)
- misuse and disclosure of personal health information (right to privacy).

In 2015, the OHSC redesigned its complaint form to ensure better access and clarity. It also created a new framework for the concurrent handling of complaints involving the Australian Health Practitioner Regulation Agency. The new framework has reduced the time it takes to decide which agency should manage each complaint from around one month down to two days. The OHSC noted that this enhances the promotion of human rights by handling complaints quicker and more appropriately.

<sup>90</sup> Commission for Children and Young People, *Annual Report 2014-2015* (2015) 40.



## The Mental Health Complaints Commissioner

The Mental Health Complaints Commissioner (MHCC) has a key role in safeguarding the rights of people receiving assessment and treatment in public mental health services. The MHCC reported that most concerns raised with them related to the adequacy or effectiveness of treatment, the extent to which a consumer's views and preferences were taken into account, the decision to provide compulsory treatment, and the view that treatment was excessive. Complaints about treatment decisions raised rights including the rights to treatment with consent and privacy.

### Provision of rights information to compulsory patients

The MHCC reported that under the *Mental Health Act 2014*, compulsory patients must be given a statement of rights when they are placed on an assessment, treatment or temporary treatment order. These statements set out key information about the person's rights, including their right to make a complaint to the MHCC and to appeal to the Mental Health Tribunal. The service must also explain these rights in a way that helps the person understand them and how they are going to be assessed or treated, and must provide copies of assessment or treatment orders to the person.

In 2015, the MHCC received many calls from people in acute inpatient units seeking advice about their rights. The MHCC noted that:

*Our work with consumers, carers and families shows people in acute inpatient units often find it difficult to absorb or recall the information provided orally or in writing. Some complainants have also raised concerns about the timing and provision of statements of rights and copies of orders or reports relating to the Mental Health Tribunal.*

*In the majority of these matters, we have been able to address the person's concerns by asking the service to explain the rights again directly to the person, and provide another copy of the statement. However, we have also identified the need for services to see this practice as part of their ongoing conversation with the person and ensure it continues throughout the period of compulsory treatment.*

The MHCC also received a number of consumer concerns about whether their individual needs, including their culture, language, communication, age, disability, religion, gender and sexuality had been met. The MHCC often resolves these complaints early by supporting the person to communicate directly with the service about their needs. In other cases, the MHCC actively engages services on the need to develop coordinated treatment and care plans with other services, such as disability services, to respond to specific needs.

## The Commissioner for Privacy and Data Protection

The Commissioner for Privacy and Data Protection (CPDP) reported that privacy enquiry and complaints statistics during 2014/15 indicate that people are particularly concerned about the collection, use, disclosure and security of their personal information – including personal information being collected without prior notice and/or consent. CPDP noted that:

*There is also community concern about the impact of current and emerging technologies on their privacy. While CPDP can only deal with these concerns where related to information privacy, the issues raised go to broader privacy issues such as those articulated in section 13 of the Charter, viz. bodily privacy, or arbitrary interference with a person's home or family.*

*These concerns could be due to the fact that there is increasing awareness in the community about new technology's potential to collect and process personal information. Instances of this include surveillance technologies, such as closed circuit televisions in the workplace and public areas, biometric technology in schools and workplaces, the use of GPS to track a worker's location, cloud computing, outsourcing and the use of personally-owned information and communication technologies in Victorian Government schools.*

*These current and emerging technologies – and in particular their use to surveil and track individuals – can have significant implications not only on a person's right to privacy, but also on their right to freedom of thought, conscience, religion and belief (s 14), their right to freedom of expression (s 15) and their right to freedom of association (s 16).*

To address these issues, CPDP has continued to promote Privacy by Design, a practical policy guide focused on the importance of designing privacy in new business systems or processes from the outset and to see privacy-positive policies as a sound and important part of any business strategy. It has also published new guidance materials to assist the Victorian public sector and community to better understand and respond to the challenges posed by these technologies.<sup>91</sup>

## The Independent Broad-based Anti-corruption Commission

The Independent Broad-based Anti-corruption Commission (IBAC) reported that it considers each individual allegation made within a complaint when assessing whether the allegation involves a breach of the Charter. IBAC's approach to ensuring that Victoria Police officers and protective services officers have regard to the Charter is focused on identifying potential breaches at the assessment stage.

IBAC may decide to conduct an own motion review of a police investigation because of concern regarding human rights violations. A recent example is the review of Corinna Horvath's complaints alleging police assault and the resulting Victoria Police disciplinary action against officers. After reviewing the matters, IBAC considered that there were outstanding matters that warranted IBAC's consideration as to possible serious police personnel misconduct. The matter is ongoing.

## The Victorian Auditor-General's Office

The Victorian Auditor-General's Office reported that some of its reports tabled in 2015 were linked to human rights issues, including a report into early intervention services for vulnerable children and families (which raises the right to protection of families and children under the Charter).

### Auditing Victoria Police complaints

IBAC is conducting an audit of Victoria Police's local complaint handling processes in two regions to identify issues in the processes and to determine potential areas of improvement. IBAC reported that one area being examined is how human rights

were addressed by an investigator in the final report of an investigation. Other areas include the impartiality of the investigation, and the appropriateness of the investigative process.

Following completion of the audit, IBAC will consult with Victoria Police to discuss identified issues and opportunities for improvement to current practices.

## Part two: Human rights complaints and complaint mechanisms

Effective complaints mechanisms can help public authorities manage complaints fairly, improve decision-making and comply with their obligations under the Charter.

### Development of internal complaint guidelines

The Department of Justice and Regulation (DJR) reported that two statutory reviews into the Charter (2011 and 2015) found that not all public authorities have internal human rights complaints procedures. DJR noted that 'such procedures are an important first step in managing complaints and should attempt to resolve disputes at the earliest opportunity'.

In 2015, DJR's Human Rights Unit prepared draft guidelines and sought comments from the Commission and Victorian Ombudsman. The guidelines will assist departments and agencies to take human rights into account as part of their internal complaint handling processes. The guidelines will also ensure that complainants are aware of the Ombudsman's role in investigating human rights complaints.

The guidelines are intended to be released in 2016 subject to ensuring that they align with any amendments to the Charter that may result from the 2015 Charter review.

### Improvements to complaint processes

The Department of Environment, Land, Water and Planning (DELWP) reported that it developed a gateway on the department's website to receive a range of complaints from members of the public. Complaints received via the gateway will be acknowledged by letter, recorded and forwarded to the appropriate departmental area for investigation and resolution.

<sup>91</sup> For example, Commission for Privacy and Data Protection, 'Biometrics and Privacy Information Sheet' (Information Sheet, April 2016); 'Report on the Victorian 2015 Global Privacy Enforcement Network Privacy Sweep – Children's Privacy' (Report, 2016); 'A Cloud computing in the Victorian Public Sector discussion paper' (Discussion Paper, 3 July 2015); and 'Privacy Background Paper' (Background Paper, October 2014).

The Department of Health and Human Services (DHHS) redeveloped its Complaint Management Policy and Procedures. DHHS noted that the method in which complaint information can be provided/obtained encourages consideration of the unique circumstances and needs of some complainants which may include use of an advocate, interpreter or Tele Type Writer.

## Examples of human rights complaints

This section includes a sample of complaints to public authorities that raised human rights concerns and demonstrate how they were resolved.

### Department of Justice and Regulation

A complaint was raised at the Commission about discriminatory language used in the online applications for identification certificates that referred to 'Mother' and 'Father', therefore ignoring the reality of same-sex families. The complaint was successfully conciliated and resolved by making changes to online applications for a certificate, in consultation with the complainant. Standard labels were removed and an applicant now selects a 'role' from a list that best describes their situation.

### Department of Education and Training

A parent appealed a decision by DET not to allow early age entry into school of their four-year-old child. The parent argued that the decision and delaying enrolment would have an adverse impact on the child's social, emotional and educational development. On appeal, the decision was reviewed to ensure that all relevant matters had been taken into account including the obligation to act compatibly with the best interests of the child under section 17 of the Charter.

While the parent had appealed on the basis that the decision would have an adverse impact on their child, it was clear that the original decision-maker had considered this together with all other relevant material. DET noted that its age-based entry requirements, and the criteria for exemption, create a school-age entry scheme that is based on the best interests of the child. In this case, there had been no limitation on section 17 of the Charter.

### Commissioner for Privacy and Data Protection

An individual alleged that a school failed to provide adequate data security for a confidential memorandum, which contained sensitive personal information. Whilst the school stated that it had appropriate data security practices in place, it acknowledged that an inadvertent disclosure occurred. CPDP conciliated a successful outcome, including an apology from the school, an undertaking to review its data security practices, and destruction of the copy of the memorandum.

# Part three: Human rights resources and education

The body of resources available on the Charter and human rights continued to be developed during 2015 by public authorities.

## Judicial College of Victoria publications

### *Charter Case Collection*

In 2015, the Judicial College of Victoria (JCV) published a collection of case summaries on the Charter, in collaboration with the Supreme Court of Victoria.<sup>92</sup>

The *Victorian Human Rights: Charter Case Collection* draws together more than 70 published decisions on Charter issues. It summarises all significant cases on the Charter by the Supreme Court of Victoria. The collection will be updated continually as new cases are heard by the Supreme Court.

### *Bench books*

JCV developed two bench books (designed as a resource for judicial officers) relevant to the Charter and human rights:

- 1: *A Charter of Human Rights Bench Book* which includes chapters on each human right in the Charter and on other relevant sections, including section 32 (interpretation of law) and section 7 (limitation on rights). This was launched in May 2016.
- 2: *A Disability Access Bench Book* which is currently being developed in collaboration with the Commission.

Resources on the Charter continue to be maintained and developed for the Victorian Public Service. For example, DJR reported that its Human Rights Unit:

- continued to co-manage and update a 'Human Rights Portal', together with the Victorian Government Solicitor's Office. The portal is an internal government website that is used as a resource to assist Victorian public servants to fulfil their obligations under the Charter

<sup>92</sup> The Victorian Human Rights: Charter Case Collection is available at Judicial College of Victoria <<http://www.judicialcollege.vic.edu.au>>. The Charter Bench Book is available at <<http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57496.htm>>. The Disability Access Bench Book will be available during 2016.



- is developing Charter rights fact sheets, to be uploaded on the portal in 2016. The fact sheets are intended to assist legal and policy officers across government when considering human rights issues in policy and legislation development.

### **Victorian Public Sector (VPS) Human Rights Network**

The Commission launched the VPS Human Rights Network in 2014. The Network aims to provide information, ideas and networking opportunities to public sector employees who are interested in applying human rights in their work. Membership is targeted at public sector workers with an interest in human rights – state government, statutory agencies, local government, or other organisations delivering public services that have obligations under the Charter.

In 2015, the Commission hosted two expert panel discussions related to the 2015 review of the Charter. The first was on human rights complaints handling, with discussion of existing pathways for members of the public to raise human rights complaints, experiences and challenges faced by those who exercise this role, and how those challenges might be addressed. The second panel discussion followed the tabling of the 2015 Charter Review Report, and included a presentation by the independent reviewer, Mr Michael Brett Young.

In June 2015, the Commission also launched a series of videos for the VPS Human Rights Network on *Good decision making with the Charter – How council planning decisions can consider human rights*. The videos demonstrate how the Charter is being used by councils in regard to planning matters, as well as providing resources to help councils consider and apply human rights in their work. The videos were produced with support from Hume City Council and the City of Greater Bendigo.

## **Charter training with public authorities**

In 2015, the Commission delivered human rights training to a number of public authorities including:

- DHHS to conduct training for housing practice support managers and team leaders. The aim of the training was to assist team leaders and managers to lead their teams in meeting their compliance obligations and strengthening their practice under the Charter and equal opportunity laws.
- the Victorian Ombudsman to conduct training for their enquiries and investigations units. The aim was to strengthen participants' understanding of the Charter and its application to the Ombudsman's role of investigating decisions and actions of Victorian government bodies.
- staff of the Mental Health Complaints Commissioner to deliver training tailored to its work
- the Disability Services Commissioner to ensure a more thorough understanding of the Charter and its continued application in its complaints resolution role.

Several other public authorities reported that they continued to undertake training and workshops on the Charter and human rights.<sup>93</sup> For example, members of the Department of Treasury and Finance's (DTF) Human Resources team participated in a 'creating a human rights culture' workshop hosted by the Victorian Public Sector Commission.

In 2015, the State Revenue Office reviewed and refreshed induction materials on Charter-related issues that may arise in daily operations and decision-making.

<sup>93</sup> Department of Premier and Cabinet; Department of Health and Human Services; Department of Economic Development, Jobs, Transport and Resources; Disability Services Commissioner; Mental Health Complaints Commissioner; State Revenue Office; and State Trustees.

## Local council initiatives

Knox City Council continued to invest in Charter training of staff, using self-guided workbooks, online training modules and face-to-face sessions.

Southern Grampians Shire Council arranged for the Commission to provide Charter training to its new councillors, and undertook training on equality issues and cultural diversity in the workplace.

The City of Darebin reviewed and renewed delivery of its human rights training for staff, including the use of a case study and the Commission's resource, *The Charter of Human Rights and Responsibilities: A Guide for Victorian Public Sector Workers*.

Moreland City Council undertook stakeholder engagement in developing a new draft Human Rights and Inclusion Policy with stronger links to the Charter, and incorporating the Council's support for Moreland's LGBTI community.

# Chapter 4: The right to equality

## Overview

The chapter profiles the issues raised with the Commission about laws, policies and practices that impacted on the right to equality in 2015, including:

- Gender equality (part one)
- LGBTI equality (part two)
- Equality for people with disabilities (part three)
- Racial and religious equality (part four).

The chapter also includes examples of the work being done by public authorities to protect and promote the right to equality in Victoria.

### The right to equality

Equality is one of the founding principles of the Charter which recognises that human rights belong to all people without discrimination.

Section 8 of the Charter states that:

- Every person has the right to recognition as a person before the law.
- Every person has the right to enjoy their human rights without discrimination.
- Every person is equal before the law.
- Every person is entitled to the equal protection of the law without discrimination.
- Every person is entitled to equal and effective protection against discrimination.

Discrimination for the purposes of the Charter refers to the definition of discrimination under the *Equal Opportunity Act 2010*. This includes discrimination on the basis of attributes including disability, race, sex, sexual orientation, and gender identity.<sup>94</sup>

Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

## Part one: Gender equality

Gender inequality exists in many Victorian workplaces, services and communities. In 2015, stakeholders told the Commission about entrenched issues that have a disproportionate impact on Aboriginal and Torres Strait Islander women, including family violence and interactions with child protection and the criminal justice system.

The Commission welcomed significant efforts by public authorities and community organisations to address gender inequality and create safe and inclusive workplaces, services and communities, such as the Department of Environment, Land, Water and Planning's new Gender Equity Action Plan with all roles being advertised as 'flexible', and the introduction of new guidelines which require no less than 50 per cent of all new appointments to Victorian Government boards to be women.

### Equal treatment for Aboriginal and Torres Strait Islander women

*Aboriginal women and their children face disproportionate and systemic discrimination due to the intersection of racism, poverty and gender inequality – Aboriginal Family Violence Prevention & Legal Service Victoria.*

The Aboriginal Family Violence Prevention & Legal Service Victoria (FVPLS Victoria) raised the need to address the specific needs of Aboriginal and

<sup>94</sup> *Equal Opportunity Act 2010* (Vic) s 6.

Torres Strait Islander women as some of the most marginalised and discriminated against members of the community. They noted that:

*The multiple intersections of inequality including racism, poverty and gender inequality are visible in the disproportionate representation in statistics for Aboriginal women, including homelessness, mental health issues, alcohol and drug abuse, incarceration and family violence.*

FVPLS Victoria provided the following statistics to illustrate that the key issues disproportionately impacting Aboriginal women are family violence and interactions with child protection and the criminal justice system:

- Aboriginal women are 34 times more likely to experience family violence
- men's violence against Aboriginal women is the primary driver of up to 90 per cent of Aboriginal children entering out-of-home care
- Victorian Aboriginal children are 12.3 times more likely to be on care and protection orders in comparison with non-Aboriginal children
- Aboriginal women make up 22 per cent of all clients of specialist homelessness services
- one in 10 women in prison identify as Aboriginal, making them the fastest growing segment of the Victorian prison population and 80 per cent of them are mothers<sup>95</sup>

FVPLS Victoria explained:

*the lack of appropriate housing options, particularly for Aboriginal women in the lower socio-economic strata results in a dangerous bind where women are trapped and lack substantial options to remedy their situations. FVPLS Victoria reported that some Aboriginal women have had to forsake the care of their children because they were in inadequate housing.*

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<sup>95</sup> See also the Commission's 2013 research into the experiences of Koori women and the justice system, *Unfinished business – Koori women and the justice system*. The report can be viewed on the Commission's website.

## DHHS response

The Department of Health and Human Services (DHHS) supports, and coordinates a variety of programs focused on addressing the key issues raised by FVPLS. These include active engagement with Taskforce 1000, the Aboriginal Justice Forum, the Aboriginal Children's Summit and the Aboriginal Family Violence Partnership Forum. The department also supports local initiatives to address locally identified issues.

The issues raised by FVPLS are important to improving the health and wellbeing of Aboriginal people in Victoria and the department will continually strive to address these inequalities.

## DJR response

The Department of Justice and Regulation (DJR) reported that the Aboriginal Justice Agreement (AJA3) has seen significant improvements across a number of areas and includes initiatives to reduce violence and conflict between families.

For example, AJA3 Objective 2, 'Diversion and Alternatives to Imprisonment', aims to increase the rate at which justice agencies successfully divert Koori offenders, particularly Koori women, from further contact with the criminal justice system, and to strengthen community based alternatives to imprisonment for Koori women offenders. This objective includes a commitment to explore the underlying factors contributing to the remand of Koori women.

Similarly, the Aboriginal Justice Forum (AJF) has responded to the issue of rising numbers of Koori women in prison by supporting the establishment of the Koori Women's Diversion Project (KWDP), which aims to reduce Koori women's contact with the criminal justice system by developing community-based alternatives and diversionary options for Koori women at all points of contact with the system.

In October 2015, the Mildura KWDP Pilot, developed in partnership with Mallee District Aboriginal Services commenced. This program provides an integrated 'wrap around' service for Koori women referred from the criminal justice system, in particular the local courts. Using a similar approach, a Morwell KWDP, in partnership with the Victorian Aboriginal Child Care Agency, is commencing in mid 2016.

In relation to transitional housing, Corrections Victoria (CV) has implemented a pre- and post-release support program (introduced in January 2015), which includes specific transitional housing for Aboriginal prisoners. Two six-bed purpose built facilities for men and women post-release will be built on land owned by DHHS and managed by Aboriginal Housing Victoria (pre-release programs and post-release support links will be provided by Victorian Aboriginal Legal Services).

## Promoting gender equality

### Sisters Day Out®

To address the above concerns, FVPLS Victoria's Community Legal Education team is dedicated to working on community education and early intervention and prevention, including significant and successful outreach with Aboriginal women.

For example, the *Sisters Day Out* program is a one-day workshop that engages with Aboriginal women. The purpose is to prevent family violence by facilitating community networks to reduce social isolation, raising awareness of family violence and its underlying cause and impacts, and by providing information and tools to promote community safety. The program has also been delivered in prisons.

*Sisters Day Out* has reached more than 8000 Aboriginal women since its commencement in 2007. A recent independent evaluation of FVPLS Victoria's early intervention and prevention programs (including *Sisters Day Out*) found that these programs have significant beneficial impacts on participants' immediate and ongoing wellbeing and access to services.

*Sisters Day Out plays a crucial role in breaking down barriers to access to justice for Aboriginal women – FVPLS Victoria*

### Respectful relationships

The Department of Education and Training (DET) reported that in 2015 it commenced work to deliver on the Government's commitment to implement respectful relationships education in Victorian schools from 2016.

In 2015, a Year 10 unit of learning was made available as a resource to schools. The unit, *Gender, power and media*, builds on the current suite of

sequential teaching and learning activities focused on the key themes of gender, power, violence and respect: *Building respectful relationships: Stepping out against gender-based violence*.

DET hopes that its ongoing work will better equip schools to educate children in age-appropriate ways on challenging negative attitudes such as prejudice, discrimination and harassment that can lead to violence, often against women. Students will also be better supported to learn how to build healthy relationships, understand global cultures, ethics and traditions, and to prevent family violence.

### A sustained commitment to gender equality

The Department of Environment, Land, Water and Planning (DELWP) said it was 'committed to working towards a gender equal workplace where men and women are represented equally in leadership positions, and men and women have equal opportunity for great careers'. The department reported a range of projects it was involved in during 2015 to advance gender equality.

#### Gender Equity Action Plan

The department developed a Gender Equity Action Plan with seven areas of focus:

- Improving our Systems – focused on ensuring the department's systems and approaches support equitable access to meaningful and successful careers.
- Leadership and Advocacy – building the capability of the department's leaders to role model gender equitable approaches.
- Development and Support – providing targeted development.
- Flexibility First – All jobs in the department are now being offered as flexible. A Flexible Working kit was also launched.
- Storytelling – ensuring the department communicates effectively the importance of a gender equitable organisation and talk about its successes.
- Governance and Measurement – ensuring focus on the right things.
- Acting against Domestic and Family Violence – determining the best way to support our people being impacted by violence.

#### Women in fire and emergency research

A Women in Fire and Emergency research project was conducted to understand what actual and perceived barriers exist for women to take on fire and emergency leadership roles. The research identified key areas of opportunity for the



department. The project will continue in 2016 to commence addressing the issues.

### Women's Networking Program

The department's Women's Networking Program was launched in 2015 as an important way for women to connect across the department. The program also recognised that women in the department are spread across broad geographical and subject matter areas and offered tools to establish networks that meet local needs.

### Diversity and Inclusion Council

The department also worked towards establishing a Diversity and Inclusion Council, which will lead a strategic and coordinated approach within the department to diversity and inclusion. The Council's initial emphasis will include gender equity.

A significant number of initiatives were developed by public authorities in 2015 to address family violence. These are discussed below at page 108.

## Appointments to government boards and courts

In 2015, the Premier of Victoria announced that no less than 50 per cent of all future appointments to paid Government boards and Victorian courts will be women.<sup>96</sup> The Premier noted that:

*While the Labor Government has a record number of women in Cabinet, female representation on government boards in Victoria has dropped from 40 per cent to 35.6 per cent over the last four years.*

*An aspirational target currently exists within the Victorian Government to make sure board appointments are balanced. It was implemented in 2009 but it isn't working – because it isn't enforced.*

*Boards that properly represent the public make better decisions, reach into a deeper pool of talent, and train more people from different backgrounds to become economic leaders of our state.*

*Of all the appointments my government makes from now on, at least one half of them will be women. Under this Government, equality is not negotiable – Daniel Andrews, Premier of Victoria*

An example of this mandate in action is seen by DELWP reporting that 58 per cent of 46 board

members appointed to Victoria's 10 catchment management authorities and the Victorian Catchment Management Council were women.

## Women encouraged to nominate for council elections

The GoWomenLG2016 project is a partnership between the Victorian Governance Association, the Victorian Government and local government and community supporters aimed at improving the representation of senior women in the public and private sectors. The project aims to increase the numbers and diversity of women who participate as candidates in Victoria's 79 local government elections in 2016.

## Part two: LGBTI equality

This year, stakeholders told the Commission about the laws, policies and practices that continue to impact on the rights and dignity of LGBTI Victorians, such as:

- the continuing inability for trans and gender diverse people to obtain a birth certificate that reflects their affirmed gender, unless they have had sex-affirmation surgery
- religious exceptions under Victorian laws that allow lawful discrimination against LGBTI people.

Despite these concerns, 2015 saw a range of initiatives by the Victorian Government to advance LGBTI equality including the appointment of Victoria's first Gender and Sexuality Commissioner, the establishment of a whole-of-government LGBTI taskforce, and a new Victorian Public Sector Pride Network.

## The right to equality for trans and gender diverse Victorians

### Birth certificates

Transgender Victoria noted the continuing inability for trans and gender diverse people to obtain a birth certificate that reflects their affirmed gender, unless they have had sex-affirmation surgery. This means that trans and gender diverse people in Victoria who choose not to or are unable to undergo sex-affirmation surgery (for example, for financial reasons) have official identification documents that do not match their affirmed gender. Transgender Victoria is pleased that the Victorian Government has progressed this issue by commencing consultations.

The Victorian Gay & Lesbian Rights Lobby (VGLRL) uses the Charter to advocate for improvements to birth certificate laws for trans, gender diverse and intersex Victorians.

<sup>96</sup> Premier of Victoria, 'Balanced boards make better decisions' (Media Release, 28 March 2015).

## DJR response

DJR reported that the Government recognises that there are a number of Charter rights relevant to this issue, including the right to equality before the law, and the Government has made a pre-election commitment to remove barriers to new birth certificates for trans, gender diverse and intersex Victorians.

## Access to healthcare

Transgender Victoria continues to advocate for publicly funded surgery for trans and gender diverse people in Victoria. Currently, the only option for surgery is the private health system which is often cost-prohibitive. In addition, many endocrinologists refuse to treat trans and gender diverse people on the basis that such treatment is still 'experimental' despite the prevalence and success of this treatment in other jurisdictions both in Australia and worldwide.

VGLRL also advocates for funding for gender treatment services.

Victoria Legal Aid (VLA) continues to support young trans people who seek access to gender dysphoria treatment, which currently requires Family Court approval. VLA noted that some stakeholders argue this requirement should be removed.<sup>97</sup> VLA reported that:

*if the government introduces reforms, we will use our practice experience to advocate for retaining a pathway for young people to receive treatment, if their parents do not consent, and they are mature enough to make their own medical decisions.*

## Case study – Isaac's case<sup>98</sup>

In 2014, VLA was successful in assisting Isaac (not real name) to obtain a court order giving him responsibility for making medical decisions. Isaac had approached VLA in relation to his school's insistence that he wear a dress. He is a non-binary male who was designated a different gender at birth. His family strongly opposed his transition. He was at risk of family violence and forced removal from Australia.

97 For example, see discussion in *Re Martin* [2015] FamCA 1189, 34; and Australian Broadcasting Commission <<http://www.abc.net.au/news/2016-02-22/parents-of-transgender-children-meet-with-politicians-in-canberra/7189454>> (sources provided by Victoria Legal Aid).

98 Victoria Legal Aid, 'Case study', information provided to the Victorian Equal Opportunity and Human Rights Commission (March 2016).

VLA's lawyers ensured he was placed on the Airport Watch List, so he could not be removed from the country, and assisted him to apply to the court for approval for gender dysphoria treatment. The court found Isaac was mature enough to make his own medical decisions.<sup>99</sup> The decision clarified that an avenue exists for a child, who is not supported by their parents, to be declared competent so they can choose treatment for gender dysphoria.

## DHHS response

In late 2015, DHHS established an Expert Advisory Group on Trans and Gender Diverse issues, as part of the government's LGBTI Equality agenda. Comprising community members, support groups and leading health professionals, this group is providing advice on how health services and social care supports relating to gender dysphoria in Victoria can be improved. A range of strategies for making appropriate care more accessible are being considered.

In 2015/16, the department provided increased funding to the Royal Children's Hospital to support Gender Dysphoria specialist clinics at the hospital. An additional \$1.5 million per annum (\$6 million over four years) was committed for a range of recognised therapeutic medical interventions and mental health care for transgender children, adolescents, adults and their families.

## Sport exceptions

Transgender Victoria is concerned about the competitive sports exception under the Equal Opportunity Act that allows the exclusion of people of a particular sex or gender identity from participating in competitive sport where the strength, stamina or physique of competitors is relevant.<sup>100</sup>

*The sports exceptions are an unnecessary and discriminatory restriction to the full participation of transgender people in sport and broader society in Victoria – Sally Goldner, Executive Director of Transgender Victoria*

99 *Re Isaac* [2014] FamCA 1134.

100 *Equal Opportunity Act 2010* (Vic) s 71(1).

Transgender Victoria considers that this exception clearly discriminates against transgender people in sport and prevents their equal and active participation in society. Transgender Victoria noted that new guidelines published by the International Olympic Committee make the Victorian exception even more unnecessary and confusing. The new guidelines mean that trans male athletes can compete in male competitions ‘without restriction’, while trans female athletes are required to demonstrate that their testosterone levels are below a certain level for at least 12 months prior to their first competition (rather than being required to have reassignment surgery under the previous guidelines).<sup>101</sup>

## DJR response

DJR reported that the Government has made a commitment to review all Victorian legislation to identify provisions that unfairly discriminate against lesbian, gay, bisexual, trans, gender diverse, and intersex Victorians, and to act to change them.

## Religious exceptions

Stakeholders, including VGLRL, Bisexual Alliance Victoria and Transgender Victoria, are concerned about religious exceptions under Victorian laws that allow lawful discrimination against LGBTI people. This includes statutory exceptions for religious bodies under the Charter, the Equal Opportunity Act and the *Adoption Act 1984*.

*An increasing number and breadth of services are delivered by faith-based organisations, in part due to the rapid expansion in the contracting out of services traditionally performed by government agencies. Under the Charter, this leaves LGBTI people without the same human rights safeguards as other Victorians and vulnerable to discrimination – Victorian Gay & Lesbian Rights Lobby<sup>102</sup>*

## Religious exception under the Charter

The Charter includes an exception that allows public authorities that are religious bodies to act in conformity with their religious doctrines, beliefs or principles.<sup>103</sup>

VGLRL considers this exception is contrary to international human rights principles and is inconsistent with government policy. It suggests that:

*The religious exception has the potential to justify discrimination and exclusion of people on the basis of their sexual orientation or gender identity. Such a notion runs counter to the Victorian Government’s equality agenda and the substantial investment in the health and wellbeing of LGBTI people.<sup>104</sup>*

VGLRL is aware of the following issues in the provision of services:

- trans women turned away from homeless shelters
- queer young people fearing discrimination by faith based service providers opting out of accessing services and risking homelessness
- teenage girls exiting state care turned away from faith based welfare agencies when they are discovered to be pregnant
- a teenage trans masculine person locked in a room while in full view of others as ‘punishment’ for wanting to wear pants
- a 12-year-old girl suspended from a religious school because she came out as same-sex attracted.<sup>105</sup>

## DJR response

DJR reported that the 2015 Charter Review made 52 recommendations, including Recommendation 18, that the Government ‘consider the exception from public authority obligations in section 38(4) of the Charter (an exception relating to the religious doctrines, beliefs and principles of a religious body), as part of its current examination of religious exceptions and equality measures in other Victorian laws, so it can apply a consistent approach’.

The Government is considering the recommendations of the Review.

<sup>101</sup> International Olympic Committee, ‘IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism, Transgender Guidelines’ (November 2015).

<sup>102</sup> Victorian Gay & Lesbian Rights Lobby, Submission No 77 to the Victorian Government, *2015 Review of the Charter of Human Rights and Responsibilities*, 2015, 3.

<sup>103</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(4).

<sup>104</sup> Victorian Gay & Lesbian Rights Lobby, above n 102.  
<sup>105</sup> *Ibid* 4.

## Religious exceptions under the Equal Opportunity Act

Sections 82, 83 and 84 of the Equal Opportunity Act allow for religious exceptions in a variety of situations, including schools. VGLRL, Bisexual Alliance Victoria and Transgender Victoria consider that these exceptions are unnecessary and entrench discrimination against LGBTI people in Victoria.

For example, Transgender Victoria explained that the religious exceptions under the Act mean that religious schools can lawfully discriminate against trans students.

### DJR response

DJR reported that the Government has made a clear commitment to put equality back on the agenda in Victoria. An important part of this is amending the religious exceptions in the Equal Opportunity Act to reverse changes made by the former Coalition Government.

The former Government's changes removed an 'inherent requirements test' for employment by a religious body or religious school, which was intended to limit the ability of these organisations to discriminate unreasonably against people with particular characteristics. The removal of this test has meant that many Victorians remain vulnerable to unjustified discrimination in employment, particularly because of their sexual orientation or gender identity.

A large number of people are employed by, or seek to be employed by, religious bodies and schools in Victoria, in a range of different positions. In these circumstances, it is fair to ask these organisations to demonstrate the connection between their religious beliefs and principles, and the action they want to take in relation to a person because of a personal attribute.

## Religious exceptions and the Adoption Act

The *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* legalised adoption by same-sex and non-gender specific couples in Victoria.

DJR explained that the Bill introduced by the Government included an amendment to the Equal Opportunity Act, which would have prevented a religious body that provides adoption services from relying on a religious exception to discriminate in the provision of those services. The proposed amendment was removed from the Bill by a House Amendment.

DJR noted that:

*As a result, there is no specific 'carve out' from the religious exceptions in the Equal Opportunity Act in relation to adoption services. However, an adoption agency seeking to rely on a religious exception in order to discriminate lawfully would need to establish that it was a religious body within the meaning of the Equal Opportunity Act, and that its actions otherwise meet the requirements of the statutory exception.*

VGLRL is disappointed that the religious exception will continue to apply to same-sex adoption, noting that:

*We will continue to advocate for a broader review of religious exemptions with a view to ensuring no lesbian, gay, bisexual, transgender or intersex person is turned away from services simply because of who they are. We firmly believe that children's rights, welfare and best interests must never be trumped by the religious beliefs of a state-funded service provider.<sup>106</sup>*

The Adoption Amendment (Adoption by Same-Sex Couples) Act has a default commencement date of 1 September 2016, unless commenced earlier.

The Act is discussed in more detail at page 27.

## Promoting LGBTI equality

In 2015, a range of important initiatives were undertaken by the Victorian Government with the aim of advancing LGBTI equality.

The Victorian Government created the position of a dedicated Gender and Sexuality Commissioner for Victoria. The Commissioner's role is to advocate for LGBTI equality within government and the broader community. Rowena Allen was appointed as the first Commissioner and is currently focused on the issues of family violence, gay conversion therapy, and the intersections between LGBTI people and other cohorts, including people with disabilities and Aboriginal people.

A whole-of-government taskforce was established to focus on laws and services that include LGBTI Victorians. This was to ensure that the LGBTI community has input into relevant government policies.

An Equality Branch was established within the Department of Premier and Cabinet (DPC) to provide advice and support to the Minister for

<sup>106</sup> Victorian Gay & Lesbian Rights Lobby, 'Victory for adoption equality campaign' (Media Release, 2 November 2015).



Equality and the Premier. The Equality Branch also provides support to the Victorian Commissioner for Gender and Sexuality and the whole-of-government taskforce.

### Victorian Public Sector Pride Network

The Victorian Public Sector Pride Network was established to champion LGBTI inclusion and equality in the workplace. As a peer-directed network, its objectives include increasing LGBTI visibility and celebrating LGBTI participation in the Victorian Public Sector, building organisational human resources capability to embed LGBTI diversity in practice, and connecting LGBTI staff and allies through professional and social networking opportunities.

The network is overseen by the Victorian Public Sector Pride Council, which is made up of endorsed members from all departments and a number of large agencies. The network is supported by its members' organisation-specific pride networks, allies, executives, human resources areas and DPC's Equality Branch.

A number of departments reported that they established their own departmental Pride Networks and were represented on the VPS Pride Network,<sup>107</sup> and they had joined as members of Pride in Diversity – Australia's national employer support program for LGBTI workplace inclusion.<sup>108</sup>

### Safe and inclusive schools

In 2015, the Victorian Government committed to expanding the Safe Schools Coalition Victoria program to every Victorian government secondary school, to make schools safe and inclusive for all students. The Department of Education and Training (DET) reported that it had commenced work to deliver on this commitment. The Department noted that the right to equality and the protection of children under the Charter had informed the development of the program work plan.

DET also launched its Gender Identity policy which school staff can access through the Department's Schools Policy and Advisory Guide.<sup>109</sup>

### City of Banyule – Leading the promotion of LGBTI rights

The City of Banyule's 2014/15 LGBTI plan contained 24 actions focused on increasing the visibility and recognition of Banyule's LGBTI community. Council achieved 91 per cent of the actions, with significant progress in the areas of:

- improving access and equity in services and practices (for example, establishing a playgroup for same-sex parents and their children with Nillumbik Shire Council)
- partnership with community organisations and advocacy (for example, supporting the work of Queer Sphere, a collective of young adults in Banyule who advocate and promote diversity and inclusion)
- increasing community awareness.<sup>110</sup>

### Non-gendered pronouns and misgendering

In September 2015, the Minister for Equality, the Victorian Equal Opportunity and Human Rights Commissioner and the Victorian Commissioner for Gender and Sexuality made a joint statement addressing misgendering.<sup>111</sup> It noted that:

*Deliberate and continued misgendering, including using 'he/she' or 'it' to describe a transgender person not only reflects a lack of acceptance but perpetuates ignorance and confusion. Furthermore, word choices can often reflect unconscious assumptions around gender roles. We know that transgender and gender diverse people face discrimination every day in their schools, employment or in accessing healthcare. Many feel socially isolated and often face rejection from family or peers. We know the impact of this is that transgender and gender diverse people experience significantly worse mental health than the general population.*

107 Department of Premier and Cabinet; Department of Education and Training; Department of Economic Development, Jobs, Transport and Resources; Department of Justice and Regulation

108 Victoria Police; the Department of Environment, Land, Water and Planning; the Department of Justice and Regulation; and the Department of Economic Development, Jobs, Transport and Resources.

109 Department of Education and Training, *Gender Identity* (4 March 2016) <<http://www.education.vic.gov.au/school/principals/spag/health/pages/genderidentity.aspx>>.

110 City of Banyule, *Inclusion, Access and Equity: Achievements Report 2014/15* (2015) 5.

111 The statement can be viewed at <<http://www.humanrightscommission.vic.gov.au/index.php/news-and-events/commission-news/item/1294-joint-statement-addressing-misgendering>>.



The Equality Branch at DPC reported that the Victorian Government is currently making the Safe Schools Coalition program available to all Victorian Government schools, which will include education about trans and gender diverse issues such as pronouns.

## Part three: Equality for people with disabilities

In 2015, consultations commenced on the design of the full National Disability Insurance Scheme's (NDIS) quality and safeguarding framework. This was a critical time to ensure that the human rights of Victorians with disabilities are properly safeguarded and remain at the forefront of the full scheme.

### The National Disability Insurance Scheme (NDIS)

#### Human rights protection in the full NDIS scheme

With the current transition to the NDIS, stakeholders reported concerns about a weakening of Victorian protections and services to people with disabilities if measures are not put in place to safeguard or improve existing human rights protections.

At present, the human rights of people with disabilities in Victoria are protected by the Charter. However, it is unclear whether these protections will be carried forward under the full NDIS scheme.<sup>112</sup>

The Disability Services Commissioner reported that:

*During a time of transition for the disability sector, with the ongoing roll out of the [NDIS], we are continuing to work to influence and direct the debate about future national safeguards to ensure the rights of people with a disability, including their rights to be free from abuse, remain at the forefront of support. We continue to advocate for a scheme that will ensure people with a disability and their support people can speak up and be heard, have access to justice and receive quality rights-focussed supports to meet their needs.<sup>113</sup>*

<sup>112</sup> Disability Discrimination Legal Service, Submission to the Department of Social Services, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, 12 May 2015.

<sup>113</sup> Disability Services Commissioner, information provided to the Victorian Equal Opportunity and Human Rights Commission (15 February 2016).

In 2015, the Commission responded to the national consultation into the NDIS Quality and Safeguarding Framework.

The consultation requested views on the design of a national safeguarding framework that will replace existing state-based frameworks once the NDIS transitions to the full scheme.

The Commission made the following key recommendations in its submission:<sup>114</sup>

- the NDIS be nationally consistent in protecting human rights by directly incorporating into federal legislation the legal rights and duties under the Convention on the Rights of Persons with Disabilities; or
- the Charter continue to apply in Victoria after the transition to the full national scheme so that it continues to protect people with a disability, apply to the National Disability Insurance Agency as decision makers, and apply to services providers in Victoria.

The Victorian Ombudsman said that:

*The obligation to act compatibly with the Charter does not extend to Commonwealth authorities. There is a risk that moving to a national system may result in people with disability in Victoria losing the protections of the Charter. Given this, safeguards for fundamental human rights must be at the core of the national system.<sup>115</sup>*

### DHHS response

DHHS reported that the report on the 2015 Review of the Charter noted the application of the Charter to national schemes as one of three areas that required further attention. The report also recommended that the Charter should apply to national schemes in Victoria to the fullest extent possible, or alternatively, that

<sup>114</sup> Victorian Equal Opportunity and Human Rights Commission, *National Disability Insurance Scheme Quality and Safeguarding Framework: Submission to the NDIS National Consultation*, Department of Social Services (April 2015) <<http://www.humanrightscommission.vic.gov.au/index.php/submissions/policy-submissions/item/1224-submission-to-the-ndis-national-consultation-department-of-social-services-april-2015>>.

<sup>115</sup> Victorian Ombudsman, *Reporting and Investigation of Allegations of Abuse in the Disability Sector* (June 2015) 564.

the national scheme should incorporate human rights protections equivalent to, or stronger than the Charter.

The NDIS gives effect to a number of key provisions of the UN Convention on Rights of Persons with Disabilities. As such, the NDIS Quality and Safeguarding Framework currently under development is intended to advance the rights of people with disability to dignity and respect. This includes the right to live free from abuse, neglect, violence and exploitation; and to full inclusion and participation in the community.

The Victorian Government has been a strong advocate for a national approach to quality and safeguards that builds on the strengths of the Victorian system, in legislated regulation provisions and human rights protections. It is the responsibility of all governments, as well as the National Disability Insurance Agency, to ensure that a strong quality assurance system and robust safeguards are in place for the NDIS so that the framework delivers on the NDIS promise of a better life for people with disabilities.

The Victorian Government continues to work closely with the Commonwealth and other States and Territories to develop a nationally consistent quality and safeguarding framework for the full scheme of the NDIS.

## DJR response

DJR reported that in consultation with DPC, DHHS and the Commission, DJR is undertaking work to better understand the impacts of the NDIS to ensure that the human rights protections available to Victorians with a disability are not diminished.

DPC established a NDIS Reform Branch to provide advice to the Premier and Cabinet on the policy implications of major initiatives by departments and agencies related to NDIS issues.

The Branch also has responsibility for coordinating a whole-of-government approach to implementation of the NDIS. The Branch specifically considered the Charter impacts of the proposed legislation on people with a disability in Victoria.

The NDIS Reform Branch is developing a framework that identifies a set of intended outcomes that seek to maximise the opportunities of the reforms to improve services for people with a disability. This includes a set of principles to guide work that:

- promotes the economic and social inclusion of people with a disability
- ensures that people with a disability receive high quality and safe services, can exercise individual choice and control, and are supported by a service system that provides a robust and meaningful set of safeguards and protections.

## The NDIS and mental illness

In order to be eligible for an individual support package under the NDIS participants must have a permanent disability. The Victorian Council of Social Service (VCOSS) noted that some people with mental illnesses avoid describing their condition as permanent, aiming to recover and resume an ordinary life. The episodic nature of some mental illnesses may not meet the permanency criteria.

VCOSS expressed concern that Victoria, unlike other states, has committed all of its mental health community support funds to the NDIS which means that if people are not eligible for the NDIS they may no longer be able to rely on their current support services.<sup>116</sup>

## DHHS response

DHHS reported that psychosocial disability support delivered within a recovery framework enables individuals with psychosocial disability to achieve maximal recovery.

A client-centred approach in which participants have choice about the nature of supports they need to achieve their own goals will both encourage and enable people to recover and 'resume an ordinary life'.

A strong and collaborative interface between the NDIS and specialist mental health treatment services will assist in enabling individuals with psychosocial disability support needs to access the NDIS and in aligning mental health treatment with disability support where appropriate.

<sup>116</sup> Victorian Council of Social Service, Submission to Department of Treasury and Finance on the State Budget 2016–17, 2015, 43.

## The NDIS and taxi services

VCOSS noted that participants of the NDIS will be fully transitioned out of Victoria's Multi-Purpose Taxi Program (MPTP), which currently funds transport services to people with disabilities.<sup>117</sup> VCOSS proposes the NDIS package reflect additional funding to maintain mobility and ensure NDIS participants are not worse off after the transition.<sup>118</sup>

### DHHS response

DHHS reported that Victorian MPTP users who are eligible for NDIS will transition to the scheme. All NDIS participants will have their travel needs assessed and included in their individual plans, as required, to enable participation in community, social, economic and daily life activities. There will be no changes for existing MPTP users who are not eligible for the scheme.

## The NDIS and advocacy

Some stakeholders highlighted the increasing importance of advocates for people with disabilities, particularly in light of the transition to the full NDIS scheme.<sup>119</sup>

VCOSS noted the need to provide advocacy for people with disabilities who do not qualify for individual support under the NDIS.<sup>120</sup> The Victorian Ombudsman recommended an increase in the funding for advocacy, which should be informed by a comprehensive assessment of the need undertaken by government. The Ombudsman noted this is particularly critical in the transition to the NDIS.<sup>121</sup>

117 Victorian Council of Social Service, Submission to the Department of Economic Development, Jobs, Transport and Resources, *Multi Purpose Taxi Program Review*, 11 December 2015, 17–18.

118 Ibid 17.

119 See Victorian Ombudsman, Reporting and Investigation of Allegations of Abuse in the Disability Sector (June 2015) para 559; Victorian Council of Social Service, Submission to the Family and Community Development Committee, *Inquiry into Abuse in Disability Services: Stage 2*, October 2015, 12; Disability Justice Advocacy, Submission to the Family and Community Development Committee, *Inquiry into Abuse in Disability Services*, 21 October 2015.

120 Victorian Council of Social Service, Submission to the Family and Community Development Committee, *Inquiry into Disability Abuse: Stage 2*, October 2015, 12.

121 Victorian Ombudsman, *Reporting and Investigation of Allegations of Abuse in the Disability Sector* (June 2015) recommendation 2.

VCOSS also reported that disability advocacy services in the Barwon launch site of the NDIS have experienced a significant increase in demand, resulting from the NDIS transition, to help people assert their rights in the planning process.<sup>122</sup> Without advocacy, people with disabilities are at risk of reduced access to services, unaware they can challenge restrictions or advocate for greater support.<sup>123</sup>

### DHHS response

DHHS reported that the Victorian Government has committed to maintaining a strong and robust advocacy sector as we transition to the NDIS. It is important that Victorians with disability have access to quality advocacy regardless of whether they receive supports through the scheme or not.

The department is consulting with the 24 funded organisations that make up the Victorian disability advocacy program to identify opportunities to strengthen the sector and ensure that their work is well positioned to inform policy, such as the development of the next State Disability Plan 2017–2020.

This work is being undertaken in the context of the Commonwealth's review of the National Disability Advocacy Framework, and future reform of the National Disability Advocacy Program.

## Equality for students with disabilities

During Victoria's 2015 review of the Program for Students with Disability (PSD), VCOSS expressed concern that too many students with disabilities have additional health and development needs that are not being well supported by the school system.<sup>124</sup> While the PSD supports approximately 4 per cent of the student population, around 20 per cent of those children have health and development needs requiring additional supports to achieve their potential at school.<sup>125</sup>

122 Victorian Council for Social Services, above n 119, 13.

123 Victorian Council of Social Services, "State Budget Submission 2016-17: Putting people back in the picture", 47.

124 Victorian Council of Social Services, Submission to the Department of Education and Training, *Program for Students with Disabilities Review*, September 2015, 5.

125 Ibid.

VCOSS noted that inconsistent practices within schools are leading to considerable differences in how a student is treated depending on which school they attend. Although some schools use evidence-based interventions to support their students, many schools resort to ineffective or poor practices, including restraint, seclusion expulsion or suspension of students for behaviour directly related to their disability.<sup>126</sup>

Some schools resist enrolling students with disabilities, concerned they will not get sufficient funding or that they lack skills and expertise needed to support students with health and development needs.<sup>127</sup> VCOSS also reported that families can be reluctant to apply for funding due to a diagnosis-based funding model applying a label to a child affecting their future options. This includes concerns about the stigma associated with a label during schooling or post-education.

In its report to the parliamentary review, the Commission for Children and Young People (CCYP) also observed:

*We must be clear that poorly funded, planned and delivered education for children and young people with a disability is not just a missed opportunity – it is a breach of their human rights.*

*A human rights approach acknowledges barriers to full access experienced by people with a disability as being discriminatory. It is discriminatory and a breach of human rights to prevent a person from enjoying their rights on an equal basis to other people.<sup>128</sup>*

## DET response

The Department of Education and Training (DET) reported that:

The Education State makes a commitment to every Victorian having an equal right to the knowledge and skills to shape their lives. Making Victoria the Education State is about promoting inclusive practices in schools so every school can better support all children and young people with disabilities and special needs, including those with additional health and development needs.

The Victorian Government's Special Needs Plan for Victorian Schools sets out a

commitment to inclusive schooling through nine initiatives that will strengthen and improve support for children and young people with a disability.

The plan sets out new requirements for schools, such as providing that all newly built schools provide facilities to accommodate diverse needs of students. All new teachers are also required to complete a special needs component as part of their tertiary studies and existing teachers must undertake training in special needs as part of their ongoing professional development.

DET reported that oversight of seclusion and restraint by the Senior Practitioner – Disability (Office of Professional Practice) will be extended to schools.

Another key initiative of the Special Needs Plan is the Department's Review of the Program for Students with Disabilities (the Review).

On 18 April the Premier released the Review of the Program for Students with Disabilities and the Government's response: *Inclusive education for all students with disabilities and additional needs*. This new reform agenda will complement and enhance the initiatives already underway through the Special Needs Plan and broader Education State reforms.

Work has already begun to implement the reforms set out in *Inclusive education for all students with disabilities and additional needs*, with the intent of ensuring that every school is an inclusive school, and improved educational outcomes and quality of life for all students with disability. The reforms place inclusive practices at the centre of our efforts to maximise the learning and wellbeing for all students with disabilities, and include a focus on individual strengths and rights, rather than deficits.

The reforms will deliver personalised learning and support planning for students with disabilities, additional funding for schools, more resources and access to expertise and a focus on professional learning and building the skills of our school staff and regional workforces to support the full range of children and young people with disabilities.

At the heart of the reforms is a commitment to a great school for every community and excellent teaching in every classroom for every child.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid 20.

<sup>128</sup> Commission for Children and Young People, information provided to the Victorian Equal Opportunity and Human Rights Commission (February 2016).



## Update on Held Back report

In 2012, the Commission published *Held Back*, a report into the experiences of students with disabilities in Victorian schools. In July 2015, DET provided the Commission with an implementation update.

For example, DET noted that it has led national work to develop a public website for parents and the broader community that sets out the rights of parents and students in relation to the Disability Standards for Education, including enrolment.

The full implementation update is available on the Commission's website.

## Right to communicate in mental health facilities

In 2015, the Mental Health Complaints Commissioner (MHCC) received a number of enquiries and complaints about the lack of access or confiscation of mobile phones, tablets or laptops from consumers during inpatient admissions. MHCC observed that a number of rights are raised by these enquiries and complaints including the right to communicate under the *Mental Health Act 2014*, as well as the right not to be unlawfully deprived of property and freedom of expression under the Charter.<sup>129</sup>

MHCC reported that:

*The responses provided by services in some cases raised concerns about the adequacy of the explanation provided to the consumer for confiscating the device. MHCC also identified in these instances variable practices across services with no evidence that these services have reviewed existing policies and practices to take into account the requirements of the [Mental Health] Act.*

MHCC referred this issue to DHHS in 2015 for the development of policy and practice guidance for the sector.

## DHHS response

DHHS reported that phones are not routinely removed from inpatients of mental health services. For clinical reasons, some clients are not allowed routine access to their mobile phones while in mental health services. In such circumstances clients are able to request access to a phone to communicate as needed. Mental health services are required to facilitate such access.

This issue has recently been raised with senior clinical leaders across mental health services. The Chief Psychiatrist is exploring whether a clinical guideline on this issue is required to provide greater guidance to health services on this issue.

## Evictions into homelessness for people with disabilities

Stakeholders raised concerns about the eviction of people with disabilities into homelessness, including people experiencing mental illness (such as hoarding or other conduct related to mental illness).<sup>130</sup>

### Case studies: Preventing the eviction of people with disabilities into homelessness

The Council to Homeless Persons (CHP) has intervened in a number of cases concerning the eviction of people with disabilities who were at risk of homelessness. CHP uses the Charter to negotiate safe and stable housing for vulnerable tenants.

#### Case study<sup>131</sup>

Joan had an acquired brain injury and was living with her partner in a community-managed rooming house. She was given immediate notice to vacate by the landlord for violence and drug dealing. The landlord did not approach Joan with regard to the allegations but rather believed other people. The landlord applied to VCAT to evict Joan. Joan's advocate contacted the landlord advising them that they had not spoken to Joan about the allegations in

129 *Mental Health Act 2014* (Vic) pt 3 div 2.

130 For example, Justice Connect Homeless Law and Council to Homeless Persons.

131 Council to Homeless Persons, Submission No 74 to the Victorian Government, *2015 Review of the Charter of Human Rights and Responsibilities*, 2015.



breach of the section 8 of the Charter. The notice to vacate was withdrawn due to a lack of evidence.

#### Case study<sup>132</sup>

Peter had an acquired brain injury and a physical disability. He was living in a community-run rooming house and was issued with a notice to vacate due to an alleged assault on his neighbour. CHP contacted the housing worker seeking details of the alleged assault particularly in light of Peter's physical disability. The CHP advocate challenged the unsubstantiated nature of the assault allegations and requested an investigation. Until such time as the allegation was substantiated, CHP argued that the eviction breached Peter's right to equality before the law under section 8 of the Charter. The notice to vacate was withdrawn.

## Promoting equality for people with disabilities

### Victoria's 10 year mental health plan

DHHS reported that during 2015 the department led the process to develop a long-term strategic plan for mental health in Victoria. The process was driven by community consultation and feedback, with the release of the plan in November 2015. DHHS commented that:

*Both the plan and the Charter seek to promote an inclusive community that respects human dignity, equality and freedom. The plan aims for all Victorians to experience their best possible health, by promoting mental health for all ages and stages of life. It seeks to enable Victorians living with mental illness to live fulfilling lives of their choosing, with or without symptoms of mental illness.*

*The plan also seeks to reduce stigma and increase the participation of persons with mental illness. Over the life of the plan, this will include action to reduce the prevalence of mental illness, the suicide rate and the gap in social and emotional wellbeing between at risk groups, including Aboriginal Victorians and the general population.*

## Equal access to public facilities

In 2015, some public authorities improved accessibility to public facilities.<sup>133</sup>

### Public toilets – Mornington Peninsula

*The ability to have access to a toilet/ sanitation facility is a basic human right. However, standard accessible toilets don't always meet the needs of all people with a disability – Mornington Peninsula Shire*

Mornington Peninsula Shire sought to raise awareness of people's right to appropriate sanitation through a social media campaign on the need for more accessible toilets to be built on the peninsula. Council has worked actively with stakeholders on the issue. Access to dignified and accessible sanitary facilities for people with disabilities is important for social inclusion and participation to daily opportunities.

The shire noted that more accessible facilities would help to provide such opportunities for people with high care needs because they have height adjustable adult-sized change benches, a ceiling hoist, ample room and a safe and clean environment.

### Victoria's parks

Parks Victoria's initiatives to make parks more accessible and inclusive included developing and making available a motorised version of an all-terrain wheelchair (TrailRider) to enable visitors with significant physical disabilities to access more rugged walking trails at the Grampians National Park, Wilsons Promontory National Park, Dandenong Ranges National Park, and Buchan Caves Reserve. Parks Victoria's work was recognised as joint winner of the 2015 National Disability Award – Excellence in Technology.

## Equal access to information

The Accident Compensation Conciliation Service (ACCS) reported that it engaged Vision Australia to audit its website to improve access to information about the ACCS and its services for the vision impaired. Following the audit, significant changes were made to its website resulting in greater accessibility.

DPC's Strategic Communication, Engagement and Protocol Branch tested a number of websites to ensure that they were accessible. The branch

132 Ibid.

133 For example, Department of Environment, Land, Water and Planning; Public Record Office Victoria (providing an Auslan interpreter for seminars on request); Moyne Shire Council.

explained that the testing helped identify opportunities for improved accessibility and a remediation plan has been developed. In addition, user experience and accessibility compliance testing is now a standard requirement for all new websites developed by the branch.

DHHS reported that it launched the Independent Mental Health Advocacy Service to provide information, support and advocacy to persons receiving compulsory mental health treatment. The service supports patients to understand their rights and make decisions about their assessment, treatment and recovery.

### **Improving access to information about housing services**

DHHS reported that it created a new, client-focused housing assistance website that is a 'one-stop-shop' to help people understand their housing options and access information about housing and related issues. DHHS noted that people's needs were paramount, with useability, accessibility and privacy considered and built into the project from the beginning.

Real service users were crucial to the project, from design to testing. Public housing tenants, people who have experienced homelessness and department staff made a significant contribution to the service design, function and content.

The [housing.vic.gov.au](http://housing.vic.gov.au) website is translated into 11 languages common among Victorians who have low levels of English proficiency. DHHS noted that:

*This initiative provides an example of how the department is making information more accessible, including for persons from a diverse range of cultural backgrounds, while ensuring that their privacy is protected. The information on the website also assists users to understand their rights and housing options, thereby contributing to the protection of their family and home.*

### **Equal access to transport**

The Taxi Services Commission (TSC) is the regulator of the taxi industry. It reported partnering with disability organisations in 2015 to promote access to taxis for people with disabilities. This included developing brochures, conducting on-road operations, and attending information sessions. The TSC is also producing information in a broader variety of formats including Easy English, large print and Braille. It has begun rolling out disability awareness training internally across the organisation.

The TSC observed that each year it receives a number of complaints from passengers about the refusal of taxi services because of an assistance animal. In response, the TSC partnered with Guide Dogs Victoria and Service Dog Training to hold an educational event for taxi drivers to help them better understand the role of assistance animals and developed material to identify different types of assistance animals. The material details appropriate questions that drivers can ask to confirm the status of the animal without infringing on the person's right to privacy.

The TSC also provides information on avenues for complaints if passengers with assistance animals face discrimination, including a feedback form and information on the Commission's complaints process under the Equal Opportunity Act.

### **Advocating for equal access to transport**

The Commission's Disability Reference Group (DRG) provides guidance to the Commission on systemic discrimination and human rights issues that impact on people with disabilities in Victoria. The group includes members who have direct experience of disability, parents of children with disabilities, service providers and advocates. In 2015, the DRG identified equal access to transport as a priority area.

DRG members met with Public Transport Victoria (PTV) and raised a number of issues affecting equal access to public transport, including the lack of wheelchair accessible tram stops outside the CBD, the small number of wheelchair accessible V/line services and inconsistent audio announcements on buses, trams and trains.

PTV noted concerns that DRG members had raised. PTV discussed its Accessible Public Transport in Victoria Action Plan 2013–2017 and welcomed further engagement from DRG members as this action plan was implemented.

## Equal access to courts

The Magistrates' Court of Victoria reported that the majority of human rights complaints against the Court related to access to its courts. For example:

- A legal representative could not access Kyneton Court as the doors to the court are not wheelchair accessible. The case was adjourned to Bendigo.
- A teenager in a wheelchair had to be lifted by staff into Wonthaggi Court so that he could participate in an education program for youths at the court.
- A complaint raised issues at Heidelberg and Melbourne courts about facilities for people with disabilities, including signage for toilets, location of locks and flush buttons in toilet cubicles, space in lifts and fixed seating in courts which restricts mobility.

The Magistrates' Court acknowledged the need to investigate and address the lack of equal access in a number of its courts and the standards of facilities. In some cases, refurbishments are already underway.

Court Services Victoria, which provides and arranges for the provision of administrative services and facilities to support the Victorian courts, was also notified of the difficulty in accessing the Wonthaggi Court due to a steep incline at the front path leading from the nature strip to the Court. Court Services Victoria reported that an alternate more suited location was identified as a temporary measure and an accessibility consultant has been engaged to review the site.

Court Services Victoria also reported that works were undertaken at the County Court of Victoria to install a person-in-custody lift, which included seating within the lift and an accessibility ramp from the lift, leading to a court dock. CSV noted that accessibility consultants are engaged as part of the design process for developments and refurbishments.

## Update on Beyond Doubt: The Experiences of People with Disabilities Reporting Crime

In 2014, the Commission published a research report on the experiences of people with disabilities reporting crime. The report found that people with disabilities may be more likely to experience violent and sexual crime than other people.

In 2015, Victoria Police launched an Easy English resource about people's rights when reporting crime. The resource was developed in partnership with the Commission with input from a range of stakeholders.

The resource provides information on:

- what a crime is
- where crime can occur
- how to report a crime
- how to make complaints
- where to go for additional help and support.

## Equality of bequests under a will

State Trustees Limited reported that it pursued a number of testator family maintenance claims on behalf of represented people with a disability whose bequest under a will is less than their other able-bodied siblings. State Trustees Limited noted that 'this reflects the principles of the Charter in upholding the represented person's right to be treated equally, and often allows them greater quality of life – for example, through health aids, outings, possessions – than they would otherwise have had'.

## Part four: Racial and religious equality

The Commission heard from stakeholders about the prevalence and impact of racism and religious vilification in the Victorian community.<sup>134</sup> In particular, stakeholders raised concerns about the impact of international terror attacks in local communities. For example, Moreland City Council told the Commission that:

*While community relations among multicultural communities in the City of Moreland are generally harmonious and positive, the recent international situation in Syria and Iraq has had some local impacts. In particular in the suburb of Fawkner residents have expressed their fear of racist attacks and abuse.*

Both the City of Greater Dandenong and Moreland City Council identified the need to combat racism as a priority, as well as enhance social cohesion. The City of Greater Dandenong emphasised the importance of strengthening connections across diverse cultural and faith communities. Moreland City Council underlined ‘the critical need to enhance social cohesion and relationships between Islamic and non Islamic communities’.

### Victoria Police response

Victoria Police reported that it works closely with its multicultural and multifaith communities to provide community reassurance. Victoria Police engages through a number of channels including its Multicultural Portfolio Reference Group and its Multi Faith Council.

In addition, Victoria Police has signed a Memorandum of Understanding with the Commission to investigate and cross-refer prejudice motivated offences and crime.

Through a range of communication measures, Victoria Police will continue to encourage community members to report racism and prejudice motivated incidents and crime.

### Update on Equality is Not the Same

In 2013, Victoria Police released its report *Equality is Not the Same*, which contains a three-year action plan to develop, implement and evaluate improvements to frontline policing. The development of the report was triggered by the settlement of the *Haile-Michael* case, which alleged racial profiling within Victoria Police.

Victoria Police reported that while 2014 was about the design of the projects and policies under *Equality is Not the Same*, 2015 was about their implementation.

Victoria Police reported that its Priority Communities Division developed and published the following policies:

- *Human rights, Equality and Diversity Standards* – Victoria Police’s first stand-alone human rights policy to ensure human rights considerations are integral to all Victoria Police decision making and policy development, as well as a stated zero tolerance towards racial profiling.
- *Interactions with the Public Policy* – to enhance Victoria Police’s interactions with the public and increase public confidence and trust.
- *Reporting Contacts and Intelligence Policy* – to clarify Victoria Police’s field contact interactions and the process for reporting contacts and gathering intelligence in a way that is fair, respectful and transparent.

Victoria Police reported that it also launched the following projects:

- *Receipting Proof of Concept* – to increase police accountability when Victoria Police initiate contacts with the public.
- *Cultural, Community and Diversity Strategy* – to further enhance the capability of Victoria Police staff when working with diverse communities.
- *Human Rights Train the Trainer Package* – to build Victoria Police staff understanding of the Charter’s operation in the context of Victoria Police’s work.

In addition, human rights considerations are being ‘threaded’ through police academy training, including an unconscious bias package for academy trainers to incorporate in their curriculum for recruits and promotional programs. The new police custody officer training also incorporates human rights considerations.

<sup>134</sup> For example, Moreland City Council, Darebin Council, the City of Dandenong and the Victorian Aboriginal Legal Service.



The Commission welcomed Victoria Police's receipting trial as an important component of *Equality is not the Same* but raised the following concern about its operation:

*The current receipting trial ... does not record on police receipts the ethnicity of those stopped by police. In order to answer community concerns around whether particular groups are being subjected to over-policing, we need to have an understanding of whether there are systemic trends. Without the collection and monitoring of data in this area, these questions will not be answered.*<sup>135</sup>

## Update on Report Racism

In 2015, the Commission completed its pilot project for Australia's first ever third-party reporting mechanism for the Aboriginal community. Third-party reporting allows an individual to report racial vilification or discrimination to a community organisation, rather than directly to police or a regulator.

The project is a joint initiative of the Commission, Victorian Aboriginal Legal Service and Victoria Police. It has been carried out in Northern Melbourne (Cities of Yarra, Darebin and Whittlesea) and Shepparton, where a range of organisations volunteered to be trained to take reports of racism. People could also report racism online, by phone or directly to the Commission.

In 2015, an independent evaluation was undertaken and the Commission is currently considering options for the project's future.

## Social cohesion

In 2015, DPC established a Community Resilience Unit, which it reported 'works in the area of social cohesion and violent extremism, and necessarily raises issues of Islamophobia and the rise of far-right organisations which protest against mosques and espouse anti-Islamic sentiment'.

The Unit is mindful of the right to freedom of religion under the Charter and met with the Commission to discuss opportunities to promote this right and to discuss the *Racial and Religious Tolerance Act 2001*.

DPC reported that Muslim stakeholders of the Unit regularly complain of harassment in public on the basis of their religious dress. These complaints were referred to the Commission, and where a crime may have been committed, to Victoria Police.

## Strengthening Victoria's social cohesion

DPC reported that 'the [unit] is mindful that opinions, whether extreme Islamist belief or far-right extremist opinions, are protected by the Charter. This focuses the work of the [unit] on preventing violent extremism, rather than preventing extreme beliefs'.

Victoria Police reported that it facilitated a panel discussion on 'human rights and social cohesion in a policing context' to explore challenges and appropriate human rights compliant policing responses to manage the increasingly frequent protests and counter-protests while facilitating people's right to peaceful assembly.

Darebin Council's submission to the State Government's 'Social Cohesion Framework' emphasised the need for a cohesive government and whole-of-community approach to countering religious extremism. The submission focused on the need to address the marginalisation and discrimination experienced by young people who are members of faith communities.

Darebin Council drew on its experience working with Preston Mosque, which includes a Memorandum of Understanding with the mosque committing to collaboration on projects that have benefit to the whole community.

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<sup>135</sup> Victorian Equal Opportunity and Human Rights Commission, 'Commission response to Victoria Police receipting trial' (Public Statement, 1 April 2015).



# Chapter 5: The protection of families and children

## Overview

In 2015, the Commission continued to hear reports from stakeholders about the challenges of supporting families and protecting vulnerable children and young people.

The chapter profiles the issues raised with the Commission about laws, policies and practices that impacted on section 17 of the Charter in 2015, including:

- the right to protection of families (part one)
- the right to protection of children (part two).

### The right to protection of families and children

Section 17(1) of the Charter recognises that 'families are the fundamental group unit of society and are entitled to be protected by society and the State'. This right is discussed in more detail in part one of this chapter.

Section 17(2) states that 'every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. This right is discussed in more detail in part two of this chapter.

## Part one: The protection of families – section 17(1)

### The right to protection of families

The right to protection of families under section 17(1) of the Charter places a positive obligation on the State of Victoria to protect families – for example, by adopting laws, policies or practices that protect families, or by providing families with financial or other support.<sup>136</sup>

The term 'family' has a broad meaning and recognises 'the diversity of families that live in Victoria, all of whom are worthy of protection'.<sup>137</sup> For example, a family may include children living with their grandparents or a legal guardian, a foster family or extended family (such as where kinship ties exist).

Section 17(1) of the Charter is supported by the right to privacy in section 13 of the Charter which prevents public authorities from unlawfully or arbitrarily interfering with a person's family.

Although section 17(1) aims to protect families, there are times when it may be reasonably limited under section 7(2) of the Charter. For example, the right may need to be limited by the best interests of a child under section 17(2) if a child is in a family violence situation.

<sup>136</sup> Human Rights Committee, *General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 39th session (27 July 1990) 3.

<sup>137</sup> *Explanatory Memorandum Charter of Human Rights and Responsibilities Bill 2006* (Vic) 14. Also see *Director of Housing v Sudi* [2010] VCAT 328, 33.

## Services to intervene early and promote positive outcomes

Stakeholders underlined the need for stronger family support services and early intervention to prevent the breakdown of families and removal of children.<sup>138</sup> For example, Ararat Rural City Council reported that it is partnering with out-of-home care providers to advocate for additional support services to children. The initiative aims to better support at-risk children by working at the local level to improve the coordination and efficiency of services.

### DHHS response

The Department of Health and Human Services (DHHS) reported that a range of early intervention services are already available in Victoria, which assist to help families and where possible divert them from entering the child protection and out-of-home care services. This includes Child FIRST and Family Services, Early Parenting Services, Parenting Assessment and Skills Development Services, and Cradle to Kinder.

Additional services have been provided for Child FIRST and Family Services following additional funding in the 2015/16 State Budget.<sup>139</sup>

## Early intervention for Aboriginal families

The Aboriginal Family Violence Prevention and Legal Service (FVPLS) reported that Aboriginal women are the fastest growing prison population in Victoria and the overwhelming majority of those have experienced family violence, making a causal link between their criminalisation and experiences as victims of violence.

FVPLS Victoria advocate for reform of the child protection system to move away from victim blaming for children being exposed to family violence to a therapeutic and supportive model that builds victims/survivors' capacity to safely care for their children.

<sup>138</sup> For example, the Centre for Excellence in Child and Family Welfare, information provided to the Victorian Equal Opportunity and Human Rights Commission (February 2016).

<sup>139</sup> DHHS reported that additional funding is also provided for Family Services in the 2016-17 State Budget. The 2016-17 State Budget provides funding for a new intensive early childhood support service.

FVPLS Victoria reported that the rates of contemporary Aboriginal child removal and child protection intervention in Aboriginal families acts as a significant deterrent for Aboriginal victims/survivors to disclose family violence and seek assistance from services.<sup>140</sup> FVPLS Victoria expressed concern for the absence of meaningful effort at early prevention in relation to Aboriginal women and their children prior to the involvement of Child Protection.

## Protecting families of people with disabilities

The Disability Services Commissioner (DSC) documented that almost half of all complaints to the DSC were made by families on behalf of people with disabilities, as evidence of the critical role families play in safeguarding the rights of people with a disability. Despite this, DSC found that families reported often feeling that their knowledge of, and role in the life of, their family member with a disability was dismissed or minimised by their disability service provider.

To address this, DSC developed a digital resource for service providers. *Jane's Story* recounts one mother's experience of having a child with a disability and the advocacy she had to provide for her son after placing him in a group home. DSC noted that:

*This work aligns with section 17 of the Charter, the protection of children and families, through supporting disability service providers and their staff to enhance their understanding of and respect for the role of families in the life of their family member with a disability.*

### DHHS response

DHHS reported that it is undertaking a program of work to strengthen safeguards for people with a disability during transition to the National Disability Insurance Scheme. As part of this work, the department is funding the Association for Children with a Disability to build the capacity of families of children with a disability to identify and report abuse.

This initiative will provide:

- an online resource to assist families to recognise and report abuse

<sup>140</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, Submission to the Legal and Social Issues Committee, *Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015*, June 2015, 5.

- workshops to promote the online resource
- translation of materials into community languages.

## Part two: The protection of children – section 17(2)

### The right to protection of children

Human rights recognise children as rights-bearers whose capacity to express their interests evolves with increasing maturity. A child is defined in section 3 of the Charter as a person under 18 years of age.

Children are also entitled to the enjoyment of all Charter rights (except where they may not be eligible, such as the right to vote under sections 18(2)).

Section 17(2) requires the Victorian Government to adopt special measures to protect children. It also requires the best interests of the child to be taken into account in all actions affecting a child. What will be in each child's 'best interests' will vary according to their personal circumstances.

To consider these circumstances, a child should have the opportunity to express their views in matters concerning them and for their views to be taken into account. In Victoria, some laws recognise a child's best interests as a paramount consideration. For example:

- section 10 of the *Children, Youth and Families Act 2005* (Vic) states that the best interests of the child must always be paramount. It requires regard to 'best interest principles' when making decisions under the Act.
- section 60CA of the *Family Law Act 1975* (Cth) requires a court to have regard to the best interests of the child as paramount when making a parenting order.

### Children in out-of-home care

#### Aboriginal children in out-of-home care

FVPLS Victoria identified Aboriginal women and their children as some of the most marginalised in the community. It noted that Aboriginal women are 34 times more likely to experience family violence, and men's violence against Aboriginal women is the primary driver of up to 90 per cent of Aboriginal children entering out-of-home care.

Aboriginal children are overrepresented in the child protection system with Aboriginal children representing one sixth of the children placed in out-of-home care.<sup>141</sup> According to the Commissioner for Children and Young People (CCYP), as at 30 June 2015, there were 1334 Aboriginal children in out-of-home care or 18 per cent of the 8,031 children in care.

Aboriginal children are 12.3 times more likely to be on care and protection orders in comparison with non-Aboriginal children.<sup>142</sup>

CCYP noted that through the Aboriginal Children's Forum, DHHS is working with the Aboriginal child and family sector, community services organisations, other government agencies and CCYP to improve service responses and reduce the overrepresentation of Aboriginal children and young people in out-of-home care.

### DHHS response

DHHS reported that the overrepresentation of Aboriginal children in the child protection system has long been acknowledged as an issue that requires serious and sustained attention. To a large extent, the solutions to this overrepresentation are to be found in broader policy to address Aboriginal socio-economic disadvantage and the enduring impact of dispossession and community destruction playing a significant role in this overrepresentation.<sup>143</sup>

Child protection seeks to address the impact of these issues on a case-by-case basis and the department is working closely with the Commissioner for Aboriginal Children and Young People to improve services responses.

<sup>141</sup> Commission for Children and Young People, information provided to the Victorian Equal Opportunity and Human Rights Commission (February 2016).

<sup>142</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, information provided to the Victorian Equal Opportunity and Human Rights Commission (January/February 2016).

<sup>143</sup> DHHS reported that a \$16.5 million initiative was announced in the 2016-17 State Budget to develop state-wide responses to improve the lives of vulnerable Aboriginal children and young people through better support to children in out-of-home care and their carers, and intervention for Aboriginal young people involved with the youth justice system.

## Amendments to the Children, Youth and Families Act

During 2014, amendments were made to the Children, Youth and Families Act<sup>144</sup> intended to simplify Children's Court orders, and identify and remove barriers to achieving permanent placements for children.<sup>145</sup> However, the introduction of time limits for children placed in out-of-home care to be reunified with families has been criticised as having the potential consequence of not reunifying children with their families where support services to families are unavailable or inadequate.<sup>146</sup>

Victoria Legal Aid noted that the time frames will put greater pressure on parents hoping to reunite with their children and with a good chance of doing so, but where two years is an insufficient period of time to comprehensively address the issues of concern. After the two years, reunification becomes substantially more difficult. The independent oversight of certain orders and DHHS actions under some orders by the court will be reduced. Victoria Legal Aid reported that:

*We have made changes to our service delivery model so, as much as possible within the new framework, children's and parents' voices can be heard in decision-making. This includes, for example, a provision to fund lawyers to assist with internal reviews of [DHHS] decisions. We remain concerned that rigid time limits and less independent oversight in an already overloaded system may not promote outcomes in the best interests of children and young people.*

*Our experience also shows us that the legislative changes will increase the burden on families in which mothers have experienced family violence and are doing their best to protect their children, but are struggling to do this because they are unable to access support services.*

144 *Children, Youth and Families (Permanent Care & other Matters) Amendment Act 2014* (Vic).

145 Department of Health and Human Services, *Changes to child Protection Law* (29 February 2016) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/changes-to-child-protection-law>>.

146 For example the Centre for Excellence in Child and Family Welfare, information provided to the Victorian Equal Opportunity and Human Rights Commission (February 2016) 7–8.

## The impact of the amendments on Aboriginal families

Stakeholders raised specific concerns about the impact of the permanency reforms on Aboriginal families in Victoria.

*We are profoundly concerned that the amendments will have a disproportionate and devastating impact on Aboriginal children as the most vulnerable and overrepresented cohort within the child protection system*  
– FVPLS Victoria

FVPLS Victoria point to a number of factors which lead to a failure to access services, including families being without a DHHS worker for months during staff turnover, delays by workers in making referrals to family support services, long waiting lists to access services, long waiting lists for housing, and a failure to convene or delays in convening Aboriginal Family Led Decision Making Meetings (AFLDM).<sup>147</sup>

CCYP similarly noted that delays in establishing Aboriginal identity and in convening AFLDM meetings are concerning in light of the new permanency reforms.

### Providing services necessary in the best interests of the child

To rectify some of the concerns arising from the 2014 amendments, the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill was introduced in 2015 to reinstate section 276 of the Children, Youth and Families Act which prevents the Children's Court from making a protection order unless the Court is satisfied DHHS has taken reasonable steps to provide services necessary in the best interests of the child. This requires all other options to be explored before the child is made the subject of a protection order. FVPLS Victoria noted this is especially important in the case of family violence where therapeutic supports are pursued to assist the non-violent parents to safely care for their child.<sup>148</sup>

However, FVPLS Victoria is concerned that the 2015 amendments do not go far enough to address the issues raised by the 2014 amendments. In particular, FVPLS remains concerned about the operation of the new Family Reunification Orders, the arbitrary time limits inserted by the 2014 amendments, and the prohibition on the Court in properly taking

147 Aboriginal Family Violence Prevention and Legal Service Victoria, above n 140, 7.

148 Ibid.



into account steps DHHS has or has not taken to provide services to a child and his or her family.<sup>149</sup>

### The need for early intervention and targeted resources

FVPLS Victoria anticipate that the amendments will fast-track the increased removal of Aboriginal children from their families and communities, compounding what it says is now being referred to as a 'new stolen generation'.<sup>150</sup> The service is concerned that fast-tracking the children of family violence victims into permanent out-of-home care not only punishes victims and exacerbates trauma for children, it also rules out the possibility of intensive, therapeutic interventions that would lead to family reunification, healing and stability for children within the family unit.<sup>151</sup>

FVPLS argue that a suite of targeted, evidence-based processes to reduce family violence and family-violence driven child protection involvement in Aboriginal communities is needed. This includes a strengthened commitment to and resourcing of culturally safe and targeted early intervention, prevention work (including community legal education) for Aboriginal communities, and increased investment in frontline legal services for Aboriginal victims/survivors of family violence.<sup>152</sup>

#### DHHS response

DHHS reported that the views of Victorian Legal Aid and FVPLS Victoria about the impact of the amendments have been well canvassed. The critique of the reforms by some stakeholders has failed to recognise the very harmful impact of drift in care many Victorian children are facing and the poor life outcomes these children experience as a result and that the Children's Court retains decision-making regarding the removal of all children from parental care. These reforms are to be reviewed later this year by CCYP, and this review will consider whether the changes are meeting the intended objective of improving permanency for children.

Additional resources and new requirements for earlier case planning, inclusive of family-led decision making, are intended to ensure that families are given every opportunity to achieve reunification within the 24-month time frame. Notably, reunification has almost always been achieved within two years over the past decade, and 'fairness' to families must be balanced against the interests of the child.

### Protecting sibling relationships in out-of-home care

Under child protection orders, some siblings are separated with different carers. In a study of sibling relationships, the CREATE Foundation found that stability and permanency in placements are more likely to be achieved when siblings are located in the same placement. Being placed together in care strongly predicts successful reunification.<sup>153</sup>

Yet some children are separated from siblings and do not have adequate communication and contact with one another for a variety of reasons. Some children are unaware of the reason why they have been separated from siblings, usually in circumstances where the children are also removed from parents. When given the opportunity to express their view, children most often express a desire to live with their siblings.<sup>154</sup>

CCYP has ongoing concerns about the significant number of Aboriginal children and young people who are separated from their siblings in out-of-home care<sup>155</sup>. Taskforce 1000 found that the majority of Aboriginal children in out-of-home care have lost contact with their siblings.<sup>156</sup>

#### DHHS response

DHHS reported that it fully supports the desirability of placing siblings together in out-of-home care, and the Children, Youth and Families Act Best Interests Principles require consideration of this issue. The placement of siblings is an important factor in maintaining the identity of children in out-of-home care and siblings are placed together wherever possible. A case plan for a child who has siblings must include a plan for the promotion and maintenance of sibling relationships where the siblings are not living together.

Sibling placements are dependent on a range of factors such as whether all children in a sibling group are in care; whether they require the same form of care; the age and stage

149 Ibid.

150 Ibid 6.

151 Ibid 10.

152 Ibid 6.

153 CREATE Foundation, *Sibling Placement and Contact in Out-of-Home Care* (2015) <[http://create.org.au/wp-content/uploads/2014/12/Sibling-Report\\_LR.pdf](http://create.org.au/wp-content/uploads/2014/12/Sibling-Report_LR.pdf)>.

154 CREATE Foundation, information provided to the Victorian Equal Opportunity and Human Rights Commission (February 2016).

155 Commission for Children and Young People, information provided to the Victorian Equal Opportunity and Human Rights Commission (February 2016).

156 Taskforce 1000, *Bulletin Three* (September 2015) Department of Human Services <[http://www.dhs.vic.gov.au/\\_\\_data/assets/word\\_doc/0009/922662/Taskforce-1000-bulletin-September-2015.doc](http://www.dhs.vic.gov.au/__data/assets/word_doc/0009/922662/Taskforce-1000-bulletin-September-2015.doc)>.

of children entering care; whether a carer is willing and able to care for sibling groups; and whether it is safe for all siblings to be placed together.

### **Criminalisation of children in out-of-home care**

A number of stakeholders raised concerns about the criminalisation of children in residential care on child protection orders.<sup>157</sup>

CCYP pointed to evidence of the Youth Parole Board that approximately 60 per cent of children in detention have current or previous Child Protection involvement. Similarly, Youthlaw noted that children in residential care were reported to police for conduct that would not otherwise be reported if they were living in a family environment.<sup>158</sup>

CCYP has urged DHHS to review the criteria or threshold for involving police in troubling behaviour that occurs in out-of-home care settings, such as property damage.

### **DHHS response**

DHHS reported that it is considering an alternative approach to deal with conflict in residential units utilising restorative conferences with the aim to provide a mechanism for care providers to address young people's behaviour without using the criminal justice system. A conference could be used in situations where young people have had conflict with either staff or fellow residents, committed a property offence at their residential unit or demonstrated challenging behaviour that is impacting negatively on those residing or working in the unit.

### **Victoria Police response**

Victoria Police reported that it endeavours to respond to all requests for assistance and that it will continue to exercise its decision-making in compliance with its Charter obligations to consider the least restrictive approach.

## **Children in the youth justice system**

### **Independent Person for children in police interviews**

The Centre for Multicultural Youth (CMY) operates the Youth Referral and Independent Persons Program, a roster of trained Independent Persons to support children during police interviews when parents and guardians are unable to attend.<sup>159</sup>

In 2011, the Victorian Law Reform Commission recommended that legislation clearly describe the role of Independent Persons and detail the consequences of failing to arrange for an Independent Person to attend an interview.<sup>160</sup> However, CMY is concerned that the reforms have not been implemented. CMY underlines the importance of the role of the Independent Person being set out at law so that the Independent Person and police have a clear understanding of the role the person will play during the interview with a child.<sup>161</sup>

### **DJR response**

The Government is considering how recommendations in the Victorian Law Reform Commission's report can be implemented in Victoria. Consideration is being given to clarifying the role of a support person, the processes to be followed in circumstances where police interview children in police custody, and the consequences for failing to follow any such procedures. It is important that children, as well as their parents or carers, are supported in any interaction with the criminal justice system. They need to understand the process in which they are involved, and that the child's Charter rights are protected, including the best interests of the child (section 17(2)) and rights in the criminal process (section 23).

### **Victoria Police response**

Victoria Police recognises the importance of the role of the independent person when interviewing children, as outlined in section 464E(1) of the *Crimes Act 1958*. This requirement is also reflected in the Victoria Police Manual. Victoria Police works closely with its stakeholders through the Victoria Police Youth Portfolio Reference Group and liaises directly with the Youth Referral and Independent Persons Program (YRIPP) to work through and address any issues relevant to its service delivery.

157 Commission for Children and Young People, Youthlaw, and Victoria Legal Aid, information provided to Victorian Equal Opportunity and Human Rights Commission (February 2016).

158 Youthlaw, information provided to Victorian Equal Opportunity and Human Rights Commission (February 2016).

159 Centre for Multicultural Youth, *Information for Police* (2014) <<http://cmy.net.au/yripp/info-for-police>>.

160 Victoria Law Reform Commission, *Supporting Young People in Police Interviews* (2011).

161 Centre for Multicultural Youth, information provided to the Victorian Equal Opportunity and Human Rights Commission (February 2016).

## Bail for children

Amendments to the *Bail Act 1977* in 2013 introduced a new criminal offence for breaching various bail conditions including conditions relating to curfews, geographical restrictions of movement, no contact with certain individuals and restrictions of driving. However, the amendments did not distinguish between children and adults. As a result, there was a dramatic increase in the number of children being held on remand.

Examples have included children remanded for being 30 minutes overdue on curfew or being in the wrong postcode.<sup>162</sup> Stakeholders instead recommend that diversion programs are used and the Bail Act be amended to differentiate between child and adult offenders.<sup>163</sup>

In response to community concerns,<sup>164</sup> the government introduced the Bail Amendment Bill 2015 into Parliament on 24 November 2015 to amend the Bail Act by ensuring that, in relation to children, all other options must be considered before remanding a child in custody, among other considerations. The Bill also removes children from the offence of breaching bail conditions.<sup>165</sup> The Bill passed Parliament and was assented to in February 2016.

### DHHS response

DHHS reported that the commencement of amendments to the Bail Act on 2 May 2016 presents the department with an opportunity to introduce further youth justice practice improvements through review of relevant procedures, bail supervision guidelines and the Remand/Bail strategy.<sup>166</sup>

### Victoria Police response

Victoria Police welcomes the opportunity to implement and work within the framework set by the new legislative regime.

162 Paul McDonald, *Surge in Victorian Children held in prison-like conditions for bail breaches needs urgent remedy* (8 November 2015) Anglicare Victoria.

163 Ibid.

164 Commission for Children and Young People, information provided to the Victorian Equal Opportunity and Human Rights Commission (February 2016).

165 Attorney-General, 'Stronger New Bail Laws For Serious Offenders' (Media Release, 25 November 2015).

166 DHHS reported that the 2016–2017 state budget included a commitment of \$1.77 million over two years to provide intensive bail supervision. DHHS reported that it will work closely with DJR, the Children's Court and Victoria Police regarding opportunities to improve bail justice practice and supervision.

## DJR response

The *Bail Amendment Act 2016* commenced on 2 May 2016. From this date, children who breach a condition of their bail will no longer be required to 'show cause' why their detention in custody is not justified. This reform is intended to reduce the significant increase in numbers of children remanded since the introduction of the 2013 changes. Other changes include introducing child-specific factors to be taken into account by bail decision-makers when considering whether to grant bail and if so, whether the conditions are no more onerous than necessary.

## Children in custody on remand

Stakeholders raised a number of concerns about children in custody on remand. CMY is concerned that police did not apply a child focus to decisions concerning when to exercise a caution, issue a summons, make a recommendation for bail or remand. The centre is concerned that police apply an adult framework for bail decisions leading to a higher number of children recommended for bail or remand than use of a caution or summons to appear on their accord. CCYP is also concerned about children being remanded, or their remand extended, into custody due to a lack of accommodation or placements.<sup>167</sup>

### DHHS response

DHHS reported that the court is responsible for decisions regarding remand and bail and must be satisfied of a range of considerations, as outlined in the Bail Act. The Bail Act is clear that a child must not be refused bail on the sole ground that accommodation is not available. Decisions to remand often involve consideration of a range of complexities, of which accommodation may be one issue.

### Victoria Police response

Victoria Police noted that the *Bail Amendment Act 2016* aims to respond to matters raised above particularly increased numbers of children in custody. Victoria Police will work within the framework set by the new legislative regime and will develop appropriate policy and guidelines to ensure implementation commensurate with its Charter obligations.

167 Commission for Children and Young People, information provided to the Victorian Equal Opportunity and Human Rights Commission (February 2016).

## DJR response

The *Bail Amendment Act 2016* responds to concerns about increases in the number of children in custody. The reforms introduce a presumption that proceedings against children will be initiated by way of summons rather than arrest. This presumption accords with current Victoria Police best practice and elevates the principle into statute. The Act also introduces a number of child-specific considerations into the Bail Act, to take into account the particular vulnerabilities of children.

The Honorary Justice Office is currently providing specialist training and resources to assist bail justices to implement the reforms.

## Incarcerating children in police cells

CCYP reported that the placement of children in gazetted police cells was a concern.<sup>168</sup> CCYP explained in its 2014/2015 Annual Report that:

*The alarming issue of detaining children in police lockups was the subject of several recommendations by the Royal Commission into Aboriginal Deaths in Custody. One recommendation was that a refusal of bail by a police officer or a Justice of the Peace should immediately be referred to a magistrate or other qualified person so that bail can be reconsidered.*

*The incarceration of Aboriginal children in regional police cells and the lack of appropriate assessments by suitably qualified medical practitioners for children with mental health issues and histories of attempted suicide highlight the urgent need for reform.<sup>169</sup>*

CCYP wrote to the Chief Commissioner of Victoria Police referencing the Charter in highlighting concerns about holding children in gazetted police cells.

## Victoria Police response

Victoria Police reported that it works closely with members of the Aboriginal Portfolio Reference Group and the Aboriginal Justice Forum (AJF) to address justice matters impacting Aboriginal and Torres Strait Islander communities, particularly young people. A pre-charge diversion evaluation process is underway to assist Victoria Police in developing options to strengthen youth diversion, particularly in reference to young Aboriginal people.

## DJR response

Under the Children, Youth and Families Act, Victoria Police must ensure that certain conditions are met in respect of children held in police cells. Children must be kept separate from adult prisoners and prisoners of the opposite sex and are entitled to receive visitors (subject to limited exceptions). Reasonable efforts must be made to meet their medical, religious and cultural needs, including, in the case of Aboriginal children, their needs as members of the Aboriginal community.

Under AJA3 Objective 2, 'Diversion and Alternatives to Imprisonment', there are a number of initiatives to reduce the numbers of Koori youth on remand and increase Koori youth access to bail:

- identifying and monitoring barriers to timely bail opportunities for young Aboriginal people, including monitoring the duration of detention
- reviewing the operational effectiveness of existing bail support programs aimed at keeping young Aboriginal people out of custody, including the Koori Youth Intensive Bail Support Program
- ensuring appropriate access to legal representation and advocacy at arrest and court.

<sup>168</sup> Ibid.

<sup>169</sup> Commission for Children and Young People, *Annual Report 2014–2015* (2015) 35.



## Age of criminal responsibility

Stakeholders continue to advocate for raising the age for criminal responsibility in Victoria in line with international consensus and the International Convention on the Rights of the Child. Both CCYP and Anglicare recommend increasing the age of criminal responsibility from 10 to 12.

The Committee on the Rights of the Child encourages State parties to increase their lower minimum age of criminal responsibility to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.<sup>170</sup>

### DHHS response

DHHS reported that recognising the impact of trauma and neglect on cognitive development, the department supports a welfare response to antisocial behaviour by 10 and 11-year-olds who are currently dealt with by the criminal justice system. This response could be prioritised through improved collaboration between agencies including Victoria police, child protection, out-of-home care providers, the Department of Education and Training and family and children's services.

If the age of criminal responsibility is increased to 12 years of age, Victoria Police will need to be supported to intervene appropriately in the cases of 10 and 11-year-old children engaging in antisocial behaviour.

## Infringements for children and young people

Youthlaw raised concerns about the impact of the infringement system and excessive fines on children and young people.

The imposition of fines acts to entrench disadvantage for already disadvantaged and vulnerable children and young people by drawing them into the criminal justice system and increasing their interactions with the court system.

Parents often pay fines, however young people without this support and without capacity to pay their fines, often end up in court and face criminal charges.<sup>171</sup>

Under the existing laws, children do not have the same option as adults to seek to have fines dismissed under special circumstances, including

<sup>170</sup> Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's rights in juvenile justice*, CRC/C/GC/10 (25 April 2007) 32.

<sup>171</sup> Youthlaw, *Fairer Fines* <<http://youthlaw.asn.au/campaigns-advocacy/fines-system/>>.

homelessness, mental or intellectual disability or addiction to drugs or alcohol.

In order to address these difficulties for children and young people, Youthlaw proposes:

- limiting the imposition of fines on young people
- reasonable and affordable fines for vulnerable people
- facilitating an early exit of children generally, and additionally of young people with special circumstances and/or without capacity to pay, from the infringement system

To address infringements, Youthlaw advocates for:

- free public transport for people under 18 and all means tested concession holders
- children and young people to receive discounted fines that reflect their financial capacity to pay
- support for issuing officers to exercise their discretionary powers not to impose a fines
- a less complex infringements system that supports the early exit of vulnerable and financially disadvantaged children and young people.<sup>172</sup>

### Department of Economic Development, Jobs, Transport and Resources (DEDJTR) response

DEDJTR reported that it is exploring a range of initiatives to support a greater focus on 'triaging' people out of the infringement system at early stages – particularly those with special circumstances – and working closely with DJR to develop appropriate guidance/guidelines for internal reviews that are in line with the *Fines Reform Act 2014*.

### DJR response

The *Infringements Act 2006* provides the framework for the issuing and enforcement of infringement notices in Victoria. The Attorney-General has released guidelines under the Infringements Act to assist enforcement agencies to meet their responsibilities for issuing and enforcing infringement notices.

DJR advises that under the Infringements Act, a child who has been served with an infringement notice is afforded the same rights as an adult for dealing with

<sup>172</sup> *Fines Reform Act 2014* (Vic) commencing by December 2017.

an infringement notice at any time prior to default. Such rights include the ability to apply for internal review by the enforcement agency on grounds including that 'special circumstances' apply. If a child does not pay the infringement notice, the matter is registered for enforcement with the Children's Court.

Under the Children and Young Person Infringement Notice System (CAYPINS), the Children's Court may consider the totality of a child's circumstances that are put before the Court. The legislative procedure for CAYPINS is clear that a registrar must take into account the child's personal and financial circumstances.

DJR notes Youthlaw's proposal that young people should receive discounted fines to reflect their financial capacity to pay. DJR advises that certain public transport offences already have a discounted penalty for children.

The Infringement Management and Enforcement Services unit within DJR plays a role in educating enforcement agencies on their responsibilities under the Infringements Act and is always willing to consult with agencies in relation to the operation of the infringement system.

### Victoria Police response

Victoria Police reported that its officers exercise discretion when determining the suitability for issuing a penalty notice to a young person. In making this decision, members must determine whether their decision is lawful, ethical and professional. At present, young people under the age of 18 can apply to have their infringements managed by CAYPINS operated by the Children's Court.

## Children's views and participation in decision-making

The CREATE Foundation emphasised the importance of ensuring that children participate in decision-making. CREATE is concerned that:

- children under 10 are unable to express an independent view as they are not provided with legal representation in the child protection jurisdiction
- the views of children are not given sufficient weight in the child protection system
- young people in out-of-home care are not given an opportunity to be heard on matters affecting their lives, such as the impact of a 7.30am lock-in policy on job opportunities commencing at an early hour of the morning
- children in out-of-home care have limited awareness of support services they can access, complaints processes, and the rationale underpinning policy decisions in their residential care facility, which affect the ability of children to take part in decision-making processes.<sup>173</sup>

### DHHS response

DHHS reported that it is undertaking a project, co-designed with children and young people in residential care, to increase their awareness of complaint mechanisms available to them when they have concerns about their care or feel unsafe. The department has also commenced promotion of complaint processes through distribution of DVDs and booklets explaining the Charter for Children in Out-of-Home Care to residential homes. In addition, community service organisations providing residential care are required to have complaint mechanisms in place.

Children and Youth Area Partnerships (Area Partnerships) actively:

- engage children and young people to understand their lived experience, identify key local priorities, and design solutions
- build the capability of stakeholders to effectively engage children and young people to make decisions on matters affecting their lives.

173 CREATE Foundation, *Sibling Placement and Contact in Out-of-Home Care* (2015) <[http://create.org.au/wp-content/uploads/2014/12/Sibling-Report\\_LR.pdf](http://create.org.au/wp-content/uploads/2014/12/Sibling-Report_LR.pdf)>.

## Protection from forced marriage

The Centre for Multicultural Youth (CMY) expressed concern about a lack of preparedness in law enforcement, child protection and family support systems to manage situations of forced marriage of children. CMY is concerned that there is a lack of awareness among law enforcement officers and service providers of laws prohibiting forced marriage and a lack of understanding about appropriate responses.

CMY provided the Commission with an example of a matter involving a parental decision for two teenage sibling children to be married abroad at 16 and 17 years of age. One of the children indicated that she was not consenting to the marriage and the other sister indicated her consent, although in circumstances where there was considerable pressure from her family.

The handling of this matter by police and services raised a number of concerns for CMY relating to the ability of the lead agency to manage such a situation, the expertise of support services available to the family, the need to protect children from crime and enforce the law while managing cultural sensitivities, and how children are engaged by police and services where there is family pressure.

### Victoria Police response

Victoria Police reported that forced marriage is now included in the *Criminal Code Act 1995* (Cth) and Victoria Police members may encounter victims of this crime when attending family violence incidents. They may also encounter victims of this crime during human trafficking investigations which involve recruiting, transporting, transferring, harbouring or receiving a person through force, coercion or other means for the purpose of exploitation through:

- slavery, or a condition similar to slavery
- servitude (including sexual servitude)
- forced labour
- forced marriage
- debt bondage
- organ trafficking.

In the context of its work, Victoria Police members refer Commonwealth matters to the Australian Federal Police (AFP) and state-based offences are investigated and prosecuted under the most appropriate state legislation such as the *Family Violence Protection Act 2008* and the *Crimes Act*.

Victoria Police continues to work with its partners at the AFP and with community organisations to ensure its knowledge, practice and approach in relation to forced marriage is informed and appropriate. Victoria Police welcomes any additional information to support its understanding and the appropriateness of its response.

## Education for Aboriginal children

CCYP reported that Taskforce 1000 revealed many instances of Aboriginal children being excluded or suspended from school or attending only minimal hours due to detected or perceived 'behavioural problems'. There were also many instances (including a significant cluster in one regional town) of Aboriginal children attending flexible learning models outside the mainstream schooling program.

CCYP explained that:

*Further investigation is required to determine the causes of the 'behavioural problems' and wherever possible implement strategies to support and encourage Aboriginal children to remain at school. It is well-documented that exclusion/ disengagement from school is a primary risk factor for subsequent contact with the law and incarceration. This is an issue for children of all cultural backgrounds.*

### DET response

DET reported that the Government is committed to making Victoria the Education State, giving every Victorian the opportunity to succeed in life, regardless of background, place or circumstance.

### Suspensions and expulsions

The department's Student Engagement and Inclusion Guidance contains information about a range of prevention and intervention strategies that schools can put in place to promote and maintain student engagement in school. Students who demonstrate challenging behaviours and/or are experiencing barriers to engagement in school may need additional support and interventions to address these issues and improve their engagement.

The Guidance provides a staged approach to these interventions, as well as outlining intervention strategies that should be implemented, to ensure that where

possible, no student is excluded from the education system.

As well as putting these strategies into practice with students, school staff should also include specific strategies in their Student Engagement Policy and outline how these will be used to address individual or collective needs within their school environment. There are a range of factors that may contribute to a child or young person becoming disengaged, or at risk of disengaging from school. These include:

- family and community factors such as poverty, parental unemployment and/or low educational attainment, homelessness, transience or living in out-of-home care, Aboriginal or Torres Strait Islander status, refugee background, family breakdown/relationship issues and domestic violence
- personal factors such as physical or mental health issues, disability, behavioural issues, offending behaviour and/or contact with police or justice system, substance misuse or dependency, pregnancy or parenting, caring responsibilities, and learning difficulties
- school-related factors such as negative relationships with teachers or peers, unsupportive school culture, limited subject options and lack of student participation in decision making.

Young people may experience multiple risk factors, which can be interdependent. For example, family breakdown might be a factor in substance misuse, which may itself contribute to other problems such as offending behaviour.

The impact of risk factors on engagement, health and wellbeing will vary between individuals, depending on their levels of resilience and protective factors such as support from a trusted adult. While the presence of one or more risk factors does not inevitably mean a child or young person will become disengaged, it is important that schools have an awareness of these factors to be able to identify and address issues as early as possible.

DET worked with the Victorian Aboriginal Education Association Inc (VAEAI) to develop a fact sheet for parents and carers of Koori children and young people on the suspension and expulsion process.

## Navigator

- The Victorian Government committed \$8.6 million over two years from 2015/16 to 2016/17 to pilot Navigator. Navigator will reach out to disengaged young people aged 12-to-17 years old, and actively work with them and their support networks to return them to education or training. Navigator will be delivered by community organisations who will work closely with local area schools and regional offices.
- Community organisations applying to deliver Navigator were required to demonstrate cultural competence including an awareness of working with learners from culturally and linguistically diverse backgrounds, including those from Aboriginal and refugee backgrounds.
- Navigator will operate alongside school based interventions to provide support to at risk young people. This includes young people who have been suspended or expelled from school.

## LOOKOUT

- The Victorian Government committed \$13.2 million over four years from 2015/16 to 2019/20 to establish new LOOKOUT Education Support Centres. LOOKOUT Centres will boost the capacity of schools, child protection and out-of-home care services to improve education outcomes for children and young people living in out-of-home care.
- LOOKOUT Centre staff will include a Koori Cultural Advisor who will work closely with schools to advocate for the educational and cultural needs of Aboriginal students in out-of-home care and build the capacity of schools to provide culturally appropriate supports. The Koori Cultural Advisor will draw on the capacity and expertise of the Koori Education Coordinators and Koori Education Support Officers to have a comprehensive and consistent approach to supporting Aboriginal students in out-of-home care.
- In the case where a student or young person living in out-of-home care is at risk of exclusion or expulsion, the LOOKOUT Centres will hold schools to account to ensure that every option is explored to avoid this outcome. Exclusion and expulsion should be the last resort. If expulsion is necessary, schools will



be responsible for finding a new school placement for the child or young person. LOOKOUT Centre staff will work with the school, case workers and carers to ensure that the student is promptly enrolled in a new school or setting.

In addition, the Koori Education Workforce, which includes approximately 110 Koori Engagement Support Officers, is available to support schools to develop strategies to improve the learning outcomes of Koori students and strengthen their engagement with families and communities. This includes developing strategies in response to specific place based issues, such as attendance and retention.

In responding to specific students' needs, schools will also benefit from the recent creation of 17 areas within the existing four DET regions. This new structure provides a focus on place-based service delivery to allow localised, tailored and integrated decision-making, service and support, which will deliver better outcomes for learners and their families.

A new Aboriginal Education Plan, which is currently being finalised, will deliver improved educational outcomes for Aboriginal Victorians by leveraging existing universal service platforms and targeted initiatives. This includes actions to support Aboriginal children to remain at school.

## Supporting students with behaviours of concern

DET reported that in 2015 it released new policy, guidance and approaches to assist schools to respond effectively to students with behaviours of concern.<sup>174</sup>

A range of practical tools and resources are available to support implementation of the new guidance and policy initiatives, including:

- online training modules focusing on using positive behaviour approaches to address challenging behaviour
- a rollout of the School Wide Positive Behaviour Support
- the establishment of the Principal Practice Leader in DET who extends the oversight of the DHHS Senior Practitioner.

DET reported that in developing its guidance, it took into account the human rights impacts that are likely to arise when a staff member is required to respond to a student displaying behaviours of concern. This includes the rights of the student exhibiting behaviours, as well as their parents, other students and staff.

The guidance contains a specific section on human rights obligations of a staff member to consider Charter rights when considering an appropriate response to a student displaying behaviours of concern.

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174 For example, this included the new Guidance for responding to violent and dangerous student behaviours of concern and an updated policy on the use of restraints on students. See Department of Education and Training, *Responding to Violent and Dangerous Student Behaviours of Concern* (19 October 2015) <<http://www.education.vic.gov.au/school/principals/participation/pages/behaviourofconcern.aspx>>; and *Department of Education and Training, School Policy and Advisory Guide: Restraint of Student* (27 October 2015) <<http://www.education.vic.gov.au/school/principals/spag/governance/pages/restraint.aspx>>.

# Promoting the rights of families and children

## The Roadmap for Reform

DHHS reported that the *Roadmap for Reform: strong families; safe children* project will set the long-term reform directions for the Victorian child and family services system.

The Roadmap will establish the vision and practical steps for a new way forward that:

- strengthens communities to better prevent neglect and abuse
- delivers early support to children and families at risk
- keeps more families together through crisis
- secures a better future for children who cannot live at home.

DHHS commented that:

*The Roadmap has been developed via a significant amount of sector engagement, evidence gathering and analysis. This has included consultations; a review of 190 studies and evaluative reports; a two-day symposium with key stakeholders; and a field trip to a number of government, non-government and research organisations in the United States. Ongoing evidence, challenge and feedback has been provided throughout by an expert advisory group.*

*The development of the Roadmap has also been cognisant of other major reform programs across government including Education State, Early Childhood Development Reform Plan, Health 2040, Mental Health 10 year plan, Taskforce 1000, the National Disability Insurance Scheme and the Royal Commission into Family Violence.*

*The Victorian system for supporting vulnerable children, young people and families includes universal, targeted and statutory services, which address a lifecycle of complex need across a spectrum of risk and acuteness. Services are provided by a range of sectors – education, early childhood, health, mental health, disability, alcohol and other drugs, family violence as well as specific child and family services. The scope of the Roadmap reflects this system.*

## New standards on child safety

Victoria introduced compulsory minimum Child Safe Standards that apply to services for children to help protect children from all forms of abuse.<sup>175</sup>

DET commenced work in 2015 to support early childhood services and schools to meet the new Child Safe Standards. The aim of the Standards is to drive cultural change in organisations that provide services for children so that protecting children from abuse is strengthened and embedded in everyday thinking and practice. The department noted that the Standards strengthen its existing approaches to child safety and support the best interests of the child under the Charter.

CCYP reported that the standards ‘represent an important step towards full implementation of the recommendations of the Betrayal of Trust parliamentary inquiry’.

Implementation of the standards furthers the fundamental right of children to be safe. Human rights frameworks underpinned CCYP’s contributions to the development of the standards.

Consistent with a human rights approach, CCYP is pleased that the standards include the promotion of the participation and empowerment of children as well as a requirement that the following principles are incorporated in each standard:

- promoting the cultural safety of Aboriginal children
- promoting the cultural safety of children from CALD backgrounds
- promoting the safety of children with a disability.

## New Broadmeadows Children’s Court

The Children’s Court of Victoria reported that a new, innovative Broadmeadows Children’s Court building was opened in 2015, which promotes the right to protection of families and children, as well as the right to privacy and the right to a fair hearing.

The Victorian Government committed \$18.45 million for this project, which is the first purpose-built Children’s Court outside of the Melbourne CBD. The Broadmeadows Children’s Court deals with child protection cases from the Northern region of DHHS. The new court was:

*designed to provide a safe, calming and comfortable space for people attending*

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<sup>175</sup> Department of Human Services, *Child Safe Standards* (30 December 2015) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/child-safe-standards>>.

*court, with plenty of meeting rooms and waiting spaces to preserve people's right to privacy and reduce stress and tension to ensure a fair hearing for all.*

In conjunction with the Alannah and Madeline Foundation, a Cubby House program also commenced at the new court, providing a purpose-designed space to cater for children in the emergency care of the department, while awaiting the outcome of child protection hearings. A qualified member of the foundation provides support and coordinates activities for the children. The aim is to reduce children's risk of any further anxiety, trauma, distress or exposure to violence within a court environment.

The new court has also reduced the number of cases heard at Melbourne Children's Court, alleviating overcrowding and delays.

Broadmeadow's Children's Court will further introduce and trial programs in child protection proceedings that reduce the adversarial nature of court processes and improve outcomes for children and families.

## **Children's views and decision-making – Mature Minor policy**

DET developed a revised policy, *Decision Making by Mature Minors*. The policy is available to school staff and recognises that as children mature, so does their capacity to make decisions about matters that affect them. The department reported that the policy recognises there are circumstances where a child under 18 years of age should be empowered to make decisions on their own behalf. It contains principles and examples to guide school staff and act in students' best interests.

For example, the policy explains that a principal may decide that a student is a mature minor for the purposes of participating in a LGBTI support group at school, or to attend a sex education class. The principal may decide that the student may choose to participate on their own behalf without parental consent. The guiding principles set out in the policy were formulated by reference to the Charter.

## **Case study: Considering the protection of families and children to sustain a public housing tenancy**

A DHHS team in regional Victoria identified a public housing property that had been significantly damaged by a tenant's daughter. On the basis of the evidence of the cause and extent of the damage, the tenant was at risk of being issued with an immediate notice to vacate for causing malicious damage to the premises.

Staff carried out a Charter assessment, in particular focusing on section 17 of the Charter. They determined that issuing a notice to vacate was likely to lead to a breakdown of the family unit. After consideration of all the circumstances, the department decided to serve a breach of duty notice rather than an immediate notice to vacate. The family engaged with the department and agreed to referrals and a tenancy management plan aimed at sustaining a successful tenancy.

# Chapter 6: Cultural rights

*We live in a state that is justifiably proud of its multiculturalism, support for diversity, and the promotion of inclusivity and social cohesion. Many people have acknowledged that these are some of the things that make Victoria a truly wonderful and vibrant state to live in – Ethnic Communities' Council of Victoria.<sup>176</sup>*

## Overview

The chapter profiles the human rights concerns raised with the Commission in 2015 that engage:

- cultural rights broadly (part one)
- Aboriginal cultural rights (part two).

For example, stakeholders reported that public authorities need to better:

- consider cultural rights in local planning decisions and in access to community and health services
- protect Aboriginal cultural rights in the justice system, for Aboriginal victims/survivors of family violence, and for children in out-of-home care.

Along with the Commission's project to increase awareness, understanding and use of Aboriginal cultural rights under the Charter, it was promising to see a growing number of stakeholders initiate or participate in projects in 2015 to recognise and promote Aboriginal cultural rights in Victoria.

<sup>176</sup> Ethnic Communities' Council of Victoria, 'Leading Victorian multicultural organisations condemn planned anti-mosque protests' (Media Release, 9 October 2015).

## Cultural rights

Section 19(1) of the Charter protects cultural rights broadly. It states that 'all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language'.

Section 19(1) reflects the principles of multiculturalism in section 4(3) of the *Multicultural Victoria Act 2011*. It complements freedom of religion under section 14 of the Charter and freedom of expression under section 15 of the Charter.

## Aboriginal cultural rights

Section 19(2) specifically protects Aboriginal cultural rights. It states that:

'Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community:

- (a) to enjoy their identity and culture
- (b) to maintain and use their language
- (c) to maintain their kinship ties
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs'.



# Part one: Cultural rights – section 19(1)

*The diversity of the people of Victoria enhances our community – Charter preamble.*

## Cultural rights in planning decisions

In a joint statement in 2015, the Ethnic Communities' Council of Victoria (ECCV) and the Islamic Council of Victoria (ICV) condemned anti-mosque protests.

ECCV said it was well recognised that multiculturalism and the multifaith networks that existed within Victoria were richly celebrated and part of what made Victoria so culturally vibrant, noting that 'I would strongly encourage those people who are planning to protest against far-right groups and others promoting intolerance and prejudice, to do so peacefully, because to use violence to counter them is to give them a legitimacy they don't deserve'.<sup>177</sup>

Last year, more than 40 leaders from Greater Bendigo community issued a joint statement in support of the local Muslim community. The approved building of a mosque in the area was the subject of some community anger and hostility which escalated following plans by anti-Islam groups to rally in Bendigo.<sup>178</sup> The statement noted that:

*Greater Bendigo is proudly a multifaith community that respects the rights of residents and visitors to practice their chosen faith with dignity and respect ...*

*As leaders of this community we stand united against any form of racism and bigotry. We respect the right for people to have a point of view and believe that any view should be expressed in a peaceful and respectful manner.*<sup>179</sup>

177 Ethnic Communities' Council of Victoria, 'Leading Victorian multicultural organisations condemn planned anti-mosque protests' (Media Release, 9 October 2015).

178 A Court of Appeal decision concerning the application for a planning permit to develop a mosque in Bendigo is discussed at page 14.

179 City of Greater Bendigo, 'Taking a stand' (Joint Statement, 21 August 2015).

## Victoria Police response

Victoria Police reported that it operates under a human rights framework to ensure it strikes the right balance when it enforces the law. With the increasing frequency of protests and counter-protests, Victoria Police has a responsibility under the Charter to promote the right to peaceful assembly and to protect life, property, liberty and the security of persons protesting as well as the surrounding community.

Victoria Police's Operational Response Unit (ORU) provides a highly visible and highly trained police response to deal with public safety, road policing and crime issues that exceed the capacity of individual Police Service Area or Regions. ORU has recently completed human rights training to ensure a greater awareness of how to appropriately consider and balance human rights in these complex and dynamic situations.

In addition, Victoria Police works with its human rights stakeholder organisations through the Chief Commissioner's Human Rights Strategic Advisory Committee to ensure it strikes the right balance and takes into account relevant considerations when promoting and lawfully limiting human rights.

## Access to culturally competent services

The ECCV is concerned about access to community and health services for culturally and linguistically diverse Victorians. ECCV noted:

- the need and importance of allowing communities to access qualified interpreters when accessing health and other community services
- the need for culturally competent health and other community service delivery, including having a diverse workforce
- concerns with some government agencies regarding increased use of online services and its impacts on some members of culturally and linguistically diverse (CALD) communities, including elders and people with limited literacy skills.

## DHHS response

The Department of Health and Human Services (DHHS) reported that its *Cultural Diversity Plan 2016–19* sets out a strategic framework to strengthen the department's efforts to ensure culturally responsive policies and services. Implementation of the plan will incorporate action to improve cultural competency in the health and community services workforce, ensure effective use of language services and enhance data collection on cultural and linguistic diversity.

Cultural and linguistic diversity is being addressed in the development of new digital online services. The Health Translations Directory, being developed in partnership with the Centre for Culture, Ethnicity and Health, is an online portal for health professionals and the wider community to access high quality multilingual resources to support communities to make informed health and lifestyle choices. The directory currently has more than 10,000 resources in some 90 languages.

## DJR response

The department has a Cultural Diversity Plan (CDP) and a Language Services Policy. The CDP sets out legislative obligations that DJR has (including under the Charter) to support and advance the human rights of Victorians from a CALD-background. Objectives include:

- facilitating a strong foundation for learning, and obtaining and maintaining employment
- protecting rights and promoting full civic participation
- providing access to justice information, services, programs and facilities
- inclusive and responsive justice systems.

## State government departments

Following the Hazelwood mine fire in 2014, the Environmental Protection Authority (EPA) identified gaps in communication channels, particularly for CALD groups with low levels of literacy and highlighted a need to continue to be proactive in building relationships. The EPA established a project to focus on and research how it disseminates environmental and health messages in CALD and other communities.

The EPA also partnered with DHHS and Brimbank Council to make the community aware of concerns about the dumping of asbestos in Sunshine North. Newsletters were translated into Mandarin and Vietnamese, and interpreters were used at public events about this issue.

DHHS reported that its new client-focused housing assistance website has been translated into 11 languages.<sup>180</sup> The department has also translated materials in 20 languages to assist CALD communities to manage their physical and emotional health in response to emergencies, and to assist their recovery from emergencies.

The Victorian Government provided financial support to promote the provision of culturally and linguistically competent services by others. For example:

- The Office of Multicultural Affairs and Citizenship provided 136 scholarships for languages in demand. The department reported that by improving the supply and quality of interpreters and translators in Victoria, the program strengthened the Charter rights of Victorians with limited English proficiency.
- The Victorian Government launched a Multicultural Media Grants Program, with grants of between \$500 and \$25,000 to multicultural media organisations to enable them to upgrade their equipment to modern technology standards.

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<sup>180</sup> See Department of Health and Human Services, *housing.vic.gov.au* <<http://www.housing.vic.gov.au>>.

## My Name Project 2015/16 – Change of name for the Myanmar (Burmese) community

In 2015, the Western Community Legal Centre, now called WEstjustice, approached the Victorian Births Deaths and Marriages Registry to resolve concerns of the local Myanmar (Burmese) community about issues being experienced when registering to use essential services.

A large community from Myanmar lives predominantly in Melbourne's western suburbs, most of whom have been resettled through Australia's Humanitarian Program from refugee camps. Myanmar is one of the most ethnically and linguistically diverse countries in the world. The Karen and Chin communities are two of the main groups who make up a large portion of Melbourne's Myanmar community.

These communities, along with many others, have cultural naming practices that differ from the traditional 'first name, family name' structure. The Karen and Chin only have a first name or names at birth and do not have family names. In refugee camps, their name is often recorded in the paperwork incorrectly. These mistakes are then carried over to other identification documents.

Upon arrival in Australia, the Department of Immigration and Border Protection record the given name(s) as the individual's family name. Because many Australian agencies require a family name and due to the individual's communication and cultural issues, their recorded name may be changed a number of times as they register for many essential services such as Medicare, Centrelink, banking, property rental and school. Given the requirement for a family name, many Chin and Karen people provide their birth name, which creates discrepancies with other identification documents.

In March 2016, the Registry agreed to undertake a pilot in partnership with WEstjustice, to assist 20 families from the Karen and Chin community to register a change of name. The pilot will provide important case studies for identifying roadblocks faced by these communities in accessing Victorian services and developing a systemic response to appropriately assisting with the change of name process.

The Public Record Office Victoria (PROV) reported that it has a CALD Committee that is responsible for ensuring that the services it delivers is informed by an appropriate cultural awareness. For example, PROV has engaged with the Museum of Australian Democracy at Eureka who are developing an exhibition focused on the positive contribution the Chinese community have made to the Central Goldfields.

### Courts and tribunals

The Victorian Government Reporting Service, which provides recording and transcription services to courts and tribunals in Victoria, implemented a policy to allow members of the public to access interpreters when using its services. This means that individuals from CALD communities will not be disadvantaged when accessing court and tribunal transcripts and other services.

The Victorian Civil and Administrative Tribunal (VCAT):

- appointed a Member of Social and Cultural Inclusion, 'aimed at putting greater emphasis on initiatives relating to access to justice and the fair application of the law in a socially and culturally diverse community'
- established a Diversity Committee which is responsible for the development, coordination, implementation, review and monitoring of cultural and social diversity issues at VCAT
- held its annual professional development conference on the theme of 'Serving the diverse needs of the community'.

The Supreme Court, VCAT and the Judicial College of Victoria reported that they were represented on the National Judicial Council on Cultural Diversity. In 2015, the Council completed a national survey of resources and information available to assist court users from culturally diverse backgrounds and is working on a national protocol relating to the use of interpreters in courts, as well as a training package on cultural competency.

### Local councils

Cardinia Shire Council developed its first Cultural Diversity Plan, which recognises and respects the rights of its residents to express and share their cultural, linguistic and religious heritage. The plan is:

*based on the vision that all residents in Cardinia Shire feel valued, included, respected and able to access the range of services, programs and facilities offered by us.*

The plan will guide the Council's work over the next four years, with a focus on social cohesion, access and participation, language services, health and wellbeing services, education and employment, and connecting young people.

## Promoting inclusion and cultural diversity in commemoration programs

The Department of Premier and Cabinet (DPC) reported that the 2015 Premier's Spirit of Anzac Prize asked Victorian secondary students to explain what the Spirit of Anzac means today in the context of multicultural Victoria with the aim not to exclude people from a particular culture or background from participating.

DPC also reported that many of the recipients of the ANZAC Centenary Community Grants were local communities organising inclusive and culturally relevant commemoration and education programs. For example:

- an education program for the Somali community called 'Our African Elders on the Anzac spirit'
- an Anzac day community education program for Latin American migrants, refugees and international students
- an exhibition on the Turkish experience of our Anzac history by the Australian Intercultural Society
- the 'We will remember them' event put on by the Melbourne Hebrew Congregation.

The Veterans Branch, together with Aboriginal Victoria, supported a Victorian Aboriginal Research project which will improve access to resources and information about Victorian Aboriginal service men in World War One. The Veterans Branch, through the Anzac Centenary Major Grants Program, also provided funding to support the Melbourne season of the theatre production, *Black Diggers*.

## Part two: Aboriginal cultural rights – section 19(2)

*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 relation with their traditional lands and water – Charter preamble.*

### Cultural abuse

The Victorian Aboriginal Legal Service (VALS) noted that the abuse and denial of Aboriginal cultural rights is a key human rights issue for its clients. In the last year, VALS has advocated for definitions of child abuse to include cultural abuse for Aboriginal Victorians (discussed in detail below).

*Whether it be through sexual, physical, emotional or cultural abuse, the effects of institutionalisation on our communities remain vivid. They can be seen in the high incarceration rates and increased contact with the justice system; in the ongoing removal of our children and young people into out-of-home care; in the low employment and education outcomes; and in cultural breakdown, loss of land, language and heritage. – Wayne Muir, Chief Executive Officer, Victorian Aboriginal Legal Service<sup>181</sup>*

### Aboriginal Victoria response

Aboriginal Victoria (DPC) reported that the Indigenous Family Violence Task Force identified that family violence in the Aboriginal community may encompass cultural abuses. The Government recognises the value of working with mainstream and Aboriginal community controlled organisations to ensure that Aboriginal clients are treated with dignity and respect and services are responsive to securing and upholding the cultural rights of Aboriginal people.

<sup>181</sup> Victorian Aboriginal Legal Service, Submission to the Victorian Government, *Exposure Draft – Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014*, 2014, 5.



## DJR response

The department recognises that cultural strength is an important factor closely linked to social, emotional and spiritual wellbeing. Through the AJA3, cultural strengthening activities reinforce a positive Koori identity, often by increasing connectedness to family, community and country, and building on existing strengths.

Cultural strengthening initiatives include: traditional language and cultural statements included in Koori Court proceedings and the Police Aboriginal Liaison Officers' coordination of sporting events, cultural camps, cultural training, flag-raising and cultural awareness activities with the local Koori community.

## Redress scheme for institutional child abuse

In August 2015, the Victorian Government released a public consultation paper on a Victorian redress scheme for institutional child abuse. The Victorian Government sought views on the forms of institutional child abuse that a Victorian redress scheme should cover. The paper recognised that children in institutions have been subjected to a range of harms that extend beyond sexual abuse and noted that a redress scheme could potentially cover cultural abuse.<sup>182</sup> It defined cultural abuse as:

*'the cessation of the ability to continue cultural practices that would have been handed down by parents to children but for the fact of institutionalisation – including spiritual practices, language, cultural practices, understanding of kinship relations, and other traditions'.*

VALS made a submission to the public consultation based on consultations conducted in Aboriginal communities and correctional centres on the proposed redress scheme. VALS's submission recommended, among other things, that for Aboriginal and Torres Strait Islander peoples, cultural loss and cultural abuse be included in the terms of reference for the proposed Victorian redress scheme for institutional child abuse.

<sup>182</sup> Victorian Government, *Exposure Draft – Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014* (5 August 2015) 11.

Providing redress for cultural abuse and cultural loss acknowledges the unique historical, cultural and colonial circumstances that have impacted on First Nations Peoples. This also recognises Aboriginal and Torres Strait Islander peoples' unique status under international and domestic law as per the United Nations Declaration on the Right of Indigenous Peoples and the Victorian Charter of Human Rights and Responsibilities (s 19(2)).<sup>183</sup>

## The definition of criminal child abuse

VALS also made a submission on the Exposure Draft – Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 about whether the Bill's definition of 'criminal child abuse' (including physical and sexual abuse) appropriately covered all cases of child abuse.<sup>184</sup> The exposure draft Bill proposed to remove limitation periods for civil actions for damages arising from criminal child abuse. VALS argued that the definition should be amended to include cultural abuse for Aboriginal Victorians.

VALS raised Aboriginal cultural rights under section 19(2) of the Charter, noting that:

*Aboriginal people, by way of their removal and subsequent abuse in institutional settings, and the intergenerational trauma that has impacted on families and communities, have been denied access to these rights. Although these rights may not be applied retroactively, VALS would suggest that Aboriginal people today are continued a denial of these rights due to past policies and practices.*

*Land, language, kinship ties, culture, identity and spiritual belief systems all continue to be 'at risk' due to the impacts of institutionalisation. As such, changes to Victoria's civil litigation procedures should reflect and address the ongoing effects of cultural abuse within institutions.*<sup>185</sup>

The Bill passed without amendment on 14 April 2015.

VALS is disappointed that the statement of compatibility for the Bill failed to raise Aboriginal

<sup>183</sup> Victorian Aboriginal Legal Service, *Victorian Aboriginal Community Response to the Public Consultation Paper on A Victorian Redress Scheme for Institutional Child Abuse* (October 2015).

<sup>184</sup> Passed on 14 April 2015.

<sup>185</sup> Victorian Aboriginal Legal Service, above n 181, 9–10.

cultural rights despite VALS's concerns in its submission on the exposure draft. Further, the Scrutiny of Acts and Regulations Committee subsequently determined that the Bill was compatible with the rights set out in the Charter. VALS noted the importance of Ministers understanding what Aboriginal cultural rights are, how they are engaged in law-making processes, and how the views of Aboriginal community groups need to be acknowledged.

## Aboriginal cultural rights in the justice system

VALS used the Charter to lobby the Dame Phyllis Frost Centre to allow an inmate to have her young son visit her in prison. VALS argued that Aboriginal cultural rights under the Charter meant that the prisoner had the right to maintain her kinship ties.

### Case study: Parents' access to children on child protection orders

Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS) represented an Aboriginal mother as part of a court proceeding to facilitate access to her children, which was extremely difficult due to her incarceration 750km away. FVPLS raised Aboriginal cultural rights and the protection of families under the Charter.

The Magistrate subsequently made a non-binding order for DHHS to facilitate access between the mother and her children. When this did not occur within the prescribed two-week period, FVPLS Victoria made additional representation on behalf of the client. The Magistrate directed DHHS to immediately make all necessary arrangements for the children to visit their mother.

The Victorian Ombudsman's 2015 Investigation into the rehabilitation and reintegration of prisoners in Victoria noted that the distinct cultural rights of Aboriginal and Torres Strait Islander people are protected in the Charter and that 'in managing Aboriginal and Torres Strait Islander prisoners, Corrections Victoria must comply as far as reasonable with the Charter and consider it when making decisions about Aboriginal and Torres Strait Islander prisoners'.<sup>186</sup>

The Victorian Ombudsman's investigation found that:

*culturally specific programs for Aboriginal and Torres Strait Islander prisoners were run haphazardly in the prison system. These programs have been shown to be effective in helping prisoners address their behaviours and reintegrate successfully, so they should be run consistently.*<sup>187</sup>

The Ombudsman recommended that Department of Justice and Regulation (DJR) examine the current delivery of cultural programs to Aboriginal and Torres Strait Islander prisoners and in particular:

- conduct an analysis of demand versus availability of these programs
- record and monitor participation in these programs to ensure that they are as effective as possible.<sup>188</sup>

DJR supported this recommendation.

### DJR response

DJR appreciates the importance of culturally specific programs for Aboriginal and Torres Strait Islander prisoners, and recognises their ability to help these prisoners change their behaviours and reintegrate successfully.

DJR has a number of programs in place to meet the cultural needs of Aboriginal prisoners, including:

- the Corrections Victoria Reintegration Pathway which provides an integrated approach to transitional planning and support from entry to prison through to post-release. It includes a specific service for Aboriginal and Torres Strait Islander prisoners
- an Aboriginal Cultural Immersion program that strengthens identity and self-responsibility
- the 'Marumali' program, which aims to heal longstanding trauma and loss associated with the Stolen Generation
- the 'Dardi Munwurro' family violence program.

Additionally, in 2015, Corrections Victoria (CV) introduced the 'Aboriginal Art Program' as part of the 'Statewide Indigenous Arts in Prison and Community Program', allowing prisoners to sell their artwork from prison (discussed on page 83). The program will

<sup>186</sup> Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (2015) 76.

<sup>187</sup> Ibid 151.

<sup>188</sup> Ibid 155.

improve community reintegration outcomes for Aboriginal prisoners post-release. This program demonstrates the department's commitment to developing programs consistent with the Charter, in particular the promotion of cultural rights.

CV is committed to supporting the Ombudsman's recommendation and will continue to regularly monitor the referral and participation of Aboriginal prisoners in these programs. CV will continue to review ongoing demand for, and availability of, these programs.

Finally, the Aboriginal Social and Emotional Wellbeing Plan, released in 2015, provides a number of initiatives which recognise the fundamental role of culture, community and spirituality to the wellbeing of Aboriginal prisoners. Activities under the plan include: Cultural Safety Training for all prison health staff; training for mental health clinicians in the mental-health assessments of Aboriginal prisoners; and the creation of a new Aboriginal Clinical Consultant position, which is designed to build the cultural capacity of the prison workforce, leading to increased rapport and trust between prison staff and prisoners. The Aboriginal Clinical Consultant works to ensure that prisoners receive culturally appropriate health and mental health services.

## Culturally appropriate services

FVPLS Victoria told the Commission about the need for culturally appropriate and safe services for Aboriginal victims/survivors of family violence.

*While some mainstream services are able to provide a culturally appropriate service, it is not possible for mainstream services to provide culturally safe responses – this can only be done by Aboriginal Community Controlled Organisations. It is essential that mainstream services invest in strengthened cultural awareness and family violence training, led by Aboriginal Community Controlled Organisations with frontline expertise assisting Aboriginal victims/survivors. – FVPLS Victoria*

FVPLS Victoria explained that its 'holistic legal services empower Aboriginal victims/survivors by providing proactive, culturally safe legal advice to assist women to make choices that will protect their safety and resolve legal problems before they escalate'. FVPLS Victoria noted that its *Sisters Day*

*Out* program (profiled on page 41) is an example of how protecting Aboriginal cultural rights leads to success as the program is developed by Aboriginal women for Aboriginal women.

## Aboriginal culture for children in out-of-home care

*What I have seen in practice after reviewing around 500 Koori children across the State is that when decisions are being made about Aboriginal children and young people, their culture and identity, which are core to their wellbeing and their right, in many, many of the cases is not given the necessary focus that is due ...*

*We need to know that the question as to whether the child is Aboriginal or Torres Strait Islander has been asked and more than once, and asked in the right way – Andrew Jackomos, Commissioner for Aboriginal Children and Young People<sup>189</sup>*

CCYP is concerned that identity and culture is a prominent and ongoing issue for Aboriginal children in Victoria's out-of-home care system:

*The Commission observed delays in establishing Aboriginal identity, the separation of siblings, delays in convening Aboriginal Family Led Decision Making (AFLDM) meetings, inadequacies in the application of the Aboriginal Child Placement Principle and a repeated failure to implement meaningful cultural plans.*

*The Commission observed a distinct lack of accountability for failing to comply with the statutory obligations with respect to identity and culture as contained in the Children, Youth and Families Act and the Charter, including the failure to comply with, *inter alia*, section 19 of the Charter.*

CCYP also noted that inordinate delays (for example, in establishing Aboriginal identity and in convening AFLDM meetings) raises significant concerns in light of new provisions of the *Children, Youth and Families Act 2005* regarding permanency.

Concerns about Aboriginal children in out-of-home care, including the impacts of the permanency reforms are discussed in more detail in page 59.

<sup>189</sup> Appearance at the Standing Committee on Legal and Social Issues Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015 (19 June 2015).

FVPLS Victoria is also concerned about the loss of Aboriginal children's cultural connection in the child protection system, noting that:

*Aboriginal children's cultural dislocation is exacerbated by their overrepresentation within child protection services, which causes emotional, psychological and spiritual harm. Aboriginal children's cultural rights are not being protected by the child protection system.*

## DHHS response

DHHS reported that it has been provided with an additional \$5.33 million over two years to support the implementation of a new model to ensure all Aboriginal children placed in out-of-home care have cultural plans that are implemented to maintain and strengthen their connection to their Aboriginal community and culture.

# Promoting Aboriginal cultural rights

## Aboriginal and Torres Strait Islander cultural rights introduced in the ACT

The Commission participated in the Inquiry into the Human Rights Amendment Bill 2015 (ACT) about a proposal to explicitly recognise Aboriginal and Torres Strait Islander cultural rights under the ACT *Human Rights Act 2004*.

The Commission reflected on the value and significance of protecting Aboriginal cultural rights under domestic law, including practical ways Aboriginal cultural rights have been used to achieve positive outcomes in Victoria.

For example, Aboriginal cultural rights were a key consideration in the establishment of Wulgunggo Ngalu Learning Place, a residential diversion program for Koori males that recognises the importance of culture in the rehabilitation of Koori men interacting with the justice system.

The Inquiry found that Aboriginal and Torres Strait Islander rights have a 'palpable significance for the wellbeing of Indigenous peoples'.<sup>190</sup>

The Bill passed in February 2016 and represents significant progress for the recognition of Aboriginal and Torres Strait Islander cultural rights in the Act.

## Aboriginal cultural rights project

The Commission's Aboriginal cultural rights project aims to:

- assist public authorities to comply with their obligations under the Charter by acting compatibly with Aboriginal cultural rights
- increase awareness, understanding and use of Aboriginal cultural rights under the Charter by Aboriginal peoples as a practical tool to engage with public authorities.

In 2015, the Commission undertook initial consultations to:

- gather evidence about the understanding and use of Aboriginal cultural rights by the Victorian Aboriginal community and Victorian public authorities

190 ACT Government, 'Recognition for Indigenous cultural rights' (Media Release, 11 February 2016).



- inform the development of resources on Aboriginal cultural rights
- collect case studies about the use of Aboriginal cultural rights in practice.

Following consultation, a number of initiatives were identified to raise awareness, understanding and use of Aboriginal cultural rights including:

- a dedicated website on Aboriginal cultural rights in Victoria that is informative, interactive and engaging
- a range of educational resources and tools on Aboriginal cultural rights targeting public authorities and Aboriginal communities
- practical case studies that demonstrate the use of Aboriginal cultural rights in practice by public authorities and community organisations
- targeted work with organisations where there is an opportunity to engage with key stakeholders to provide guidance or raise awareness on the Charter
- educational content aimed specifically at public authorities to increase their awareness, understanding and use of Aboriginal cultural rights under the Charter.

## Cultural Strengths Initiative

DPC reported that the Office of Aboriginal Affairs Victoria supported the Cultural Strengths Initiative, which aims to open the dialogue between the Aboriginal community and government on how to build on the cultural strengths of the community. A key part of the initiative was providing funding for a number of community-led projects and activities aimed at sharing cultural knowledge and strengthening connections between Elders and Aboriginal young people.

## DELWP initiatives to promote Aboriginal cultural rights

The Department of Environment, Land Water and Planning (DELWP) told the Commission about a number of new initiatives that demonstrate the promotion and protection of Charter rights for Aboriginal persons. These include, for example engaging Traditional Owner Groups to undertake cultural assessments of areas proposed for development and to provide advice on road and forestry works or give specialist advice during planned burning and/or emergency response activities.

DELWP also created an Aboriginal Staff Network to create a more inclusive and culturally safe workplace for Aboriginal staff. Other new initiatives include:

### Cultural heritage officers

DELWP included cultural heritage officers in Bushfire Rapid Risk Assessment Teams. These are multi-agency and multi-discipline teams who are deployed to emergency events to assess the risks on public land that have emerged following an event. The cultural heritage officers engage with local Traditional Owners to ensure that Aboriginal cultural heritage issues are captured and assessed in the risk process, and an action plan is developed for risk mitigation.

### Aboriginal customary knowledge project

The Aboriginal customary knowledge project is being delivered with the Department of Economic Development, Jobs, Transport and Resources (DEDJTR), to create an understanding that recognises appropriate handling of customary knowledge as a critical issue for Victoria's Aboriginal communities. The two departments are working to identify how customary knowledge can be recognised and protected in primary industries, land and natural resource management areas.

Stage 1 of the project has completed and focused on the extent of protection provided by intellectual property law. It highlighted that while much customary knowledge has restricted protection under Australian intellectual property law, the Victorian Government can recognise customary knowledge beyond the legal base.

Stage 2 will continue in 2016. It will involve consultation with Traditional Owners and seek input about shaping protection measures and increasing awareness of customary knowledge.

## Welcome to Country signage

The Department of Economic Development, Jobs, Transport and Resources (DEDJTR) developed a Welcome to Country initiative with VicRoads and the Wadawurrung people, through the Wathaurung Aboriginal Corporation. Welcome to Country signs were installed at 22 roadside locations to recognise the Traditional Owners of the land on which they were placed. The department explained that 'the signs celebrate Aboriginal culture, and demonstrate recognition and respect for the Wadawurrung people as the traditional owners and custodians of the land'.

## Local government initiatives

The City of Darebin reported that five guided community walks along the Darebin Spiritual Healing Trail were led by an Aboriginal cultural educator and guide, as a gift from the Aboriginal community in the spirit of reconciliation.

The City of Monash reported that it actively considers section 19(2) of the Charter in the development of policies, programs and projects. For example:

- Council has undertaken the conservation of a Scar Tree in consultation with key Aboriginal representatives and is also in the process of installing interpretive panels acknowledging the local Aboriginal history and heritage.
- Council has installed a major piece of sculpture 'The Spirit of the Land' (a breast feather) at the Hurst Reserve in Monash. This sculpture represents an important local Aboriginal creation story. As part of this public art project, Council also delivered workshops to three local schools on Indigenous Art and Culture.

## Aboriginal inclusion plans

In 2015, a number of public authorities developed or continued to implement Aboriginal inclusion plans.<sup>191</sup> For example, DHHS launched *Moondani*, 2015–2018. DHHS reported that:

*Moondani pursues cultural inclusion across the department, aligning with section 19 of the Charter regarding cultural rights, with five principles underpinning Aboriginal inclusion. These are cultural respect, aspirations, accountability, engagement and inclusiveness, and partnerships.*

*The department recognises that Aboriginal people have the right to quality services that meet their needs, and Moondani is committed to ensuring that Aboriginal people across the state have access to health and human services which are both effective and accountable. Moondani is underpinned by seven key access criteria for effective service design. These are cultural safety, affordability, convenience, awareness, empowerment, availability and respect.*

DELWP also launched its Aboriginal Inclusion Plan 2016–2020, *Munganin – Gadhaba – 'Achieve Together'*. The plan has an emphasis on relationships and collaboration.

The Supreme Court reported that its Koori Inclusion Action Plan 'is designed to increase awareness

and understanding within the Court of Indigenous culture and heritage and to demonstrate that the Court as an institution serves all Victorians'.

## Court Services Victoria – Aboriginal programs and initiatives

CSV reported a number of initiatives that promote Aboriginal cultural rights and the right to equality for Aboriginal Victorians:

- increasing Aboriginal participation in the Victorian public sector – CSV has doubled the percentage of its Aboriginal staff
- appointing more than 80 Koori Court Elders and Respected Persons in Koori Courts
- developing a Koori Employment Strategy and Implementation Plan
- developing Cultural Awareness and Competency Training
- developing a Koori Inclusion Action Plan (to be launched in 2016).

## Court and tribunal events

Courts and tribunals held a number of Aboriginal cultural events:

- The Supreme Court of Victoria and Coroners Court of Victoria both held their first smoking ceremonies and welcomes to country in their Courts.
- The Supreme Court renamed its principal meeting room the William Barak Room, and unveiled a portrait of Mr Barak in the Supreme Court library. William Barak was a 19<sup>th</sup> century Aboriginal leader and artist who was a skilful advocate for the rights of his people.
- As part of the Supreme Court Judicial Officers Annual Conference, Professor Patrick Dodson spoke about Indigenous self-determination.
- The Koori Court celebrated the 10-year anniversary of the Mildura Koori Court, with artwork presented to the court from the Koori community, which represented five elders who have retired or passed away.
- VCAT, in conjunction with the Judicial College of Victoria, sponsored and promoted a twilight presentation on reconciliation.

## Children's Court initiatives

As discussed in Chapter 7, Aboriginal children and families are overrepresented in the child protection system.

In response, the Children's Court has created the position of Koori Services Coordinator at the new Broadmeadows Children's Court, who will develop and implement an Aboriginal specific hearing

<sup>191</sup> For example, Department of Economic Development, Jobs, Transport and Resources' Aboriginal Inclusion Action Plan; the Commission for Children and Young People commenced work on an Aboriginal Inclusion Action Plan; Court Services Victoria reported that all jurisdictions, the Judicial College of Victoria and jurisdictional services have developed their own Koori Inclusion Action Plan. A Court Services Victoria Koori Inclusion Action Plan was also developed in 2015, to be launched in May 2016.

day for Aboriginal families with matters in the Court's Family Division, as well as be the first point of contact and provide day-to-day support for Aboriginal families attending court.

The Children's Court considers that the hearing day will have the following benefits:

- providing a culturally appropriate service that meets the needs of Aboriginal families coming to court
- improving participation of Aboriginal family members in child protection hearings
- promoting a joint relationship between the courts and the community to provide a service responsive to Aboriginal needs
- assisting families in understanding the Court's Family Division proceedings
- increasing Aboriginal communities' confidence in the courts and justice system more broadly.

## Aboriginal Art Program

In the Commission's *2014 Report on the Operation of the Charter of Human Rights and Responsibilities*, VALS reported its concern that Aboriginal prisoners who create artwork as part of prison rehabilitation programs are unable to keep or sell their own artwork.

In 2015, the Department of Justice and Regulation (DJR) introduced the Aboriginal Art Program as part of a statewide Indigenous Arts in Prison and Community Program, allowing prisoners to sell their artwork from prison. The program aims to improve community reintegration outcomes for Aboriginal prisoners post-release. A proportion of the funds from the prisoner's artwork sales will be held in the prisoner's trust account, and available to them upon their release to support their transition back to the community.

The department stated that the ongoing funding of the program is a priority area of its Aboriginal Social and Emotional Wellbeing Plan. The plan, also released in 2015, recognises 'the fundamental role of culture, community and spirituality to the wellbeing of Aboriginal prisoners'.

### Case study: Connection to culture and community

DHHS provided a case study of an Aboriginal young person remanded in custody and subject to a Guardianship Order. He had been disconnected from family, culture and community following the death of his mother. Disconnection, grief and loss were significant factors underlying his contact with the criminal justice system.

Support and advocacy was provided for the young person to access bail. Following his release, Youth Justice worked in collaboration with Child Protection and Koori Support Services to reconnect him to culture and community including interstate travel to visit his mother's grave and return to Country. This gave the young person a platform to commence the healing process and address the issues underlying his offending. The young person received a diversion order upon returning to court.

The young person has had no further contact with the criminal justice system, and maintained strong connection to his culture and community.

## Aboriginal cultural awareness training

DPC reported that it continued to run Aboriginal cultural awareness training in a face-to-face format that enables employees to engage with the facilitator to increase their awareness of maintenance of kinship ties, Aboriginal identity and culture, the importance of spiritual connectedness to land and waters, and understanding of the historical impacts of government policy on the human rights of Aboriginal peoples.

### Case study: Temporary guardian upholding cultural rights

The Office of the Public Advocate (OPA) was appointed temporary guardian by VCAT with powers for making decisions regarding healthcare, accommodation and services. The represented person was a young Aboriginal woman with an intellectual disability who prior to the guardianship order was living in the family home with her mother, in a rural area with a significant Aboriginal community.

The young woman's mother was taken to hospital and was expected to die within days. The woman's aunt applied for an urgent temporary guardianship order. When the guardian arrived at the family home, the young woman was in a poor state of health and not caring for herself.

After several days, the young woman's sister evicted her from the family home and she was placed in hotel accommodation by emergency accommodation providers. While DHHS initially wouldn't work with the young woman because they felt her

disability was not sufficient to require their involvement, a neuropsychologist demonstrated that she had a significant intellectual disability and DHHS agreed to provide support.

All services including DHHS and local emergency housing agencies recommended the young woman move to Melbourne where they suggested better support services could be accessed. In supporting her to remain in her local rural area, where she had kinship ties, the guardian was upholding the woman's cultural rights under the Charter.

The guardian refused to agree that the young woman relocate as her community and relationships were in the rural area where she had always lived. Instead, the guardian required the services and supports to work with her locally, a process which was long and drawn out.

Eventually the woman's mother recovered. For months, the woman's sister kept her out of the family home but, with the support of services, she has since returned home.



# Chapter 7: Liberty and security

## Overview

This chapter considers the issues raised with the Commission about laws, policies and practices that impacted on these rights in 2015, including:

- the right to liberty (part one)
- the right to humane treatment when deprived of liberty (part two)
- the right to security (part three).

In 2015, stakeholders raised overwhelming concerns about the safety and security of Victorians in a diverse range of settings – including disability and mental health services, out-of-home care and youth detention, and in families, workplaces and the broader community. There was also growing concern about the impact of family violence on victim survivors, their families, and the community, with the Royal Commission into Family Violence delivering its report earlier this year.

### The right to liberty and security of person

Section 21 of the Charter states that every person has the right to liberty and security. It provides that a person must not be subject to arbitrary arrest or detention, and must not be deprived of their liberty except by law. Section 21 also protects a number of rights once a person has been arrested or detained.

### The right to humane treatment when deprived of liberty

Section 22 states that all persons deprived of liberty must be treated with humanity and respect for their dignity.

## Part one: The right to liberty – section 21

The right to liberty applies to all forms of physical detention where a person is deprived of their liberty, not just detention in criminal processes.

The purpose of the right is ‘to protect people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense’.<sup>192</sup>

Stakeholders told the Commission about continuing concerns about the significant overrepresentation of Indigenous peoples in the justice system, and the work being done by departments to address the confronting statistics.

### Overrepresentation of Indigenous peoples in the justice system

This year, the Commission heard continuing concerns about the significant overrepresentation of Indigenous peoples in the justice system.

The Victorian Ombudsman’s 2015 report on the rehabilitation and reintegration of prisoners in Victoria found that:

*Aboriginal and Torres Strait Islander people represent only 0.7 per cent of the Victorian population but nearly 8 per cent of the prison population. While the recidivism rate for non-Indigenous prisoners is currently 45 per cent, for Aboriginal and Torres Strait Islander prisoners, this rate is 55 per cent. Victoria now has the highest rate of increase in Indigenous imprisonment in the country.*

<sup>192</sup> *Kracke v Mental Health Review Board (General)* 2009 VCAT 646, 664-665.

The Victorian Ombudsman commented that:

*Given the level of disadvantage experienced by Aboriginal and Torres Strait Islander people and their overrepresentation in custody, my report finds there is a compelling case for more action to reduce both the number of prisoners in the first instance and the re-offending rate.*

CCYP reported that:

*Aboriginal children and young people remain grossly overrepresented in Victoria's youth justice supervision and detention. Despite the Royal Commission into Aboriginal Deaths in Custody over two decades ago and the stated good intentions of successive governments, Aboriginal children in Victoria are still 13 times more likely to be incarcerated than their non-Aboriginal peers.*

## DHHS response

The Department of Health and Human Services (DHHS) reported that it shares continuing concerns about the significant overrepresentation of Indigenous peoples in the justice system. The department supports a range of programs that focus on reducing the number of children and young people in contact with youth justice through the Youth Support Service and the Community-based Koori Youth Justice Program, including the Koori Early School Leavers Program.

DHHS notes the issues raised by CCYP and recognises the need to continue to work with community leaders and families to ensure that the youth justice service actively engages with and celebrates the culture and community for young people involved with youth justice.

For Aboriginal children and young people, DHHS supports and coordinates a range of programs, including the Koori Intensive Support Program, the Specialist Koori Court Advice Worker and the Koori Cultural Support workers. The department is working across agencies and with cultural and community leaders to strengthen the support provided to Maori and Pacific Island young people involved with youth justice and their families.<sup>193</sup>

The department will continue to work closely with the community leaders, Aboriginal Justice Forum, Aboriginal Community Controlled

<sup>193</sup> DHHS reported that the 2016/2017 state budget included a commitment to deliver \$2.48 million over two years for increased capacity for the Community Based Koori Youth Justice program, to focus on early intervention and prevention initiatives.

Organisations and across government agencies to strive to reduce the overrepresentation of children and young people in youth justice.

## DJR response

AJA3 includes approximately 200 actions to be implemented by 2018 as part of an inter-generational plan to close the gap in Aboriginal and non-Aboriginal justice outcomes by 2031. Progress towards this target is reported in the Victorian Aboriginal Affairs Report.

The 2014/15 Report indicated that the number and rate of Aboriginal people (aged 10–17 years) entering the criminal justice system in Victoria is decreasing. Continued investment in effective strategies such as prevention, early intervention and diversion is needed in light of the rapidly growing Koori youth cohort, which is placing increased demand on the system.

The Department of Justice and Regulation (DJR) acknowledges that criminal justice outcomes for Aboriginal adults are deteriorating, including increasing overrepresentation in the justice system. As a result, Aboriginal demand for justice programs and related services (alcohol/drug treatment, mental health, employment and housing) is also increasing.

Corrections Victoria (CV) continues to be committed to providing Aboriginal prisoners and other offenders with access to a range of programs to change behaviour and reduce the risk of reoffending. CV operates a cultural 'wrap-around' model that links cultural programs with mainstream Offending Behaviour Programs that address a range of needs including family counselling, living skills and mental health treatment.

Similarly, AJA3 Objective 3, 'Reduce Reoffending', focuses on increasing protective factors and decreasing risk factors for further offending by Aboriginal people already involved in the criminal justice system. Important focus areas include: mental health and social and emotional wellbeing, alcohol and drug treatment, education and employment, housing, and connection to family, community and culture. Particular attention is given to the unique needs of Koori women offenders.

In 2016, CV released its inaugural Kaka Wangity Wangin Mirrie – Aboriginal Cultural Programs Grants. These grants are available to Aboriginal Community Controlled Organisations to develop and deliver Cultural Programs and support services across prisons and Community Corrections, targeting cultural strengthening, family violence, healing, parenting and women's programs.

## Exclusion from the Victorian Drug Court

The Victorian Drug Court is a division of the Magistrates' Court of Victoria located in Dandenong. It provides for the sentencing and supervision of the treatment of offenders with a drug and/or alcohol dependency who have committed an offence under the influence of drugs or alcohol or to support a drug or alcohol habit. An offender attending the Drug Court may be sentenced to a Drug Treatment Order with both a treatment and supervision component and a custodial component.

The Drug Court operates using principles of therapeutic jurisprudence to achieve therapeutic outcomes for Drug Court participants.

Non-compliant behaviour from participants on Drug Treatment Orders are addressed by the use of escalating sanctions as a tool to encourage behaviour that complies with the conditions of a treatment order, thereby achieving the therapeutic goals of the Drug Court program. Sanctions hearings can result in sanctions ranging from a verbal warning to periods of incarceration.

Victoria Legal Aid (VLA) has experienced clients being excluded from sanctions hearings by the Drug Court Magistrate, on the basis that allowing the client to be present in the courtroom for the hearing would be inappropriate because it is inconsistent with therapeutic jurisprudence principles (that is, inconsistent with the therapeutic outcomes for the participant).

VLA is concerned that the exclusion of participants from sanctions hearings is incompatible with the right of the participant to a fair hearing (denying them the right to be tried in person). Given the available sanctions, the exclusion may also be incompatible with the right to liberty, in particular the right not to be arbitrarily detained.

VLA has tried to raise the Charter to challenge the exclusion of its clients from sanctions hearings in the Drug Court:

- 'informally' in oral submissions (as opposed to 'formal' written submissions) on behalf of clients in proceedings before the Drug Court in 2014 and 2015

- with the Court outside of proceedings, in a meeting with the Drug Court Magistrate and a meeting with the Chief Magistrate in 2015.

While the Chief Magistrate has suggested VLA make written submissions to the Drug Court on this Charter issue, VLA's ability to do so depends on the right case and a client who wishes to make such a submission.

In some instances, VLA's lawyers have experienced limited receptiveness to Charter arguments in the Magistrates' Court. VLA sees scope for improvement to the way in which Charter arguments are received in this jurisdiction.

## DJR response

DJR reported that in the Drug Court, if a participant is facing the prospect of a short term of imprisonment (usually seven to 10 days), the Magistrate will require the participant to stay outside court while the participant's counsel makes submissions on the question of whether or not the participant should be sanctioned. Submissions in reply will often be made by other team members, including representatives of CV and Victoria Police. The participant is required to be outside the court in order to preserve the collaborative nature of the Drug Court Team, which is one of the evidence-based elements of successful Drug Court practice.

The participant is always legally represented during such deliberations. After the completion of submissions, the Magistrate gives the participant a detailed description of the submissions that were made by the participant's legal counsel, announces the decision of the Court and gives a detailed explanation of the reasons for that decision. This approach to Review Hearings supports the collaborative approach of the Drug Court, while upholding the principles of natural justice and the right to a fair hearing under section 24 of the Charter.

## Promoting the right to liberty

### Improving diversionary options for Aboriginal women

DJR reported that while the great majority of Koori people in prison are male, the number of Koori women in prison has been increasing, highlighting a lack of diversion options for those women. Of particular concern to the department is the high proportion of Koori women remanded in custody.

DJR noted that the Koori Women's Diversion Project aims to improve the gender responsiveness of the corrections system to the needs of Koori women by reducing Koori women's contact with the criminal justice system through community-based alternatives and diversionary options.

DJR reported that it continued to fund Odyssey House Victoria to provide six dedicated family beds for Koori women (and their children) referred from the criminal justice system. A Mildura Koori Women's Diversion Pilot Project, developed with Mallee District Aboriginal Services, also commenced in 2015. The project provides an integrated 'wrap around' service for Koori women. A further pilot is currently being developed in Morwell to commence in 2016.

In 2015 DJR released its Aboriginal Social and Emotional Wellbeing Plan, designed to improve the mental health and wellbeing of Aboriginal and/or Torres Strait Islander people while they are incarcerated and on their release from prison. The plan 'recognises the fundamental role of culture, community and spirituality to the wellbeing of Aboriginal prisoners, which is consistent with section 19 of the Charter'.

### Charges and prosecutions

A number of human rights may be engaged when a person is charged and prosecuted, including the right to liberty and security, the right to a fair hearing, minimum guarantees that people have when they have been charged with a criminal offence, and the particular human rights of children in the criminal process.

Victoria Police reported that two initiatives in 2015 related to the process of charging and prosecuting accused persons:

- Firstly, Victoria Police strengthened its withdrawal-of-charges process. As prosecutors become involved, their specialist knowledge of the law sometimes results in charges being withdrawn, either because they are duplicated or the necessary evidence is regarded as insufficient. The withdrawal-of-charges process aims to ensure consistency and transparency for the reasons of the withdrawal. A withdrawal report ensures that prosecutors and informants are held accountable in a transparent and

auditable manner for any decisions they make, and includes consideration of what could have been done better. The withdrawal report is linked to a Risk Management Framework setting out actions taken to improve practice at various stations.

- Secondly, prosecutors were deployed into the operational field to assist police in decision-making prior to taking action. The Prosecutions Frontline Support Unit advises Commanders on the law, offence types and arrest powers at operational events, such as demonstrations. Victoria Police noted that this was a significant success with a strong focus on human rights. Human rights are proactively considered to avoid errors in applying the law and exercising police powers.

The Department of Environment, Land, Water and Planning (DELWP) also reported that it always considers Charter rights when assessing briefs of evidence for prosecution. For example, the department's policy is that briefs of evidence involving minors have priority, to ensure compliance with the right of an accused child to be brought to trial as quickly as possible.

## Part two: Humane treatment when deprived of liberty – section 22

Section 22 of the Charter requires all public authorities to treat persons in detention with humanity and dignity. The purpose of the right is to recognise the particular vulnerability of persons in detention and ensure that their rights and dignity as human beings are protected.

*If the role of the Ombudsman is to address the imbalance of power between the individual and the state, that imbalance is at its most stark when people are deprived of their freedom by the state.*

*Add to this the Charter of Human Rights and Responsibilities Act, which gives my office a specific function to investigate human rights breaches. One of those rights is to humane treatment when deprived of liberty – Deborah Glass, Victorian Ombudsman<sup>194</sup>*

194 Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015), foreword.



Stakeholders raised concerns about the treatment of people who are deprived of liberty, including in mental health facilities and in the criminal justice system. Stakeholders also told us disturbing reports about the use of excessive force.

## Humane treatment when deprived of liberty

The Commission heard concerns about the humane treatment of people deprived of their liberty.<sup>195</sup> For example, VLA reported that:

*People with mental illness or disability are particularly vulnerable to limitations on their right to liberty. This is the most common human rights issue experienced by our clients receiving compulsory treatment. We raise the Charter before the Mental Health Tribunal, arguing that it is bound to give proper consideration to human rights, and raise the impact of compulsory treatment on Charter rights.*

The Ombudsman reported that the majority of its approaches concerning human rights related to the treatment of people deprived of liberty.<sup>196</sup> The Ombudsman noted that, ‘understandably, people held in closed environments like prisons and mental health facilities are the most likely to generate concerns of this kind’.

The Independent Broad-based Anti-corruption Commission (IBAC) reported that it received the following complaints and notifications about treatment in custody raising a potential or actual human rights breach under the Charter:

- belittling/degrading behaviour by police whilst the person was in custody
- person being refused access to medical assessment, legal rights, phone calls, blankets or food while in custody
- privacy not being provided while in custody.

VLA reported that its clients experience practices in the criminal justice system that limit their rights to liberty, to humane treatment when detained, to appear in person and to confer with a lawyer. This includes the failure to transport prisoners to court in contravention of court orders, conditions in overcrowded prisons and police cells, and an increasing reliance on video link appearances (which, in substantive hearings, may compromise a client’s ability to communicate with their lawyer and participate in the hearing).

<sup>195</sup> For example, the Victorian Ombudsman, the Mental Health Legal Service, the Commission for Children and Young People, and Victoria Legal Aid.

<sup>196</sup> The Victorian Ombudsman identified 2169 complaints about the treatment of people deprived of liberty in 2014/15.

## DJR response

The department notes that IBAC has a statutory function and a broad suite of powers to investigate complaints about police misconduct, including those complaints that raise allegations of human rights breaches.

In relation to access to medical assessment, DJR notes that Justice Health has established processes for resolving complaints about prison health care and access. All complaints received by Justice Health are resolved via its Complaints Handling Framework. Justice Health also meets with the Office of the Health Services Commissioner quarterly to share data and discuss prisoner complaints.

Prisoners have access to the same standard and quality of health care as in public health services in the community. Prisoners accessing specialist services in the community go on to the public wait lists like other patients in the community. All prisoners receive a physical and mental health screening assessment by a health professional within 24 hours of entry to the prison system and on transfer to a different prison. Each prison has a health centre on-site. Health professionals make referrals as required and prisoners can also self-refer.

Complaints received by CV often relate to prison-management issues. Complaints are processed according to DJR’s complaints-handling policy, which is consistent with the Charter. When a complaint is made, CV investigates it and considers the Charter in relation to any alleged breach. Following the investigation, CV will respond to the complainant in writing and/or by a meeting with senior prison staff.

External complaint avenues include the Victorian Ombudsman, Health Services Commissioner and the Victorian Equal Opportunity and Human Rights Commission. Prisoners are provided with access to free call numbers to access these avenues.

DJR has a number of strategies in place to facilitate the timely movement of prisoners and offenders through the criminal justice system and to reduce demand on police cells, including:

- the Court Integrated Services Program ‘Remand Outreach Program’, (which provides case management to prisoners on remand, improving access to bail)
- the weekend remand court at the Melbourne Magistrates’ Court

- Magistrates' Court sittings at the County Court.

DJR notes that legislation has been introduced with numerous safeguards to provide for the appropriate use of video conferencing in court hearings.<sup>197</sup>

In relation to a client's ability to communicate with their lawyer, the new video conferencing facilities in prisons enable legal practitioners to video conference with prisoners using their own electronic communication device. Introduced in consultation with VLA, the Victorian Bar Association, the Law Institute of Victoria and the Magistrates Court, the Jabber Guest software allows legal practitioners to book and initiate video conferences to confer with their client and receive instruction before and after a court hearing.

### DHHS response

DHHS reported that it has introduced a new procedure requiring staff to ask children and young people on their admission to a youth justice centre about their treatment and handling while in police custody. If there are any allegations of mistreatment (including physical or sexual abuse), or if staff suspect mistreatment, a Category One incident form must be completed and a report submitted to Victoria police. This must occur regardless of whether or not the young person wishes to make a complaint. A case note regarding the young person's allegation is attached to a case note on the young person's file.

## Humane treatment in custody

The Victorian Ombudsman provided the Commission with the following case studies that demonstrate concerns for the humane treatment of people in custody:

### Case study 1: Hygiene in prison

A prisoner in a Victorian jail rang to complain about a lack of washing facilities in their unit. Prisoners were being forced to wash underwear in the same showers and sinks that they used to brush their teeth and fill kettles. The Victorian Ombudsman made enquiries, questioning whether this practice was consistent with section 22 of the Charter,

which refers to the right to humane treatment while deprived of liberty. As a result, the prison confirmed that it would be allocating resources to manage the personal laundry of prisoners in the unit.

### DJR response

DJR reported that the complaint related to facilities within a hospital unit at a private prison location. This issue has been rectified.

### Case study 2: Clean clothes

The Victorian Ombudsman received a call from a prisoner saying he had been in a management unit for three weeks and his property had been confiscated. He complained that he had no clean clothes and had been in the same clothes and underwear for the three weeks. The Ombudsman made enquiries and as a result, the prison found the prisoner's property. It determined that he did not have enough clothing to last him for another week, so it contacted the Salvation Army to obtain more.

### DJR response

DJR notes the complexities of providing prisoner clothing after the June 30 riot at the Metropolitan Remand Centre (MRC). The Ombudsman was advised that all prisoners at the MRC were in the same position at that point in time, and information about the issuing of prisoner clothing at the MRC for all prisoners was provided.

For context, following the riot, prisoners had their clothing removed for evidence, and staff attended each cell and removed prisoner personal property. Property was then bagged, and, where staff could identify who the property belonged to, the details were recorded. Unfortunately, during the riot prisoners had looted each other's property, and it was difficult to account for most in-cell items.

The MRC had more than 600 prisoners who needed greens (prison-issued clothing). Given that the MRC is a remand facility and prisoners previously had the option to wear their own clothing (if they chose to), the MRC had limited stock of prison greens to cater for in excess of 600 prisoners. In order to issue all prisoners with greens immediately following the riot, other prisons provided greens to the MRC.

<sup>197</sup> Justice Legislation (Evidence and Other Acts) Amendment Bill 2016.

A large-scale recovery effort was undertaken at the MRC between July and December 2015 and over time, conditions improved and operations normalised. Prisoners at the MRC remain in prison greens to date. The issue will be re-considered following completion of infrastructure strengthening works at the facility.

## The use of excessive force

### Investigation into an incident of alleged excessive force by authorised officers

In 2015, the Victorian Ombudsman tabled a report into an investigation into an incident of alleged excessive force used by authorised officers.<sup>198</sup> The investigation considered an incident in which an authorised officer restrained a 15-year-old female youth at Flinders Street railway station.

CCTV footage showed the officer lifting the youth by her lower body and bringing her down to the tiled floor in a rapid motion. She was held on the ground for eight and a half minutes waiting for the arrival of police. The youth was suspected of fare evading, resisting arrest and assaulting the officer.<sup>199</sup>

The report noted that transport companies and authorised officers exercising functions of a public nature such as enforcement duties are required to comply with the Charter. The investigation considered whether the officer had acted in accordance with the Charter, including the right to humane treatment when deprived of liberty and the right to protection from cruel, inhuman or degrading treatment.

The Ombudsman found that the authorised officer's use of force was excessive and breached the Charter:

*In my view the manner in which [the youth] was arrested and detained was degrading treatment and reached the level of severity required to make out a breach of the Human Rights Charter.<sup>200</sup>*

In coming to this view, the Ombudsman considered the youth's age, the fact that she was female and was held down by three adult men, the fact that during the restraint she disclosed that she had been sexually abused, that there was an element of public exposure to the incident, and the fact that the youth had an ongoing physical injury and

required ongoing counselling.<sup>201</sup> The Ombudsman concluded that:

*I do not consider that [the youth's] right not to be treated in a degrading way was justifiably limited. There were less restrictive means reasonably available to the authorised officers to achieve their objectives. [The youth] could have been more quickly lifted to her feet, moved to a private area and handed over to police.*

### DEDJTR response

The Department of Economic Development, Jobs, Transport and Resources (DEDJTR) reported that Public Transport Victoria (PTV) engaged external specialists, PwC, to undertake a comprehensive industry-wide review of Authorised Officer (AO) training with the aim of creating a more customer focused approach to AO activities. The review included behavioural observations, reviews of previous incidents, reviews of customer complaints, meetings with other cities and industries, and engagement with the Public Transport Ombudsman, operators and disability groups. The review was completed in August 2015 and aims to move the industry from individual training to team learning with the objective of delivering customer focus in every interaction.

As recommended by the review, PTV has established the position of Manager, Authorised Officer Practice, which will be responsible for overseeing and coordinating delivery of revised training for all AOs. This role will work with PTV, DEDJTR representatives and public transport operators, with the aim of increasing consistency across operators' training delivery and implementing an improved approach to capability development for AOs.

The new AO training approach will be supported by an incident review mechanism that holds both the operators and individuals to account. A proposed process was developed as part of the training review undertaken by PwC. The final design of the review mechanism should be informed by the outcomes of the Government's Review of Public Transport Fare Enforcement.

<sup>198</sup> Victorian Ombudsman, *Report into investigation into an incident of alleged excessive force used by authorised officers* (February 2015).

<sup>199</sup> Ibid 5.

<sup>200</sup> Ibid 14.

<sup>201</sup> Ibid.

## Use of excessive force at the Melbourne Custody Centre

The Victorian Ombudsman provided the following case study about the use of excessive force at the Melbourne Custody Centre:

*A man detained at the Melbourne Custody Centre (MCC) complained to the Ombudsman that officers had used excessive force to restrain him, after he had requested to speak to our office. While he did not directly raise the issue of human rights, we had concerns about whether the MCC had acted compatibly with his right to humane treatment when deprived of liberty under the Charter. The Ombudsman made enquiries with MCC, who advised that the complainant had refused to move from his cell for transfer to another cell. MCC said that staff used force to move the complainant to his new cell, and that CCTV footage showed that staff used reasonable force. We requested to view the CCTV footage.*

*When we reviewed the footage, it showed an officer deliberately putting his knee into the complainant's lower back. The footage also showed the complainant restrained with his hands behind his back, his head pushed down and four officers restraining him during the walk from one cell to the other. There was no incident report provided to explain the complainant's concerns or the incident. While the use of four officers to move the complainant to a new cell may have been warranted if the complainant was resisting or abusive, we considered the actions of the officer in kneeling the prisoner involved the exercise of unreasonable force.*

*We met with MCC management, who also expressed concern about the incident, stating that it was 'atrocious and unacceptable'. They said they hadn't seen the kneeling incident when they previously viewed the footage. Soon after, we received a copy of a letter from the MCC to the officer involved, outlining his breaches of the prison's Code of Conduct, including providing decent treatment and behaving professionally. The letter said that the MCC would not tolerate this behaviour, and issued a first and final warning to the officer.*

## DJR response

DJR clarified that the Melbourne Custody Centre is not a prison and is operated under contract by Victoria Police to G4S.

## Victoria Police response

Victoria Police reported that it has developed a Victoria Police specific 'Human Rights Train the Trainer' package to be rolled out to staff across the organisation. The package is flexible enough to continuously include case studies that illustrate good practice and poor service delivery or decisions.

Victoria Police continues to address complaints through its Professional Standards Command (PSC) and will monitor the roll out of the training.

## The use of excessive force by Protective Services Officers

In 2015, the Federation of Community Legal Centres published a report outlining the findings from its three-year project 'Your Rights on Track'.<sup>202</sup> The project was coordinated by the Federation in partnership with Youthlaw and the Mental Health Legal Centre. The project monitored the introduction and roll out of armed Protective Services Officers (PSOs) at metropolitan and regional train stations.

Amongst other things, the report documents cases of PSOs using physical force to obtain personal information and using excessive force in a range of circumstances, including against vulnerable people. The report notes that:

*The risk of PSOs using unnecessary physical force and inappropriately using weapons such as capsicum spray and batons remains because there is no independent monitoring and public reporting of how often PSOs use force compared to police and whether there are any concerning trends in the use of force by PSOs at particular train stations.*

*Similarly, the potential for PSOs to engage in over-policing and excessive force against people with known vulnerabilities remains without public reporting and independent monitoring. To improve public accountability, the report recommends*

<sup>202</sup> Federation of Community Legal Centres, *Tracking Protective Services Officers: Insights from the first three years* (April 2015).



*better public reporting and independent monitoring on these issues.*

*The report also recommends that PSOs should not be issued with semi-automatic guns because the risk of avoidable shootings by PSOs is higher than that of police given their comparatively shorter length of training, 'on the job experience' and supervision.<sup>203</sup>*

## DJR response

PSOs are expected to undertake their duties in accordance with the law and with a high degree of professionalism. It is important that PSOs are able to respond appropriately, and to ensure the safety of the public and of themselves in the broad range of situations they face. PSOs undertake the same mandatory Operational Safety and Tactics Training provided to police (including firearm use) with a specific focus on minimising or avoiding the use of force in conflict situations. PSOs are also subject to the same internal policies (including the requirement to record all use of force incidents), statutory discipline processes and external IBAC oversight as police.

## Case study

17 year old 'Stephen' decided to jump the turnstiles at a Melbourne suburban train station because he did not have any money on him for a ticket. Two PSOs approached him and stopped him. They took down his details, including his age. Stephen then tried to make a last minute dash to board the train. The PSOs then chased him onto the train and dragged him off the train, forcing him to the ground by tripping him on the train platform. Stephen's friend 'Paul' told the PSOs to get off Stephen. The PSOs then repeatedly sprayed both teenagers with capsicum spray and Paul was charged with assaulting and hindering the PSOs.

Paul contested the charges and was represented by lawyers from the Police Accountability Project. According to the Magistrate who reviewed the CCTV and heard evidence from witnesses and the PSOs, there was nothing in Paul's behaviour or body language which justified him being sprayed. During cross examination, one of the PSOs conceded that if he had thought more about the situation he would have tried to resolve the situation without using force.

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203 Ibid 4.

The Magistrate acquitted Paul of all charges, saying there was no evidence that he intended to assault or hinder the PSOs. After reviewing the CCTV footage, Victoria Police announced it would conduct a 6 week internal investigation into the actions of the two PSOs, while Victoria's Commissioner for Children and Young People stated he would be asking police to acknowledge that the PSOs' actions were bad practice.<sup>204</sup>

## Victoria Police response

Victoria Police reported that all PSOs use of force incidents are recorded under the same process as sworn police. They are required to submit use of force forms that are then entered onto the Use of Force register. At Transit, Victoria Police also has a Use of Force/Assault Police/ PSO Injury debrief reporting process that incorporates a full review of all use of force and injury incidents involving PSOs and Transit Police. Victoria Police ensures through this process that a thorough debrief and review of each incident is undertaken and that all available CCTV footage from train stations is reviewed and saved for future reference and learnings.

## Promoting humane treatment when deprived of liberty

### State-wide hepatitis program

DJR reported that in recognition of the prevalence of hepatitis among prison populations, a Victoria-wide hepatitis program began in 2015.<sup>205</sup>

The program provides assessment, management and, where appropriate, treatment for prisoners diagnosed with hepatitis B and C. Previously, access to treatment for hepatitis C was limited to a small number of prisons. Now, all prisoners screened and found to have hepatitis B or C are offered a referral to the program.

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204 Ibid 15.

205 See Victorian Ombudsman, *Investigation into Prisoner Access to Health Care* (2011).

# Part three: The right to security – section 21(1)

The right to security requires public authorities to take reasonable steps to protect a person's physical and mental security where that security is threatened.

This year, the Commission heard overwhelming concerns from stakeholders about the safety and security of Victorians in a diverse range of settings – including disability and mental health services, out-of-home care and youth detention, and in families, workplaces and the broader community. These concerns are outlined below.

## Safety in disability services

### Investigation of allegations of abuse in the disability sector

In the 2014 Charter Report, the Commission reported that abuse in the disability sector was one of the most significant human rights issues raised by stakeholders in 2014.

In 2015, the Victorian Ombudsman published two reports on an investigation into allegations of abuse in the disability sector:

- Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight
- Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting.

The Victorian Ombudsman told the Commission that:

*My investigation showed that oversight arrangements in Victoria are fragmented, complicated and confusing ... My recommendations included that Victoria establish a single independent body to oversee reports of abuse in the disability sector.*

The Ombudsman also provided the following reflections on the Phase 2 report:

*The investigation examined incident reporting and management in a range of environments for people with disability in Victoria. The scale of the problem is still unknown, but the report contains over 25 case studies to illustrate issues with the reporting and investigation of incidents of abuse.*

*The investigation also uncovered a fear of making reports from people with disability, their families and workers within the sector.*

*My report explores the relevance of the Charter to the reporting framework and includes a number of case studies involving human rights.*

*My recommendations included the introduction of mandatory reporting of abuse to an independent oversight body, with responsibility for ensuring that allegations of abuse are appropriately investigated and lessons are learned.*

### Victoria Police response

Victoria Police recognises the increased risk of abuse for people with disabilities within disability services and is working closely with DHHS to develop practice guidelines for both police and service providers.

The guidelines are intended to contribute to a more accessible and equitable justice system for people with disabilities and will focus on reporting and investigation of crimes involving people with disabilities. This work aims to address the areas of risk and concern outlined by the Commission and the Ombudsman. These guidelines are referred to in this report as the DHHS/ Victoria Police Practice Guidelines.

### Victorian Parliamentary Inquiry into Abuse in Disability Services

In 2015, a Victorian Parliamentary Inquiry into Abuse in Disability Services was established to consider the strengths and weaknesses of Victoria's regulation of the disability service system to prepare Victoria for changes under the National Disability Insurance Scheme. A second stage of the Inquiry set out to examine why abuse is not reported or acted upon, and how it can be prevented.

The Commission made a written submission to the second stage of the inquiry, appeared at a public hearing to discuss its submission, and provided responses to questions on notice following the appearance.<sup>206</sup> The Commission shared the findings of its major research project, *Beyond Doubt: the experiences of people with disabilities in reporting crime*, including barriers to reporting crime and in investigations – and in particular, key findings and recommendations from the report regarding abuse in disability services (also discussed at page 96).

<sup>206</sup> A copy of the Commission's submission and a transcript of the Commission's appearance at the public hearing may be found on the Commission's website.

The Commission emphasised the need for appropriate and prompt responses to any allegation or suspicion of abuse, effective complaints handling, and increased capacity of disability service staff to respond.

The submission made a number of recommendations regarding actions that should be taken to prevent and respond to abuse in disability services including:

- capacity building for clients
- training for disability staff
- supporting peer-led education and advocacy
- expanding the current Disability Worker Exclusion Scheme
- improving complaints handling.

The final report of the inquiry is due in 2016.

### **Statistics on people with disabilities as victims of abuse, neglect or violence**

Disability Justice Advocacy (DJA) provided the Commission with the following statistics about neglect, abuse and violence against people with disabilities by Victorian government-funded workers for the period 1 October 2010 to 31 March 2015:

- 86 clients contacted or were referred to DJA for assistance
- 61 victims had profound communication impairments involving inability to speak or read or write or a combination of these
- 47 of these used alternative or augmentative communication aids
- 59 were referred to Victoria Police by either DJA or family members on advice from DJA
- 11 victims were too scared to involve the police because the alleged perpetrator worked as their carer but was also employed by their landlord in a group home
- 17 of the alleged perpetrators were family members or acquaintances known to the victim
- 69 of the alleged perpetrators were employed as carers
- 16 victims were discouraged by family members not to involve the police
- Only three victims were interviewed by police, one without the presence of an Independent Third Person from the Office of the Public Advocate
- 58 clients were not interviewed by police after first speaking to the alleged perpetrator and/or their employer
- Two of the incidents went to trial and the perpetrator was convicted.

### **Victoria Police response**

Victoria Police reported that it acknowledges the barriers for people reporting crime to police and has utilised the expertise of members from its Disability Portfolio Reference Group to provide advice around making the police complaints process more accessible.

In conjunction with the Commission, Victoria Police has released an Easy English resource entitled, *Reporting Crime: Your Rights*, which is designed to assist and increase the confidence of people with communication or cognitive disabilities or with low levels of English to report crime. In addition, the DHHS/Victoria Police Practice Guidelines will ensure greater clarity and information around the type of considerations when investigating crimes against people with disabilities.

Victoria Police provided the following case study:

A complaint was received that a person with an intellectual disability was arrested and criminally interviewed without the presence of an Independent Third Person (ITP) (section 25 of the Charter). It was found that the person's rights were breached in not being supported by an ITP and the subsequent risk that he may not have fully understood the process and the consequences.

While the police involved stated that the person did not present with any identifiable intellectual disability nor identify such an issue to police, this information was readily available on the Victoria Police LEAP database.

The matter was resolved by discussing the matter with the complainant, providing advice to all members at the relevant station, providing workplace guidance to the members involved, identifying training gaps, and enabling the complainant to be re-interviewed with a suitable ITP.

## Notifications to the Public Advocate from Community Visitors

Violence perpetrated from one resident towards another is the highest category of notification from Community Visitors to the Office of the Public Advocate. The Public Advocate sees a high tolerance of violence towards people with disabilities in residential settings by accommodation service providers and responsible authorities. If this violence was to occur in a domestic environment, it would be termed 'family violence' and legal remedies put in place.

The following case study, where there was no intervention order taken out under the *Family Violence Protection Act 2008* or the *Personal Safety Intervention Orders Act 2010* illustrates this:

*Over an 18 month period, Community Visitors noted numerous assaults (throwing, kicking and punching) initiated by a young man towards his older co-residents as well as to staff. The Public Advocate contacted the Executive Director of the DHHS region for reassurance that the residents were safe and that any ongoing threat to their safety was being addressed. In their 2015 response, DHHS acknowledged that, in the period January to December 2014, there had been 28 incident reports submitted that related to physical assaults. Despite this, the Executive Director concluded that they had 'no evidence to substantiate the concern regarding resident compatibility'.*

The Office of the Public Advocate considers that violence against people with disabilities in group home settings perpetrated towards other residents should trigger an intervention order under the Family Violence Protection Act or the Personal Safety Intervention Orders Act.

The Office of the Public Advocate recommended in its recent submission to the Royal Commission into Family Violence that the Royal Commission should use the Convention on the Rights of Persons with Disabilities 2006 to guide it in reviewing the legislative mechanisms in place in Victoria that apply to people with disabilities affected by family violence.

People with disabilities in residential settings also have the right to safety and security in residential settings under the Charter.

## Victoria Police response

Victoria Police reported that its Priority Communities Division has commenced discussions with its Family Violence Command to consider the findings and implementation of recommendations from the Royal Commission, including the circumstances and particular vulnerabilities relating to people with disabilities.

## Investigation of staff to client assaults

The Disability Services Commissioner (DSC) reported that since 2013, DSC has been monitoring and reviewing all Category 1 incidents involving allegations of staff to client assault and unexplained injuries in disability services delivered by DHHS and registered, funded or contracted disability service providers. DSC reported that:

*Through this work, DSC continues to raise concerns about how investigations into allegations of staff to client assault or unexplained injuries are conducted. In 2015, in 46% of these matters, DSC has raised the concern that both the DHHS and funded service providers give more consideration to determining the allegation of abuse or assault against the staff member rather than balancing this with the client's experience, support needs and outcomes and how their human rights are met during this process.*

*Further to this, we have also expressed concern that allegations of staff to client assault made by people with a disability or their families are generally only dealt with through the incident reporting process. This practice often denies the person with the disability access to a complaints process and all the supports such a process offers (including the opportunity to make a complaint to DSC).*

DSC is also concerned about Victoria Police's response to reports of alleged assault:

*DSC has continued to highlight concerns about access to justice for people with a disability where there has been allegations of staff to client assault, frequently identifying issues of concern with how Victoria Police has responded to reports of alleged assault. DSC is continuing to work with Victoria Police to ensure that people with a disability's concerns are consistently and appropriately respected, reported and actioned in ways that align with the Charter.*



## Case study – Allegations of assault in day program

A parent contacted DSC to complain about the experiences of their adult child at their day program. The parent advised that the person with a disability had been locked in an isolated area by staff, had been physically and verbally assaulted by staff, that staff had not assisted them to go to the toilet and had not ensured they had access and support for eating and drinking when isolated.

The issues raised related to:

- the person's right to freedom, to safety and to live free from abuse (under sections 10 and 21 of the Charter)
- the person not being supported to have their needs met, including their emotional, physical and social needs
- the person's human rights not being considered in regards to the support provided to promote a good quality life.

DSC's initial assessment of the complaint raised significant concerns about how the service provider had provided support to the person and subsequently how they had responded to the complaint. DSC conducted an investigation into the issues raised and prescribed a broad range of actions that the service provider was required to undertake in order to remedy the complaint.

DSC also liaised with Victoria Police regarding the allegations of assault arising from this complaint. DSC continued to work with Victoria Police to advocate for the person's right to have the matter dealt with through the justice system.

### Victoria Police response

Victoria Police reported that it is working with both DHHS and DSC to provide a more seamless and accountable systemic response to allegations/incidents of assault and abuse. The DHHS/Victoria Police Practice guidelines will further provide greater clarity to service providers and police.

## Safety in group homes

Stakeholders raised concerns about the rights of rooming house tenants being breached due to ongoing violence and safety.<sup>207</sup>

In 2015, the Disability Services Commissioner identified an increase in complaints that related to the incompatibility of people living together in a group home, and the impact this has on people's rights to quiet enjoyment of their home and to feel safe and be free from abuse at home.

### Case study: Balancing rights in a group home

A person with a disability made a complaint to DSC that they were scared of a person who had moved into their group home. The complainant advised that the other person had hit them, yelled at them and entered their room without permission.

After consulting with the complainant, DSC spoke to the service provider about the strategies they had used or could use to balance the rights of all people in the home. DSC noted that it often finds in these situations, most of the attention and resources are directed on the person requiring behavioural support rather than equally being directed at the other people living in the group home who can be significantly impacted.

DSC ensured that the service provider focused on the rights and support needs of the complainant and on what was needed to make that person feel supported and safe both physically and emotionally. This included the service provider meeting with and organising counselling for the complainant, reviewing their support plan, planning regular communication, and implementing other support strategies.

While the complainant wanted the other person to be removed from the house, the service provider has an obligation to consider the rights of all people living in the house. DSC worked with the service provider to review how decisions about who can live at the house take into account the potential impact on everyone living there and how any limitations of people's rights are addressed.

207 For example, the Council to Homeless Persons and the Disability Services Commissioner.

Disability Justice Advocacy also noted that many clients who require supported accommodation have little choice in where or who they live with in a group home.

## DHHS response

DHHS reported that every effort is made to reduce instances of incompatibility between residents in group homes. Residents are encouraged and supported to have house meetings where they work together to discuss their viewpoints and address potential conflicts in shared living situations. Staff also proactively manage the tensions between residents and discuss strategies to de-escalate any conflicts in staff meetings.

Where there is genuine incompatibility that cannot be resolved, a transfer to alternative service options is considered and an application is lodged through the Disability Support Register.

## Victoria Police response

The DHHS/Victoria Police Practice Guidelines will recognise the increased vulnerabilities for people with disabilities. It will be designed to provide guidance around responses to all reports of crime or abuse, from or against people with disabilities, regardless of their accommodation.

## Safety in mental health services

The Mental Health Complaints Commissioner (the MHCC) identified dignity, safety and protection from harm in mental health services as a key human rights issue:

*A small proportion of complaints assessed by the MHCC in 2015 raised issues of risk, safety or alleged harm. These complaints are prioritised by the MHCC. Examples included alleged assaults and alleged harm caused by staff or other consumers, concerns about the safety of women (gender safety), and adverse events including injuries, near misses and critical incidents. Some of these complaints related to the use of restraint and seclusion. These complaints raise a number of Charter rights, including humane treatment when deprived of liberty, the right to liberty and security, protection from inhuman or degrading treatment, and the right to privacy.*

Where appropriate, the MHCC refers systemic issues arising from complaints to DHHS and/or the Chief Psychiatrist for consideration of practice and policy guidance. For example, the MHCC reported that:

*In 2015, the MHCC requested that the department consider the adequacy of oversight and monitoring of restrictive interventions (bodily restraint and seclusion) in emergency departments of public hospitals. Depending on the circumstances, complaints about the use of restrictive interventions in emergency departments may be within the jurisdiction of the MHCC or the Health Services Commissioner. The Chief Psychiatrist also has a role as restrictive interventions of people under an Assessment or Treatment Order must be reported to his office. The MHCC reported that the Department has accepted this referral and is considering the issues raised.*

## DHHS response

DHHS reported that it agrees that restrictive practices in all health settings, including emergency departments, should be reduced and is implementing a program of work to better quantify the extent of restrictive practice in emergency departments and identify best practice approaches to reduction.

DHHS reported that it has undertaken significant work to reduce restrictive practices in mental health inpatient units. DHHS funded a Safewards Victorian Trial from September 2014 to July 2015, involving 18 inpatient units within seven area mental health services. Safewards is a UK model and set of 10 interventions for reducing conflict and restrictive practices in acute mental health wards. Following the success of the trial, further work is being done to embed the approach in routine practice, disseminate learnings across the sector and develop tools to support health services.

In 2015/16, funding of \$1.48 million has been provided to 12 mental health services to help make mental health facilities safer for staff, patients and visitors.

## Elder abuse

Stakeholders reported that elder abuse continues to be a significant human rights violation for older Victorians.<sup>208</sup>

Elder abuse is any act that causes harm to an older person and is carried out by someone they know and trust such as a family member or friend. The abuse may be physical, social, financial, psychological or sexual and can include mistreatment and neglect.<sup>209</sup>

Seniors Rights Victoria (SRV) reported that:

- ageism is a key underlying cause of elder abuse
- elder abuse is commonly a family violence issue, with 92 per cent of calls to its helpline relating to abuse by a family member.

SRV reported that:

*[we] operate using a human rights framework that focuses on empowering older people. Identifying elder abuse as a human rights issue and responding within a human rights framework best empowers older people to take action and enables them to live their lives with dignity and respect. For example, we communicate with and take instructions only from the older person and not third parties (such as family members, friends or health professionals) and we act according to the older person's wishes.*

The Ethnic Communities' Council of Victoria also raised elder abuse as a key human rights issue for older people from CALD backgrounds. In 2015, ECCV completed a three year project to increase awareness of elder abuse in ethnic communities.<sup>210</sup> ECCV worked in partnership with ethnic and multicultural organisations and SRV to deliver culturally appropriate messages about elder abuse, its prevention and pathways to support. The ECCV has received funding to extend the project to another six communities over the next three years.

## Victoria Police response

Victoria Police reported that ensuring police understand and appropriately respond to elder abuse has been identified by the Seniors Community Portfolio Manager and the Seniors Portfolio Reference Group (PRG) as a key priority. Through the Seniors PRG, Victoria Police are working with key stakeholders to develop appropriate and culturally sensitive policing responses to elder abuse across Victorian communities.

## Safety for children and young people

### Out-of-home care

CCYP has significant concerns about the safety and security of children and young people in out-of-home care, including the elevated risk of, and exposure to, sexual abuse and sexual exploitation for children in residential care, as revealed in its inquiry report, *As a good parent would – Inquiry into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in residential care*.<sup>211</sup>

CCYP is particularly concerned about:

*the inadequacy of the systemic response, including significant failures and/or delays in procuring appropriate counselling for victims. The Commission is pursuing this issue in 2016 in an endeavour to increase the level of accountability and provide protection and service responses in the best interests of children. The Commission also strongly advocated for the need to recognise and resource Aboriginal family therapists.*

The report, *As a good parent would* noted that:

*Despite the awareness of deficits in the system, children continue to be at risk of sexual abuse and sexual exploitation when they are in residential care. Action is urgently needed, particularly because the number of children living in out-of-home care continues to grow and there is vast over-representation of Aboriginal children.*

208 For example, Seniors Rights Victoria and the Ethnic Communities' Council of Victoria.

209 Seniors Rights Victoria, *Online Elder Abuse Toolkit* (2014).

210 Ethnic Communities' Council of Victoria, *Elder abuse prevention in ethnic communities* (17 July 2013) <<http://eccv.org.au/projects/elder-abuse-prevention-in-ethnic-communities/>>.

211 Commission for Children and Young People, *As a good parent would – Inquiry into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in residential care* (August 2015).

*Society is measured by how we treat our most vulnerable members and there are few more vulnerable than children in out-of-home care. These children are particularly vulnerable to a range of human rights violations and, as a corollary, those in charge of their care should be more acutely focused on protecting their human rights. At the most fundamental level, these children have the right to protection and to feel safe – and they have the right to be free from torture and cruel, inhuman or degrading treatment or punishment.*

*In Victoria, through instruments such as the Charter and the Rights of the Child, we have the tools to demand public authorities and those exercising public functions to guard and protect the human rights of these vulnerable children and provide a far higher standard of care.<sup>212</sup>*

The inquiry's key findings were that:

- The current system creates opportunities for the sexual abuse of children and young people.
- The current system does not prevent sexual abuse or offer consistent responses when it occurs.
- The current system has structural problems, poor data monitoring and insufficient oversight of community service organisations (CSOs).<sup>213</sup>

In relation to compliance with the Charter, the report noted that:

*Our findings show that the residential care system is not compatible with human rights described in the Charter. We are very concerned about apparent breaches of children's rights in some of the individual cases reviewed, including placement decisions and the way the children were treated while they were in care. These potential breaches indicate that some people who work in the sector do not understand children's rights or their own obligations under the Charter. If the Department and CSOs are to meet their obligations under the Charter, there is a need for guidance by the Department and training of all staff.<sup>214</sup>*

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212 Ibid 11.

213 Ibid 14–17.

214 Ibid 13.

## DHHS response

DHHS reported that it is working with CCYP and other relevant stakeholders to address the significant and longstanding issues with the residential care system, as identified in the *As a good parent would* report. The Minister for Families and Children has provided in-principle support for all nine recommendations of the report.

DHHS has taken a number of immediate actions in response to the report and has committed to medium and longer term reform through the Roadmap for Reform: Strong Families, Safe Children initiative (outlined earlier in this chapter). This initiative provides the platform to establish the directions for long term reform of the child and family welfare system.

The sexual exploitation of children in out-of-home care is a long-standing issue. A whole-of-government response and corresponding actions to address this situation commenced in 2012, prior to the release of the *As a good parent would* report. The CCYP's concerns are shared by the Government and service providers.

The following actions are being undertaken:

- The Government has committed to an all-of-government plan, namely the Keeping Children Safe from Sexual Exploitation Strategy, which aims to prevent sexual exploitation, protect children who are subject to sexual exploitation, and prosecute and disrupt those who seek to exploit and sexually abuse children.
- Roadmap to reform: Strong Families, Safe Children, which provides the platform to establish the directions of long term reform of the child and family services system.
- The implementation of Child Safety Standards, which introduce minimum compulsory standards to organisations to help protect children from all forms of abuse. The standards form part of the Government's response to the Betrayal of Trust Inquiry.
- The continued expansion of Therapeutic Residential Care and the implementation of the Improving Safety in Residential Care Initiative. This Initiative introduced improved safety and supervision requirements for residential care, including a stand up staff member overnight, and an overnight safety plan.



- The introduction of Targeted Care Packages to transition children and young people from residential care to alternative placement options based on their individual needs.

## Victoria Police response

Victoria Police reported that it takes all reports of crimes against children and particularly sexual offences, very seriously. Victoria Police will continue to respond promptly to complaints and treat all investigations appropriately and with care taking into account their rights and special needs commensurate with their age.

## Youth justice

CCYP monitors the safety and security of children and young people in youth detention, including the use of isolation and separation, restraint and routine unclothed searches. The Commission reported that:

*The high number of children and young people on remand was a concern throughout the year, particularly given most of these children and young people do not ultimately receive a custodial sentence and many are clients of Child Protection.*

*It remains a particular concern that children can be subjected to restrictive practices while on remand and entitled to the presumption of innocence, in addition to their rights to protection and advancement in their best interests. The Commission is hopeful that the amendments to the Bail Act (introduced in February 2016) will go some way to addressing the high number of children and young people on remand.*

The amendments to the Bail Act are discussed in more detail in page 63.

## DHHS response

DHHS reported that it shares the CCYP's hope that the recent changes to the Bail Act will address the high number of children and young people on remand.

The department is committed to ensuring the safety and security of children and young people in youth justice centres, both those on remand and those sentenced to supervision. The department is developing

an evidence based therapeutic operating model to enable a more trauma informed approach to interventions. Specific to CCYP's concerns, the department will undertake a review of the isolation, safety and separation policies for youth justice centres.

The department is committed to striving towards greater clarity and consistency in relation to the application and recording of isolation and separation practices.

## Violence against women

Many local councils have identified and taken action to address violence against women in local communities.<sup>215</sup> For example, Mornington Peninsula Shire said:

*Violence against women is a common human rights abuse occurring across Australia and on the Mornington Peninsula.*

*Gender-based violence [is a key human rights issue], widely recognised as both a cause and a consequence of gender inequality, resulting in discrimination perpetrated, impacting upon the ability of all women to enjoy and exercise their human rights and fundamental freedoms.*

*Violence against women is a serious human rights violation that requires a sustained, well-resourced and multifaceted response. One of the first ports of call should be ensuring women have equal access to justice, which requires adequately funded women's specific legal and social services.*

*In addition to the Government's obligations to address individual acts of violence, the Government must also put in place programs to address the underlying structural inequalities that facilitated the violence in the first place. This includes education programs that address the ways negative gender stereotypes sustain women's social and economic inequality – Human Rights Law Centre<sup>216</sup>*

215 For example, Mornington Peninsula Shire, Glenelg Shire, Ararat Rural City Council, City of Melbourne, City of Greater Dandenong, and Murrindindi Shire Council.

216 Human Rights Law Centre, 'Family Violence should be treated as the serious human rights violation that it is' (Media Release, 15 June 2015).

## Predatory behaviour by Victoria Police officers

In 2015, the Independent Broad-based Anti-corruption Commission (IBAC) published a report on sexual predatory behaviour by Victoria Police officers against vulnerable persons in the community.<sup>217</sup> The report explained that:

*Police perform a vital function, serving the community and the law to ensure a safe, secure and orderly society. Frontline police perform their duties in often difficult circumstances, coming into contact with members of the community who are under stress, vulnerable and sometimes unpredictable due to mental health or drug issues, and in times of crisis.*

*To help keep our community safe, police officers are entrusted with significant powers that can be exercised often with discretion over their fellow citizens. The exercise of these powers can be vulnerable to misuse, damaging to both the individuals involved and the broader community.*

Amongst other things, the report found that female victims of domestic and family violence have been the most frequent targets of alleged predatory behaviour by police. Persons with mental health issues, minors, victims of other crimes and sex workers were also common victims of alleged predatory behaviour. The report also found that Victoria Police's internal discipline sanctions relating to predatory behaviour have not always aligned with community expectations.

### Victoria Police response

Victoria Police reported that it has responded to the IBAC report as well as the Commission's Independent Review into sex discrimination and sexual harassment, including predatory behaviour, by acknowledging the issues, being transparent and taking action to institute a wide raft of culture change measures. A specialist area within the organisation will be coordinating an action plan and implementing recommendations. Victoria Police is now monitoring and investigating a number of serving officers identified by IBAC as repeat offenders of predatory behaviour.

In addition to its existing policies and procedures supporting victims, Victoria Police is in consultation with a range of internal and external stakeholders including the Victim's Support Agency (VSA) to develop appropriate referral and support arrangements. These supports will also take into account circumstances where no criminal charge is laid and/or where other people are affected. Victoria Police's approach takes into account the sensitivities of victims and the need to maintain security and confidentiality.

### Independent Review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police

Victoria Police commissioned the Commission to conduct an independent review into sex discrimination and sexual harassment, including predatory behaviour, among Victoria Police personnel.

Under its Terms of Reference, the Review examined the nature, prevalence, impact and drivers of sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police.

The Review identified a high prevalence and tolerance of sexual harassment within Victoria Police, as well as evidence of a sexist organisational climate where women are overwhelmingly the targets. This has resulted in significant harm to the mental and physical health of many personnel. The Review also revealed chronic underreporting of sex discrimination and sexual harassment.

The Review identified actions to promote safety and equality in Victoria Police and developed recommendations for Victoria Police, which the Commission will independently monitor and report on over three years.

*It takes strong leadership and courage to tackle a problem of this magnitude. Victoria Police command should be commended for commissioning this review. It demonstrates a very clear commitment to promote gender equality and prevent violence against women in its own ranks – Kate Jenkins, Victorian Equal Opportunity and Human Rights Commissioner (Sept 2013–May 2016)*

<sup>217</sup> Independent Broad-based Anti-corruption Commission, *Predatory behaviour by Victoria Police officers against vulnerable persons, Intelligence Report 2* (December 2015).

## Victoria Police response

Victoria Police noted that the Review has been one of the most comprehensive reviews of this nature into any police organisation in the world. Victoria Police commented that 'the report revealed difficult and painful information about our organisational culture and the workplace harm that had been caused to staff'.

Victoria Police accepted all of the recommendations in the report. A three-year action plan has been developed and Victoria Police has promptly commenced the implementation process.

Victoria Police noted that it is making change a priority. It has identified seven key themes to help focus its efforts:

1. Leadership
2. Recruitment and retention
3. Education and knowledge development
4. Supporting local managers and supervisors
5. Ensuring workplace safety and wellbeing
6. Addressing barriers to reporting and disclosure
7. Improving actions and outcomes of formal processes

Victoria Police commented that:

*We will make our organisation a safe and supportive environment for women with prevention as the key. We have opened ourselves up to a completely independent investigation. VEOHRC are going to audit our progress against the recommendations, and the community and media will also hold us to account.*

## Family violence

Family violence is a significant concern in Victoria that can undermine a number of fundamental human rights for those who are affected, including:

- the right to security
- protection of families and children
- the right to equality
- the right to life
- protection from cruel, inhuman and degrading treatment
- privacy and reputation including arbitrary interference with family life.

In 2015, stakeholders reiterated their concerns that family violence is systemic, widespread and has far-reaching consequences for women and their children.<sup>218</sup>

In December 2014, the Royal Commission into Family Violence (RCFV) was established to investigate the entire family violence system, focusing on preventing family violence, increasing early intervention, improving victim support, making perpetrators accountable and helping agencies better coordinate their response to both victims and perpetrators of family violence (discussed in more detail on page 108).

## DHHS response

DHHS explained that in Victoria, family violence is defined in section 5 of the Family Violence Protection Act and includes:

- any act or behaviour towards a family member that:
  - is physically, sexually, emotionally, psychologically or economically abusive
  - is threatening or coercive
  - controls or dominates, or
  - causes fear for the safety or well-being of themselves or another person.
- behaviour that causes a child to hear, witness or otherwise be exposed to the effects of any behaviour referred to above.

DHHS noted that Victoria's funded responses to family violence predominantly focus on identifying and responding to women experiencing intimate partner violence. This is due to the significant overrepresentation of women and their children identified as affected family members in family violence incidents.

## DJR response

In preparing evidence and background information for the Royal Commission, DJR described the ways in which the justice response to family violence currently provides protection for women and children and identified ways in which the system can be strengthened. An increased focus on the responsiveness of the system to different cultural groups and cohorts with special needs has been a feature of ongoing work.

<sup>218</sup> For example, the Commission for Children and Young People, Ararat Rural City Council, Justice Connect Homeless Law and Victoria Legal Aid.

The Government has committed to implementing the recommendations of the Royal Commission. DJR has also continued its work to improve the experiences of sexual assault victims, including exploring alternative modes of dispute resolution in sexual assault matters.

In March 2015, Victoria Police established Australia's first Family Violence Command. The new command consists of analysts, advisors, investigators and police specialising in family violence matters. It provides a central focus to drive reform and improvement in policing family violence, sexual assault and child abuse. In particular, the command focuses on examining and improving risk assessment processes conducted by police members, strengthening education regarding the police response to incidents, and collaborating with support services in the sector.

The CV Family Violence Service Reform Strategy includes initiatives that:

- teach perpetrators more about the consequences of family violence
- provide individualised support to victims, or those at risk of family violence
- provide staff with family-violence training.

The strategy also commits DJR to developing a new women's policy to guide future program and service delivery across the women's correctional system.

## Family violence and human rights

The Commission made a submission to the RCFV, with three key recommendations:

- That the RCFV contextualise family violence within a human rights framework, and promote Charter compliance by requiring public authorities to undertake a human rights impact assessment of any family violence related policy.
- That the *Equal Opportunity Act 2010* be amended to insert a new protected attribute of 'status of victim/survivor of family violence', with consultation to take place of the most appropriate wording for the new attribute.
- That dedicated additional paid family violence leave be included in the new Victorian Public Service (VPS) Enterprise Agreement and that there be mechanisms put in place to ensure the confidentiality of employee's applications and taking of leave, as well as a complementary family violence policy for the VPS providing

for referral pathways, development of safety planning strategies, and provision of flexible work for employees where appropriate.

The Government announced prior to the RCFV report being released that it agreed with the Commission's recommendation to include family violence leave in the VPS Agreement, and the RCFV went further and recommended that family violence leave be introduced into the National Employment Standards in the *Fair Work Act 2009* as a basic minimum entitlement for all employees.

The Victorian Equal Opportunity and Human Rights Commissioner also gave evidence at a public hearing for the RCFV in 2015 and provided a written response about the exclusion of family violence services to trans and gender diverse people, or to boys over the age of 12 (such as when accompanied by their mother) and the potential discrimination issues that arise.

## Family violence risk factors

*The research helps identify someone who could continue to use violence and breach orders and that helps us manage risk to keep victims and families safe – Bevan Warner, Victoria Legal Aid*

Victoria Legal Aid has recently launched the results of new research into clients charged with breaching family violence intervention orders.<sup>219</sup> The research revealed common characteristics about this high risk group. It revealed:

- they are overwhelmingly male
- men who are unemployed, have an acquired brain injury or intellectual disability and had experienced legal problems before their first charge of a breach pose a high risk of reoffending
- clients with more than one charge of breaching were twice as likely to have an acquired brain injury
- female clients, who made up just 13 per cent of those helped with charges of breaching, had higher levels of disability and disadvantage than male clients.

Victoria Legal Aid is implementing a new Client Safety Framework to help its lawyers identify and respond to safety risk factors including the risk of family violence.

<sup>219</sup> Victoria Legal Aid, *Research Brief, Characteristics of respondents charged with a breach of family violence intervention orders* (November 2015).



## DHHS response

DHHS reported that Victoria's Family Violence Risk Assessment and Risk Management Framework, also known as the common risk assessment framework or CRAF, provides the framework for identifying, assessing and managing risk of family violence in Victoria and establishes a consistent approach to service delivery through the integrated family violence system and generalist services more broadly.

The CRAF outlines evidence based risk indicators of the likelihood and severity (including lethality indicators) of family violence occurring, including risk factors for victims and perpetrators and relationship factors.

From 2012–2015 the average number of risk factors that were recorded by people while assessing risk increased by 48 per cent. Safe Steps report that 57 per cent of victims contacting them during this period required immediate protection.

## The impact of family violence on Aboriginal women and children

CCYP noted that safety and security in the context of family violence was a prominent and ongoing issue for Aboriginal children. In partnership with DHHS, Taskforce 1000 considered the circumstances of Aboriginal children and young people in out of home care in Victoria. The Taskforce identified that:

- approximately 89 per cent of children whose cases were reviewed had experienced family violence
- approximately the same percentage of children were exposed to parental alcohol and drug misuse
- family violence was a key reason why children could not be reunited with their family.

CCYP advocates for more holistic responses to family violence, including initiatives and programs that support and nurture the family unit with a view to reunification.

FVPLS Victoria noted that 'an overwhelming majority of incarcerated Aboriginal women have experienced family violence and many draw an explicit causal link between their criminalisation and their experiences as victims of violence'.

## Aboriginal Victoria response

Aboriginal Victoria (DPC) reported that the incidence of family violence in the Aboriginal community is a complex matter linked to the injustices experienced by many Aboriginal Victorians, including the dispossession of their land and culture and the profound and ongoing impact of past policies leading to the wrongful removal of children from their families. The Aboriginal community has experienced intergenerational grief and trauma and it is not uncommon for an individual to be both a perpetrator and victim of family violence. In addition, Aboriginal communities' understanding of the family unit may be inclusive of broader kinship networks, extended family members and whole communities. Accordingly, the Government considers that there is a need to develop a holistic healing model that is sensitive to the unique experiences and obstacles that the Aboriginal community faces.

## DJR response

DJR acknowledges that the impact of family violence on Aboriginal women and children can be devastating and that Aboriginal Victorians, particularly women and children, experience disproportionately high rates of violence.

AJA3 provides an effective vehicle through which to improve government responses to conflict and violence within Aboriginal communities. It supports a commitment to prevention, early intervention and diversion in order to reduce progression of Aboriginal Victorians into the criminal justice system, and to reduce all forms of violence experienced within Aboriginal communities.

Further, AJA3 prioritises reducing conflict between families, reducing lateral violence, and meeting the needs of Koori women in the justice system. Important focus areas include mental health and social and emotional wellbeing, alcohol and drug treatment, education and employment, housing, and connection to family, community and culture.

DJR has a number of programs in place to promote community safety in Aboriginal communities, including the Koori Community Safety Grants program. This program provides opportunities for Koori community organisations to develop

effective local responses to violence. It supports initiatives that seek to prevent violence, or intervene early in situations where the risk of violence is significant. The high rates of breach of Intervention Order conditions is an ongoing issue.

## Police treatment of Aboriginal women who have experienced family violence

FVPLS Victoria noted that an emerging issue is the police treatment of Aboriginal women who have experienced family violence. FVPLS told the Commission that:

*Far too often we hear reports of systemic issues involving poor police conduct, which exposes our clients to additional trauma and risk. In particular, FVPLS Victoria have complaints from clients that police are not initiating criminal charges against perpetrators who have breached Intervention Order conditions.*

*In our experience, many women in our communities have a limited understanding of their legal rights in relation to making complaints about unsatisfactory responses from police. We also know that Aboriginal women face numerous barriers accessing services.*

## Victoria Police response

Victoria Police reported that family violence continues to be a key priority focus. In 2015, Victoria Police established the Family Violence Command to provide a more thorough systemic approach to dealing with and reducing incidents of family violence. As a result of its concerted efforts, the rate of reporting family violence has increased significantly. This is an indication of increased community confidence in the police response as well as the more robust legislative and policy frameworks.

Victoria Police is committed to continuously improving its responses to victims of family violence and holding perpetrators accountable.

The Koori Family Violence Police Protocols is a partnership between Victoria Police, DJR, DHHS and the Aboriginal community. It is aimed at strengthening police response to incidents of family violence. The protocols have been launched in Mildura, Ballarat, Darebin, Shepparton and Bairnsdale. The Protocols will be launched in Greater

Dandenong, Horsham, Swan Hill, Echuca, Warrnambool and Morwell in 2016.

A state-wide Steering Group chaired by Victoria Police with membership including DPC, DJR and DHHS continues to provide oversight and direction on Protocols policy and practice, including additional protocol sites and culturally appropriate family violence training development.

## DHHS response

The department reported that an evaluation found that the protocols are an effective and useful contribution to improving Aboriginal family violence responses.<sup>220</sup>

The aim of the protocols is to strengthen the police response to incidents of family violence in Aboriginal communities with the longer term goal of reducing both the number of family violence incidents, and the rates of families experiencing repeated incidents of family violence. The protocols are aimed at a holistic, improved response to all parties including victims, children and perpetrators.

Locally developed protocols guide police, at the time of a family violence incident, to identify whether the affected family member(s) or perpetrator identify as Aboriginal and, if so, to offer them the choice of referral to Aboriginal support services or non-Aboriginal support services according to their preference.

To support this process, the protocols specify that police members should receive cultural awareness training delivered by members of the local Aboriginal community and that local communities, police and support services should develop and sustain strong local partnerships.

## DJR response

The department is committed to working to reduce family violence in Koori communities and improve access to relevant services. Justice agencies and Koori communities work together to reduce conflict and violence through crime-and-violence prevention activities, dispute resolution processes to reduce unresolved conflict, and programs to reduce recidivism by high-risk violent offenders.

220 Clear Horizon Consulting, *Evaluation of the Koori Family Violence Police Protocols: Ballarat, Darebin and Mildura* (24 March 2015).

## Legal and support services for Aboriginal victims of family violence

FVPLS Victoria reported the following concerns about access to legal and support services for Aboriginal women who are victims of family violence:

- Clients regularly instruct FVPLS Victoria lawyers that their violent partners or family members make explicit threats to report them to child protection or have their children taken away from them if they go to police.
- Aboriginal women in Victoria are often not eligible for service at the Victorian Aboriginal Legal Service due to conflicts of interest (for example, the perpetrator is already being represented by the service). FVPLS noted that while it exists to meet this need, funding constraints effectively mean its capacity is severely curtailed. FVPLS considers that:  
*if Aboriginal women do not have access to culturally safe legal services that address their holistic needs they may face immense barriers in removing themselves from situations of cruel and degrading treatment in the form of family violence.*
- There are significant barriers for clients attempting to claim assistance through the Victims of Crime Assistance Tribunal and a need to improve user-friendliness for claimants from disadvantaged backgrounds.

### DJR response

The department has funded the FVPLS to deliver the 'Sisters' Day Out Program' to provide a culturally welcoming and safe space for Koori women to come together and participate in a range of activities that place an emphasis on self-care and well-being (discussed in more detail on page 41).

This program facilitates workshops for Koori women, covering a range of issues, including: raising awareness of family violence and its underlying causes; strengthening community networks to reduce social isolation; and providing information and tools to promote community safety.

## The link between family violence and women with disabilities

The Royal Commission into Family Violence found anecdotal evidence suggesting a high level of violence against people with disabilities, particularly

women. It also noted that family violence is the direct cause of disabilities for some women.<sup>221</sup>

## The link between family violence and homelessness

Justice Connect Homeless Law's 12-month report on the Women's Homelessness Prevention Project (WHPP) found that there is a clear link between family violence and homelessness. In particular, the report found that:

*Family violence can present both immediate and long-term risks of homelessness for women and children in their care – 95 per cent of WHPP clients report an experience of family violence in the past 10 years. Women and children affected by family violence are at an increased risk of homelessness because:*

- *they are forced to leave their home due to violence;*
- *they stay in their housing, but with less financial stability after a perpetrator has been removed; and/or*
- *long-term impacts of family violence, including mental illness, can make their lives precarious.*<sup>222</sup>

In its 12-month report, Homeless Law noted that:

*For vulnerable social housing tenants, the Charter provides a crucial layer of protection that can be used to ensure eviction into homelessness is only used as a measure of last resort ... In addition, the Charter provides a helpful framework for social landlords making difficult decisions. It encourages consideration of a tenant's individual circumstances, including their family, any health problems and their risk of homelessness, and allows these considerations to be balanced against the competing obligations of the landlord. It encourages proper consideration of alternatives to eviction and it has an important role to play in preventing unnecessary evictions into homelessness for women and children.*<sup>223</sup>

221 Royal Commission into Family Violence, *Summary and Recommendations* (March 2016) 36.

222 Justice Connect Homeless Law, *Twelve months of keeping women and children housed* <<https://www.justiceconnect.org.au/our-programs/homeless-law/law-and-policy-reform/preventing-evictions-and-sustaining-tenancies/twelve-months-keeping-women-and-children-housed>>.

223 Justice Connect Homeless Law, *Women's Homelessness Prevention Project – Keeping women and children housed – 12 month project report* (September 2015), 7.

## Addressing family violence

In the past year, family violence as a community concern has increased, no doubt in part because of the evidence provided to the Royal Commission into Family Violence and the growing understanding of the effect of family violence on victim survivors, their families, and the community.

### Royal Commission into Family Violence

On 22 February 2015, former Justice Marcia Neave AO was appointed Commissioner, and Patricia Faulkner AO and Tony Nicholson were appointed Deputy Commissioners, to the Royal Commission into Family Violence. The Commissioners consulted with over 850 people in 44 group consultations, received nearly 1000 submissions from the public and interested organisations, attended site visits, held public hearings to receive evidence, and held roundtable discussions with stakeholders and experts from within and outside the family violence sector.

The Royal Commission delivered its report with 227 recommendations to government on 29 March 2016. The report focused on improving the current system, transforming institutional responses to family violence, and developing a long-term program to deal holistically with family violence and its impact.

The Victorian Government has committed to implementing every recommendation made, and many departments, agencies and local councils have already been taking steps to make family violence a priority.

### Joint statement – Getting serious about change

In 2015, the Commission signed a joint statement with a number of other organisations including OurWatch, VicHealth, Domestic Violence Victoria and Women's Health Victoria: *Getting serious about change: the building blocks for effective primary prevention of men's violence against women in Victoria*.

The statement highlights and identifies gender inequality as a key driver of men's violence against women and canvasses a range of preventative approaches needed to achieve measurable change. The statement outlines a 10 point plan to develop the building blocks for a primary prevention approach to men's violence against women.

### Internal family violence initiatives

In 2015, there was a sustained effort by public authorities to focus on family violence as an internal issue affecting staff, with reports about family violence awareness-raising initiatives as well as support to those experiencing family violence.

The Victorian Government promoted 'Victoria Against Violence, which ran from 25 November to 10 December 2016. It was timed to coincide with the United Nations 16 Days of Activism against gendered violence. The Department of Environment, Land, Water and Planning (DELWP) supported this campaign by using its social media tool Yammer to share stories and conversations about the impact of family violence on DELWP staff. Department staff also participated in making a video called 'Taking a Stand'.

DELWP's Grampians Region branch, in conjunction with the Department of Economic Development, Jobs, Transport and Resources (DEDJTR), implemented a program called 'Act@Work' delivered by Women's Health Grampians to address attitudes and behaviours that might support violence. It focused on building a healthy, safe, and respectful workplace culture, which can positively impact staff, their families, as well as the broader community.<sup>224</sup> Ararat Rural City Council also implemented the program by creating an Act@Work committee, with staff becoming advocates for promoting bystander intervention within internal workplaces.

DTF reported that the Victorian Managed Insurance Authority (VMIA) introduced new Family Violence Policies, to recognise the impact that family violence has on an individual and their community. The VMIA policy provides those experiencing family violence with confidential support and assistance, leave as required, legal assistance, access to a support officer, and referral resources. Employees can also request access to a portion of their salary in advance, or request that their salary is paid into an alternative account, prepaid credit card or cheque.

### Embracing the White Ribbon campaign

Many public authorities reported participating in the White Ribbon campaign, an Australia wide, male-led campaign to end men's violence against women. The campaign focuses on awareness raising and primary prevention initiatives.<sup>225</sup>

DJR is participating in the White Ribbon Australia Workplace Accreditation Program. Accreditation means DJR will be recognised as a workplace taking proactive steps to stop men's violence against women. Steps towards

224 See Women's Health Grampians, *Act@Work* (2016) <<http://whg.org.au/priorities-programs/prevention-of-violence-against-women/actatwork-3>>.

225 White Ribbon, *What is White Ribbon?* (2014) <<http://www.whiteribbon.org.au/what-is-white-ribbon>>.



accreditation have included surveying staff to ascertain awareness of violence against women; having the Senior Executive Group take the White Ribbon oath; reviewing policy and leave arrangements for staff experiencing family violence; running White Ribbon events and communications campaigns; and providing family violence training to staff.

Local councils have also reported being involved in the campaign. Ararat Rural City Council led a White Ribbon Day event, the Surf Coast Shire is pursuing White Ribbon accreditation, and Mornington Peninsula Shire organised a number of White Ribbon events and awareness raising opportunities.

### *Family violence leave provisions in enterprise agreements*

In 2015, the Victorian Government committed to a model clause for a family violence provision to be included in public sector enterprise agreements.

The Victorian Equal Opportunity and Human Rights Commission commended the Victorian Government for taking this important step, commenting that it was important for the Government as a major employer to take the lead on gender equality, directly, with its own employees, and more broadly by acknowledging the profound impact employers can have in influencing community attitudes on gender inequality.<sup>226</sup>

### **External family violence initiatives**

Public authorities reported taking steps to implement community or stakeholder programs to raise awareness of family violence, and taking steps to ensure that services are provided in a way which ensures safety of those experiencing family violence. For example, in 2015, DET commenced work on implementing respectful relationships education for schools to deliver from 2016 (see page 41).

#### *Initiatives by Victorian courts*

Victorian courts reported a number of initiatives to support people using court services who are experiencing family violence:

- Court Services Victoria commenced the 'Family Violence Building Safety Initiatives Project'. This externally aimed initiative was established to identify and undertake special refurbishment in courts to ensure people attending family

violence matters are safe whilst at court, as well as providing additional family violence support workers.

- The Magistrates' Court:
  - in conjunction with the Women's Legal Service Victoria and specialist family violence service, developed a 'Family Violence Video Conferencing Project' pilot. Victims can attend court remotely, via video link to minimise the potential for contact with and intimidation by a perpetrator at court, and to enhance the victim's safety and ability to participate in proceedings
  - is staging commencement to fast-track family violence related criminal proceedings (with assistance from Victoria Police and Victoria Legal Aid). The project commenced 1 December 2014 in Dandenong, and in 2015 was expanded to Broadmeadows, Shepparton, Ringwood and Ballarat
  - has launched a dedicated family violence website, and is improving court waiting areas to ensure that persons attending court for family violence related proceedings are safe.
- The County Court revised its practices and procedures and implemented improvements to court proceedings to ensure best practice when dealing with family violence matters. For example, a new family violence checklist on court files will ensure support services for victims are more accessible and readily available, and will result in improved data collection to better respond to family violence proceedings.

#### *Local government initiatives*

In 2015, local governments took a leading role in developing both external and internal facing family violence strategies. For example:

- Surf Coast shire introduced a Gender Equity Plan and organised training by the Municipal Association of Victoria on family violence for all its supervisory staff
- City of Monash endorsed the draft Gender Equity Strategy and Year One and Two Action Plan, which includes strategies to prevent violence against women
- City of Greater Geelong worked on the development of a strategic plan as well as coordinating and supporting the Barwon Month of Action working group, both of which focus on prevention and addressing violence against women and children
- Glenelg Shire Council endorsed the 'Great South Coast Prevention of Violence Against Women and Children Strategy 2013–17', and implemented the Great South Coast Prevention

226 Victorian Equal Opportunity and Human Rights Commission, 'Victorian Government commits to family violence leave provisions in enterprise agreements' (Media Release, 17 August 2015).

of Violence Against Women and Children Action Plan. The strategy is a joint commitment by councils, health and community organisations, state government departments and regional networks across the Great South Coast.

Other councils involved in this strategy are Corangamite, Moyne, Southern Grampians and Warrnambool councils

- Knox City Council, Maroondah City Council and Yarra Ranges Council worked on a project 'Prevention of Violence Against Women in Our Community'.
- Knox City Council developed a 'Preventing Violence against Women Knox 2015 Action Plan' and supported retaining family violence provisions, including additional leave entitlements, in Council's enterprise agreement.
- City of Melbourne worked with peak organisations, industry bodies and not-for-profit organisations to develop and promote a 'Respectful Relationships/Preventing Violence Against Women Charter'.

### **Equality and Safety for Women: Preventing violence before it occurs**

A new online guide has been launched by Women's Health Victoria to support primary prevention efforts for violence against women. The guide – Equality and Safety for Women: Preventing violence before it occurs – sets out principles for action on preventing violence against women, and steps for action planning, implementing and measuring primary prevention efforts in the regional context.<sup>227</sup>

## **Part four: Promoting the right to security**

### **Reducing the use of restrictive interventions**

DHHS reported that the Senior Practitioner – Disability (Office of Professional Practice) sponsored many initiatives to support best practice in the provision of care by disability service providers. The Promoting Dignity Grants initiative awarded small grants to eight disability services to attempt to use alternatives to try to reduce the use of restrictive interventions. The department reported that all services were partially or completely successful in reducing the restraint used.

#### **Example of Promotion of Dignity Grant**

DHHS reported that the most successful grant was when two services worked together to reduce the use of mechanical restraint for a young man they supported. Mechanical restraint is described in the *Disability Act 2006* as 'material or devices that prevent a person moving freely, that are not providing treatment or helping the person be more independent'.

DHHS explained that the young man had been mechanically restrained for many years. The services had a thorough assessment completed and found the young man communicated his needs through vocalising and banging his hand. They learned to 'listen' and understand what his needs were, and by doing so were able to reduce their use of mechanical restraint from approximately 40 incidents in March 2014 to zero by October 2014.

An evaluation project was also undertaken to determine how mechanical restraint could be reduced. The results of the project showed that many people who are mechanically restrained are likely to be significantly functionally disabled especially in communicating their needs. The quality of many people's behaviour support plans showed that staff often did not appear to understand the person's behaviour.

The evaluation will contribute to the development of practical guidance for disability services to support people with disabilities who engage in self-injurious behaviour to ultimately avoid the use of mechanical restraint, therefore promoting human dignity, equality and freedom.

<sup>227</sup> The guide is available at Women's Health Victoria and Women's Health Association of Victoria, *Equality and Safety for Women* <<http://equalityandsafetyforwomen.org.au/the-guide/>>.

DHHS commented that research has shown that the quality of behaviour support plans is associated with reductions in restrictive interventions. The Office of Professional Practice developed the Positive Behaviour Support: Behaviour Support Planning program to help services increase the quality of their plans and decrease the severity of client behaviours of concern.

DHHS noted that the Roadmap resource for achieving dignity without restraint also provides a strategy that services can use to improve client-staff interactions, improve choices for clients and lessen the likelihood of behaviours of concern.

## Safety in communities

The City of Greater Dandenong has undertaken a number of initiatives to address the impacts of crime and anti-social behaviour in public places in Greater Dandenong, including:

- developing and implementing a Community Safety Plan to coordinate and strategically guide Council and stakeholders activities on priority issues
- installing CCTV cameras in key locations in partnership with Victoria Police, to support their ability to reduce crime and improve perceptions of safety
- engaging with community to raise awareness of graffiti's negative impact and removing graffiti to improve perceptions of personal safety in public places
- conducting youth programs to prevent alienation and violence
- designing public parks and other spaces to improve lighting and surveillance
- partnering in a regional integrated planning project with 10 Melbourne councils to advocate for better controls of packaged liquor outlet density and reduce associated harms
- engaging with liquor licensed venues, Victoria Police and community in initiatives to reduce the negative impacts of violence associated with alcohol consumption
- collaborating with Road Safe South East and Victoria Police to improve road, pedestrian and commuter safety.

## Safety in the courts

Court Services Victoria and the Magistrates' Court reported that the Courts Safety Audit Project commenced in early 2015. The project was established to audit the physical structure and operations of courts across the State. The project explored the ability of CSV to ensure the safety of all persons attending courts including staff and members of the judiciary. CSV noted that this work is an extension of its duty of care obligations. The report and recommendations are due to be completed in 2016.

# Appendix: Consultation

In preparing this report, the Commission consulted with:

## Government departments

Department of Economic Development, Jobs, Transport and Resources (DEDJTR)

Department of Education and Training (DET)

Department of Environment, Land, Water, and Planning (DELWP)

Department of Health and Human Services (DHHS)

Department of Justice and Regulation (DJR)

Department of Premier and Cabinet (DPC)

Department of Treasury and Finance (DTF)

## Statutory agencies

Commission for Children and Young People (CCYP)

Commissioner for Privacy and Data Protection (CPDP)

Court Services Victoria (CSV)

Independent Broad-based Anti-corruption Commission (IBAC)

Mental Health Complaints Commissioner (MHCC)

Disability Services Commissioner (DSC)

Office of the Health Services Commissioner (OHSC)

Office of the Public Advocate (OPA)

Victorian Auditor-General's Office (VAGO)

Victoria Legal Aid (VLA)

Victorian Ombudsman

Victoria Police

## Local government

Ararat Rural City Council

Banyule City Council

Cardinia Shire Council

City of Darebin

City of Greater Dandenong

City of Greater Geelong

City of Melbourne

City of Port Phillip

City of Yarra

Glenelg Shire

Knox City Council

Maroondah City Council

Moreland City Council

Mornington Peninsula Shire

Moyne Shire

Murrindindi Shire Council

South Gippsland Shire Council

Southern Grampians Shire Council

Surf Coast Shire Council

## Community organisations

Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS Victoria)

AED Legal

Centre for Excellence in Child and Family Welfare

Centre for Multicultural Youth (CMY)

Council to Homeless Persons

CREATE Foundation

Deaf Victoria



Disability Discrimination Legal Service  
Disability Justice Advocacy  
Ethnic Communities' Council of Victoria (ECCV)  
Justice Connect Homeless Law  
Mental Health Legal Centre  
Seniors Rights Victoria  
Tenants Union of Victoria  
Transgender Victoria  
Victorian Aboriginal Legal Service (VALS)  
Victorian Council of Social Service (VCOSS)  
Victorian Gay & Lesbian Rights Lobby (VGLRL)  
Women's Legal Service Victoria  
Youthlaw

## **Courts and tribunals**

Consultation with the following courts, tribunals and colleges was coordinated by Court Services Victoria:

Children's Court  
Coroners Court  
County Court  
Judicial College of Victoria (JCV)  
Magistrates' Court of Victoria  
Supreme Court of Victoria  
Victorian Civil and Administrative Tribunal (VCAT)







**Victorian Equal Opportunity  
& Human Rights Commission**

## **Contact us**

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Website	<a href="http://humanrightscommission.vic.gov.au">humanrightscommission.vic.gov.au</a>