



Victorian Equal Opportunity  
& Human Rights Commission

# 2014 report on the operation of the Charter of Human Rights and Responsibilities



## Victorian Equal Opportunity & Human Rights Commission

Published by the Victorian Equal Opportunity and Human Rights Commission, Level 3, 204 Lygon Street, Carlton, Victoria 3053. June 2015.

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### Protecting us all: 2014 report on the operation of the Charter of Human Rights and Responsibilities

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Ordered to be published.  
PP 32, Session 2014–15

Printed on Precision

ISBN 978-0-9922762-3-2 (Print)  
ISBN 978-0-9922762-4-9 (Online)

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# Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) is pleased to present the 2014 report on the operation of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

The report highlights that after eight years of operation, the use of the Charter has matured beyond simple compliance with the law. The Charter is not only part of 'everyday business' for many public authorities, but drives important human rights initiatives to address systemic issues. In this way, it prompts organisations to take a proactive, rather than reactive, approach to their operations and the way they engage with the community.

Organisations are also increasingly using the Charter in more sophisticated ways to review, develop and implement policies and practices that aim to protect people from breaches of their human rights or to actively promote the realisation of rights.

In 2014, a good example was Victoria Police's progress against its *Equality is not the same* action plan to address discriminatory policing and racial profiling. This included the development of new human rights-based policies, standards and strategies, and specific community portfolios for priority communities, including Aboriginal and multicultural communities.

2014 was an important year for the Charter. It saw the Charter as a key driver in significant law reform efforts, including reforms to Victoria's mental health laws, and it saw a number of court and tribunal decisions help to clarify the scope of the rights set out in the Charter and the responsibilities public authorities have to protect them.

In many ways, the Charter has had its greatest impact in the way it influences and shapes everyday interactions between the government and the community. This is evident by the number of positive examples we heard about human rights

and the Charter in practice in government and the community – including initiatives to increase the number of women in leadership, to improve decision-making for older Victorians, and to promote diversity and inclusion.

Although it is clear the Charter is firmly embedded in the work, language and culture of many public authorities, some challenges remain. In consultation for the report, community organisations and statutory agencies told the Commission about a number of serious human rights concerns about public services and decision-making.

These issues are highlighted in the report, along with some of the important work that public authorities are doing to address community concerns – including for example, about the human rights impacts of recent law and order reforms, about the independence of investigations of complaints against police, about children in out-of-home care, and about family violence.

We also heard disturbing reports about the abuse of people with disabilities in disability services, including the barriers that people with disabilities face reporting crime. These concerns were reflected in the Commission's 2014 research report, *Beyond doubt: The experiences of people with disabilities reporting crime*.

This year's report also considers the human rights of Aboriginal Victorians. We not only heard about entrenched examples of discrimination – such as the increasing overrepresentation of Aboriginal people in the criminal justice system – but also about the importance of respecting and promoting cultural rights, particularly for Aboriginal children and young people in care, and Aboriginal people in detention.

The Commission works with public authorities and community organisations to build the use and understanding of the Charter by the government and the community. This helps organisations

achieve human rights outcomes for individuals and can lead to the more effective management of organisations.

The Commission does this by delivering training and workshops on the Charter, developing guides on human rights, launching a toolkit to help local councils engage with human rights, running the Victorian Public Sector Human Rights Network, undertaking Charter reviews (such as a formal review of Victoria Police's Field Contact Policy), and intervening in court and tribunal cases that consider the Charter.

This year, the Commission is also preparing a standalone local government report, that will consider the operation of the Charter in local councils and communities.



**John Searle**  
Chairperson

We would like to thank everyone who contributed to this report, including people from state government departments and agencies, local governments, community organisations and courts and tribunals. We value your ongoing participation in the reporting process and look forward to working with you to build a community where every person values, understands and respects human rights and equal opportunity.



**Kate Jenkins**  
Commissioner

# Reporting on the Charter

## About this report

The Charter aims to protect and promote human rights for all Victorians. It recognises that human rights belong to all people without discrimination, and that the diversity of the people of Victoria enhances our community. It also recognises that human rights have a special importance for the Aboriginal people of Victoria.

The Commission must report to the Victorian Attorney-General on the operation of the Charter each year.<sup>1</sup> This is the Commission's eighth report on the operation of the Charter.

The Commission's yearly 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.

This report examines the operation of the Charter in the 2014 calendar year. It reflects the way the Charter has been operating in the work of public authorities, the courts and tribunals, in parliament and in the community.

## Commitment to the Charter

In 2014, public authorities and community organisations demonstrated a sustained commitment to human rights and the Charter. A number of public authorities reported that the Charter is strongly embedded in their work and organisational culture. For example, organisations commented that:

- 'The Charter has had a wide-ranging impact on all aspects of the diverse work of the Department of Justice and Regulation.'
- 'Human rights are central to the work of the Mental Health Complaints Commissioner.'
- 'The Department of Education and Training considers the Charter to be embedded in everyday business.'
- 'The Victorian Charter and the United Nations Convention on the Rights of the Child are important frameworks which shape the work the Commission for Children and Young People does.'
- 'The consideration of human rights is an integral part of the Department of Premier and Cabinet's work practices.'
- The Department of Health and Human Services has applied the principles of the Charter to shape and define the direction of integrating human services delivery.'
- Victoria Police has 'developed policies on good practice, non-discriminatory and respectful police interactions with the public that are based on the guidance provided by the Charter'.

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<sup>1</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 41(a).

- ‘The principles outlined in the Charter are embedded in the Commissioner for Privacy and Data Protection’s advice and publications.’
- Victoria Legal Aid’s ‘practitioners continue to use the Charter to support their advocacy efforts on behalf of some of the most vulnerable and disadvantaged in Victoria’.

## Overview of the report

**Chapter 1** profiles the key human rights issues that were raised with us by community organisations and statutory agencies in 2014. These concerns demonstrate that although public authorities have an ongoing commitment to the Charter, some challenges remain.

Chapter 1 considers the following themes:

- human rights in the criminal justice system
- police and protective services officers
- discriminatory laws, policies and practices
- the rights of Victorians with disabilities
- family violence.

**Chapter 2** considers the use of the Charter in public decision-making and service delivery, including highlighting case studies of good human rights policy and practice in government.

**Chapter 3** considers the role of the Charter in law-making, including consideration of the Scrutiny of Acts and Regulations Committee process.

**Chapter 4** considers the use and interpretation of the Charter in Victorian courts and tribunals in 2014.

## Our consultation

As with previous years, the Commission consulted with all state government departments, a number of statutory agencies, local councils and community organisations about the operation of the Charter in their work. We consulted with a number of complaint-handling bodies that receive information directly from the community about the human rights performance of other public authorities.

This year, the Commission also invited more than 50 community organisations and statutory agencies to complete a human rights survey to inform the content of the report. The survey helped capture a broad range of experiences about how the community engages with the Charter and human rights in practice.

We also gave government departments and agencies an opportunity to provide comments on specific human rights issues that were raised by community organisations and statutory agencies in consultation for the report. These responses are included in Chapter 1 of this report.

The Commission notes that it is beyond the capacity of this report to undertake a comprehensive survey of the experience of the community in using the Charter. Therefore, we consulted with peak community bodies and organisations that were actively engaged with human rights work in 2014. We acknowledge that the report does not capture the work of all community sector organisations and we look forward to ongoing engagement with a broad range of organisations.

This year the Commission is also preparing a standalone **local government report** that will profile the operation of the Charter in local councils in 2014.

The Commission thanks all the organisations for their participation in and contribution to this report. A full list of these organisations is included in **Appendix A**.

## Machinery of government changes

The 2014 reporting year coincided with the Victorian state election which was held on 29 November 2014. The election resulted in a change of government and a subsequent change of departmental structures, functions and responsibilities.

As a result of the machinery of government changes, departments were asked to report on their current areas of responsibility. In some cases, this included reporting on the activities of various former departments. The new departments took effect from 1 January 2015. The full list of current government departments is included in **Appendix A**.

The Commission recognises that the machinery of government changes made it more challenging for some departments to report this year. We acknowledge the ongoing commitment to and participation in the reporting process in these circumstances.



# 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. In particular, the Charter provides that:

- public authorities must act compatibly with human rights and properly consider human rights when they make decisions (see Chapter 2)<sup>2</sup>
- all Bills presented to the Victorian Parliament must be accompanied by a statement of compatibility with human rights (see Chapter 3)<sup>3</sup>
- all legislation must be assessed for compatibility with human rights by the bipartisan Scrutiny of Acts and Regulations Committee (see Chapter 3)<sup>4</sup>
- courts and tribunals must interpret legislation consistently with human rights, and may have regard to international, regional and comparative domestic human rights law (see Chapter 4)<sup>5</sup>
- 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 (see Chapter 4).<sup>6</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).

## Eight-year review of the Charter

The Charter requires the Attorney-General to arrange for a review of the Charter after four years of operation and again after eight years of operation.<sup>7</sup>

The eight-year review of the Charter will be conducted in 2015 and must be tabled in Parliament by 1 October 2015. The terms of reference for the review include ways to enhance the effectiveness of the Charter, any desirable amendments to improve the operation of the Charter, and whether any further review of the Charter is necessary.<sup>8</sup>

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

3 *Ibid* s 28.

4 *Ibid* s 30.

5 *Ibid* s 32.

6 *Ibid* s 36.

7 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 44 and 45. The four year review of the Charter was carried out by the Scrutiny of Acts and Regulations Committee in 2011.

8 Martin Pakula, 'Review to strengthen Victoria's Charter of Human Rights' (Media Release, 2 March 2015).

# The Commission's work

The Commission is an independent statutory body with functions under the Charter, including:

- providing education about human rights and the Charter<sup>9</sup>
- intervening in court cases that raise the Charter (see Chapter 4)<sup>10</sup>
- conducting reviews of public authorities' programs and practices on request<sup>11</sup>
- reporting annually to the government about the operation of the Charter.<sup>12</sup>

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

## The Commission's key work with the Charter in 2014 included:

- making five **submissions to the Scrutiny of Acts and Regulations Committee** on the human rights impacts of bills introduced into the Victorian Parliament<sup>13</sup>
- making **policy submissions** to government inquiries and reviews, such as the Victorian Ombudsman's investigation into the rehabilitation and reintegration of prisoners in Victoria<sup>14</sup>
- publishing a **guide**, *The Charter of Human Rights and Responsibilities: A guide for Victorian public sector workers*

- publishing our research report, *Beyond doubt: the experiences of people with disabilities reporting crime*,<sup>15</sup> which considers the role of the Charter in reporting and investigating crimes against people with disabilities
- publishing a **human rights paper**, *Rights and risk: how human rights can influence and support risk management for public authorities in Victoria*
- launching the Commission's **Victorian Public Sector Human Rights Network**
- launching the Everyday People, Everyday Rights **online toolkit**, to help local governments effectively engage with their communities on human rights
- delivering Charter compliance and best practice **workshops** to state government agencies across a number of domains
- delivering **whole-of-council training** in a number of local councils to ensure Charter rights are taken into account in the work of local government
- delivering **training to advocates** to equip them to use the Charter to promote the rights of their client groups
- undertaking **Charter reviews**, including a formal review of Victoria Police's Field Contact Policy
- partnering with Victoria Police and the Victorian Aboriginal Legal Service to pilot **Report Racism**, a third party reporting scheme for reporting racism (see page 50)
- **intervening** in four new cases before courts and tribunals that raise the Charter (see Chapter 4).

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

10 *Ibid* s 40(1).

11 *Ibid* s 41(c).

12 *Ibid* s 41(a).

13 This includes submissions on the Children, Youth and Families Amendment (Security Measures) Bill 2013, the Legal Profession Uniform Law Application Bill 2013, the Summary Offences and Sentencing Bill 2013, the Mental Health Bill 2014, and the Criminal Organisations Control and Other Acts Amendment Bill 2014. Some of these Bills are discussed in Chapter 3 of this report.

14 All of the Commission's policy submissions can be found at: <<http://www.humanrightscommission.vic.gov.au/index.php/submissions/itemlist/category/18-submissions-into-inquiries-and-reviews>>.

15 All of the Commission's research reports can be found at: <<http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports>>.

# Chapter 1: Human rights issues in 2014

This chapter profiles the key human rights concerns in Victoria in 2014. These concerns were raised with the Commission by community organisations and statutory agencies during consultations for the report. Government departments and agencies were given the opportunity to respond to community concerns.

## 1: Human rights in the criminal justice system

### The impacts of Victoria's 'tough on crime' reforms

Community organisations raised concerns about the human rights impacts of the recent law and order reforms introduced by the previous Victorian Government – including higher baseline sentences, mandatory sentences, new offences for breaching bail and parole conditions, and the abolition of suspended sentences and home detention.<sup>16</sup> These reforms were introduced with the aim of better protecting the community and ensuring that offenders are held to account.<sup>17</sup>

A coalition of stakeholders led by the Federation of Community Legal Centres (the Federation) expressed concern that the Government's 'tough on crime' approach lacks evidence of its effectiveness, fails to tackle the causes of crime, increases the financial cost of running prisons, and places unsustainable pressure on the Victorian justice system, including prison overcrowding.<sup>18</sup>

Stakeholders are also concerned that baseline and minimum sentences fail to deter offenders, undermine judicial discretion, over-complicate the sentencing process, and shift discretionary decision-making from the judiciary to police and prosecutors.<sup>19</sup>

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16 Victorian Council of Social Service, Smart Justice, Youthlaw, Liberty Victoria, and Human Rights Law Centre.

17 Attorney-General, 'Criminals on notice – tough new laws to come into force' (Media Release, 1 November 2014).

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18 Smart Justice, 'Smart Justice challenges Govt justice policies on evidence and cost' (Media Release, 1 November 2014); Victorian Council of Social Service, Human Rights Law Centre, and Victorian Aboriginal Legal Service.

19 For example, see Law Institute of Victoria, Letter to the Attorney-General, Sentencing Amendment (Baseline Sentences) Bill 2014 (14 April 2014); Victorian Bar, 'Victorian Bar expresses concern over proposed 'coward punch' laws' (Media Release, 1 September 14); Australian Bar Association, 'ABA opposes Victoria's proposed 'one punch' laws with mandatory sentences' (Media Release, 20 August 2014); and Liberty Victoria, 'Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014' (Media Release).

## Ombudsman's investigation into deaths and harm in custody

In March 2014, the Victorian Ombudsman released a report on an investigation into deaths and harm in custody. The investigation identified that:

- there has been a failure to provide sufficient funding for new and existing prison infrastructure over the past decade
- prisoners are placed in overcrowded and at times substandard conditions leading to increasing tensions and violence
- the likelihood of prisoners being physically or sexually assaulted or self-harming leading to deaths is greater now than at any time in recent years
- prison staff are at greater risk of being assaulted by prisoners as a consequence of overcrowding.

The Ombudsman found that:

the failure to provide sufficient funding for new and existing prison infrastructure over the past decade has resulted in Victorian prisons being overcrowded. This problem has been compounded by changes to sentencing and parole laws and the deployment of more police on our streets, resulting in greater numbers of prisoners in Victorian prisons and police cells than in recent history.

## Government response

The Department of Justice and Regulation (DJR) responded that it continues to work to identify practical solutions to maintain the safety and wellbeing of prisoners, particularly the most vulnerable or those at risk of self-harm. DJR noted that Corrections Victoria has a strong focus on prisoner rehabilitation, prisoner management and at-risk procedures, and a rolling program of infrastructure upgrades.

DJR is also working to ensure services are increased in line with prisoner numbers. For example, the department has established a mechanism in its primary health contracts so that increases in prisoner numbers above agreed thresholds will trigger a review of service provision. DJR also noted that a recent independent study commissioned by the department reaffirmed that Victoria's 'at-risk' policies and procedures reflect international best practice in preventing suicides.

## Justice reinvestment

The Victorian Council of Social Service (VCOSS) advocates for a 'justice reinvestment' approach to reducing the number of people in Victorian prisons. Justice reinvestment redirects funding from the corrections system into community initiatives that target the underlying causes of crime. VCOSS considers that investing in services that address underlying issues of mental health, unemployment, homelessness and drug and alcohol use are more cost effective, efficient and sustainable than putting more people in prison.

## Rehabilitation and reintegration

Stakeholders are concerned that access to rehabilitation programs for prisoners in Victoria (including culturally appropriate programs) is inconsistent and inequitable – particularly for Aboriginal people, people with disabilities, people from culturally and linguistically diverse (CALD) backgrounds, young people and women.<sup>20</sup>

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<sup>20</sup> Justice Connect, Victorian Aboriginal Legal Service, Commissioner for Aboriginal Children and Young People, and Human Rights Law Centre.

## Ombudsman's investigation into the rehabilitation and reintegration of prisoners

In 2014, the Victorian Ombudsman launched an investigation into the rehabilitation and reintegration of prisoners in Victoria. Victoria's prison population has grown exponentially from 4350 in June 2009 to a projected 7169 in June 2015. The Ombudsman noted that this growth has affected the availability of programs and support (pre and post-release). There has also been a 'notable increase' in complaints about access to programs.

The Human Rights Law Centre (HRLC) noted that the growth in numbers has resulted in 'more time spent in lock-down in prisoner cells' and 'more prisoners classified as high security or placed in solitary confinement as a prison management tool'.<sup>21</sup> It also noted that 'the acceleration in prisoner numbers has been accompanied by a rise in reoffending over the past four years, suggesting that diminished access to rehabilitation services and overcrowding is jeopardising community safety'.<sup>22</sup>

The Victorian Ombudsman is also concerned that when systems come under stress, women and Aboriginal prisoners 'seem to bear a disproportionate amount of the burden'. This was reflected in submissions, including by VCOSS and the Commission, which considered the disadvantage faced by particular people in prison – including women, Aboriginal people, and people with disabilities.

## Government response

DJR responded that:

- Corrections Victoria's standards require that appropriate out-of-cell hours are provided to all prisoners. Where the safety of prisoners out of cell could be compromised (for example, when staff are responding to a serious incident), prisons are accountable to the Corrections Victoria Commissioner
- prisoner classification is undertaken in accordance with Corrections Victoria's Sentence Management Manual, which provides a comprehensive framework for identifying and managing the risk associated with the classification, placement and management of prisoners
- decisions to place prisoners in solitary confinement are made within the Corrections Act's legislative framework. This allows some prisoners to be accommodated separately from the general prisoner population, with appropriate restrictions to contain the risks posed to themselves and others
- specialist programs are offered for youth (such as a program that targets young prisoners entering the adult custodial environment for the first time) and people with disabilities (such as a program which offers a 'supported' prison pathway for prisoners with a cognitive impairment). Specialised programs are also in place at the state's two women's prisons, targeting issues such as violent offending
- the third phase of the Victorian Aboriginal Justice Agreement (AJA3) focuses on prevention, early intervention and diversion. Important focus areas include mental health and social and emotional wellbeing, alcohol and drug use, education and employment, housing, and connection to family, community and culture. Particular attention will be given to the unique needs of Koori women offenders.

21 Human Rights Law Centre, Submission to the Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, October 2014.

22 Human Rights Law Centre, Submission to the Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, October 2014.

## Human rights complaints in prisons

The most common complaints to the Victorian Ombudsman that enliven human rights are complaints from people in closed environments, including prisons and youth justice facilities. Those rights include humane treatment when deprived of liberty, property rights, right to liberty and security of person, and cultural rights.

The most common types of issues raised in those environments include access to toiletries, quality of food, deprivation of property during prison transfer, the use of excessive force, observation of cultural customs such as halal food or Ramadan, and access to an Aboriginal Liaison Officer.

The Office of the Health Services Commissioner (OHSC) reported a substantial rise in prisoner complaints, from 233 in 2011–12, to 479 in 2012–13, to 752 in 2013–14, which 'may be attributed to the larger number of prisoners entering the prison system as well as changes to the parole system'.<sup>23</sup> Most complaints from prisoners are now lodged directly with the OHSC's dedicated 'prisoner free telephone service'.

The main complaints to the OHSC from prisoners included changes to prisoners' medication regimens, and access to medical, dental and physiotherapy appointments, with prisoners requesting more timely and regular services.<sup>24</sup>

## Government response

DJR responded that in February 2012, it commenced a new complaints handling framework. The approach increased emphasis on local resolution of complaints while retaining the oversight role of Justice Health (a business unit of DJR), particularly in relation to emerging trends or themes.

DJR noted that where concerns cannot be resolved locally, referral to the Health Services Commissioner is the escalation step. DJR and the OHSC meet quarterly to discuss and resolve issues with complaints or the complaints handling process.

DJR commented that the rise in complaints over the three-year period is expected to be in part due to the rise in prisoner numbers, as well as the introduction of the free call service.

In relation to the nature of complaints, DJR noted that prisoners have access to community equivalent healthcare, which includes the same wait times experienced in the community. DJR negotiates increases in health services in response to increasing prisoner numbers. At the quarterly meeting, DJR and OHSC discuss any issues of particular concern and emerging trends that may require a response.

The Federation of Community Legal Centres also expressed concerns about the difficulties people face accessing information about the parole process and accessing rehabilitation programs (including programs that are a prerequisite before being eligible for parole). The Federation noted that the lack of access to information and programs increases the risks of psychological harm, self harm and prisoner assaults.

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<sup>23</sup> Office of the Health Services Commissioner, *Annual Report 2014*, 22.

<sup>24</sup> Office of the Health Services Commissioner, *Annual Report 2014*, 22.

## Government response

DJR responded that it delivered a major reform program to the parole system in 2014/15. This includes a significant expansion of offending behaviour programs to ensure all serious violent offenders are assessed for suitability for, and participation in, rehabilitation programs. Access for other prisoners to programs has also been expanded. Offending behaviour programs are now available at all prison locations in accordance with identified demand. Emphasis is placed on ensuring programs are provided early in prisoners' sentences, to enable participation prior to parole.

Corrections Victoria provides a range of programs which are focused on four key areas of support – Offence Specific Programs, Offence Related Programs, Personal Development Programs, and Transition and Reintegration Programs. DJR noted that these programs also target the needs of cohorts including Aboriginal people, people from CALD backgrounds, women, youth and people with disabilities.

In January 2015, Corrections Victoria commenced an integrated approach to transitional planning and support that commences on entry to prison and continues post-release. This includes a new transition service that supports prisoners as they move back into the community, including linking them to critical services such as mental health care, housing and employment services. There is also a focus on alcohol and drug services, living skills and family/community connectedness.

DJR noted that parole information is available to all prisoners participating in a general pre-release program, which commences approximately 18 months prior to the earliest eligibility date for release, or immediately on reception for prisoners serving shorter terms. This program (for which all prisoners are eligible) complements the new parole application process, which commences 12 months prior to the earliest eligibility date for release.

The Department of Health and Human Services (DHHS) commented that changes to the adult parole system do not apply to the youth parole system, and the number of children and young people progressing to a sentence requiring supervision with the youth justice service has reduced annually for the past five years.

The Victorian Aboriginal Legal Service (VALS) is currently delivering post-release support services for Aboriginal prisoners.<sup>25</sup> VALS links prisoners with appropriate support services to aid their reintegration back into the community. Key support priorities are stable accommodation and cultural connectedness as foundations from which to access services to address drug and alcohol or mental health challenges, that lead to education and employment, and that support general wellbeing.

## Prisoner transport

In 2014, 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 equality, the right to liberty and security, the right to a fair hearing and rights in criminal proceedings.

The Magistrates' Court also noted that there is a lack of safe, stable housing options for Drug Court participants, including diminishing availability of affordable housing and limited availability of rehabilitation facilities for court support program participants. The Magistrates' Court continues to work with relevant agencies to address this issue. The Court noted that, indirectly, the lack of appropriate accommodation compounded custody overcrowding by increasing the number of accused held in custody, where they otherwise may have obtained bail.

In order to ensure the Magistrates' Court was meeting its responsibilities under the Charter (including protecting the right to liberty and rights in criminal proceedings), the Court undertook a number of activities and initiatives to enable access to hearing and to minimise delays in being brought before the Court. This included:

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<sup>25</sup> Victorian Aboriginal Legal Service, Response to the Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, January 2015.

- introduction of the Weekend Bail & Remand Court, which helps alleviate the number of people in custody
- increased utilisation of video conferencing where appropriate.

Court Services Victoria (CSV) assisted the Magistrates' Court to implement the Weekend Remand Court. This was in response to the high volume of matters that were referred to the Court each Monday following the weekend police interventions, which resulted in delays in Court outcomes for clients, as well as uncertain and inadequate holding in police cells. The Weekend Remand Court enables the Court to hear matters all weekend. This helps to protect the right to equality, the right to liberty, the right to a fair hearing and rights in criminal proceedings. The County Court also provided two courtrooms for use by the Magistrates' Court in 2014.

## Children and young people in the criminal justice system

A number of stakeholders reported concerns about children and young people's interactions with the criminal justice system, including about youth diversion, remand and bail.<sup>26</sup> This includes concerns about how police exercise discretion in deciding how to deal with children and young people who have allegedly committed crimes.

### Government response

DHHS noted that it funds a wide range of programs for young people designed to prevent them from having contact with, or entering, the criminal justice system.

<sup>26</sup> Youthlaw, Victorian Council of Social Service, Federation of Community Legal Centres, Commissioner for Aboriginal Children and Young People, and the Victorian Aboriginal Legal Service.

## Youth diversion

Community organisations raised the need for adequately resourced and culturally appropriate:

- pre-court diversion options for children and young people – there is particular concern that adults currently have a broader range of diversion options available
- state-wide legislated diversion options in the Children's Court (similar to the current adult system).<sup>27</sup>

Youthlaw noted that there is a particular lack of diversion options for children and young people in rural and regional Victoria.

The Children's Court supports pre-court diversion programs as part of the development of a broader diversion scheme for children and young people. The President of the Court also advocates for a state-wide legislated diversion program.

### Government response

The previous Government allocated funding to the Children's Court to establish a Youth Diversion Pilot Program in 2015. DJR anticipates that the program will be available at some metropolitan and regional locations and will operate for 12 months.

Victoria Police Priority Communities Division and the Prosecutions division are on the Steering Committee for this pilot. Victoria Police commented that this is a positive step forward in broadening the range of formalised diversion options for young people at a pre-plea stage.

The Children's Court noted that a community organisation will be contracted to deliver a range of supports and interventions set out in a diversion plan ordered by the Court. The evaluation will assist to inform direction and strategy around diversion in the future. The Court continues to work closely with DHHS, Victoria Police and other stakeholders to develop this strategy.

Victoria Police commented that its Young People's Reference Group is examining the application of pre-charge diversion as it applies to young people and policing.

DJR responded that the following commitments in the 2014 Victorian Labor Policy Platform are currently being considered in consultation with DHHS:

<sup>27</sup> Youthlaw and the Victorian Council of Social Service.



- investing in state-wide youth diversion programs to reduce recidivism in young offenders
- amending the *Children, Youth and Families Act 2005* to allow for mandated diversion options in the Children's Court.

DHHS responded that a broad continuum of services and programs focused on diversion is available to young people in Victoria. It also noted Victoria has achieved good results reducing the number of young people processed by Victoria Police and found guilty of offences in the Children's Court. DHHS recognises that a state-wide legislated pre-plea diversion program would strengthen this continuum.

### Police discretion

Stakeholders are concerned that in many cases police do not exercise their discretion to divert children and young people (between the ages of 10 and 17) away from the criminal justice system.<sup>28</sup> Youthlaw is concerned that police increasingly remand children and young people into custody, rather than issuing a warning, a caution or referring the person to diversion. This results in a high number of children and young people on remand, including a disproportionate number of Aboriginal children.

### Government response

Victoria Police responded that:

- it is currently reviewing its policy regarding diversion options for children and young people between the ages of 10–17 years to ensure consistency in practice
- it is undertaking considerable work to develop guidelines for the exercise of police discretion. These are intended to apply to adult and children's diversion pathways
- Youth Resource Officers, who are police officers with particular expertise working with children and young people, are trained to deal with children and young people in an appropriate and effective way. Youth Resource Officers perform a role in assisting and supporting other officers to deal with children and young people more effectively.

VALS reported that under the Aboriginal Justice Agreement (AJA), it will be working with Victoria Police to review the Koori Cautioning and Youth Diversion Program. The project commenced as a pilot in 2007 and has had positive outcomes.<sup>29</sup>

Victoria Police noted that a specific consideration in the establishment of the Koori Cautioning Program is that a 'no comment' interview does not exclude a young person from being offered a caution (rather, legal advice is required to be sought prior to deciding on cautioning eligibility). This consideration is a departure from earlier guidance which required the young person to admit the offence in order to be considered for a caution. This was specifically adopted in order to prevent Koori young people from being excluded from a caution.

<sup>28</sup> Youthlaw, Federation of Community Legal Centres, Commissioner for Aboriginal Children and Young People, and Victorian Aboriginal Legal Service.

<sup>29</sup> Commissioner for Aboriginal Children and Young People, and Victorian Aboriginal Legal Service.

## Government response

DJR responded that over the past decade, the AJA has focused on creating and strengthening diversion options for Aboriginal people at key risk points in the criminal justice system, and that considerable attention has been directed to the diversion of Aboriginal youth.

AJA3 further strengthens successful diversion initiatives, including Koori youth cautioning to reduce arrest rates, bail alternatives to reduce the number of Koori youth and adults remanded into custody, Koori Court services and residential alternatives such as Wulgunggo Ngalu Learning Place (a culturally appropriate learning place that houses and supports Koori men who are undertaking Community Correction Orders).

AJA3 continues to strengthen the Koori diversion workforce that includes Aboriginal Community Liaison Officers, Local Justice Workers, Koori Court Officers and Elders, who deliver and support diversionary initiatives in partnership with justice agencies. DJR provided examples of where diversion options for children are supported at strategic points including the Koori Youth Cautioning Project, Victoria Police Aboriginal Community Liaison Officer and Police Aboriginal Liaison Officer programs, Koori Children's Courts, Koori Youth Intensive Bail Support Program, Court Integrated Services Program, and Local Justice Worker Program.

Youthlaw expressed the view that police need appropriate training to ensure that they are aware of and refer to all available diversion options for children and young people. This issue is compounded by limited resources for diversion.

### Bail conditions

In 2014, Youthlaw observed a significant increase in the numbers of children and young people on remand following the introduction of new offences for breaching a bail condition.<sup>30</sup> Youthlaw considers that in some cases, bail conditions 'set a young person up to fail' – for example, a condition that a young person cannot come within 10km of the CBD makes it difficult for the young person to access support services.

The President of the Children's Court reported that he is also concerned about the number of young people on remand, particularly as the result of breaching bail conditions. The President has asked the Attorney-General to consider amendments to the *Bail Act 1977* to remove the requirement for young people to show cause as to why they should be granted bail following a breach charge.

The Supreme Court has worked to ensure timely access to the courts by responding to urgent hearing requests where other courts have been unable. For example, the Supreme Court arranged for the Practice Court Judge to sit late on a Friday night to hear a bail application when the lawyers for an individual contacted the Court after a magistrate declined to hear the bail application late on a Friday afternoon.

## Government response

DHHS explained that in December 2013, the *Bail Amendment Act 2013* made changes to the *Bail Act 1977*, making it an offence for an accused to contravene a conduct condition without a reasonable excuse, and introduced an offence for committing an indictable offence while on bail. DHHS responded that the introduction of the new laws coincided with an increase in the number of children and young people remanded for one to two days at Parkville Youth Justice Precinct.

In 2014, DHHS and Victoria Police established the Collaborative Responses Steering Committee, to explore a range of issues of joint concern (such as opportunities to better divert young people from involvement with the criminal justice system).

Youth Justice responded that it promotes the Charter through the provision of programs such as the Youth Justice Court Advice Service and the Bail Supervision Program. Through these programs, it proactively responds to children and young people who are remanded in custody, or at risk of being remanded.

DJR responded that it is currently undertaking a review of bail, including consideration of how the new offences for breaching a bail condition are operating. DJR is liaising with DHHS, which is investigating ways to reduce the number of children and young people remanded in custody.

<sup>30</sup> *Bail Amendment Act 2013* (Vic).

## Access to education and disability funding

The Commissioner for Children and Young People (CCYP) is concerned about the quality of and access to education for children and young people in youth justice centres. CCYP welcomed the establishment of Parkville College (that provides education to young people at the Parkville and Malmsbury youth justice centres). However, CCYP is concerned about examples of students missing out on educational opportunities when they are separated from their peers for behaviour management reasons.

CCYP has also heard reports that children with disabilities in youth justice centres do not have access to the same disability funding they would enjoy if they were accessing the mainstream public school system outside detention.

### Government response

The Department of Education and Training (DET) responded that it recognises Parkville College's unique requirements. DET noted that funding arrangements for children with disabilities in youth justice centres reflects the unique nature of these settings and is part of a broader funding arrangement that delivers flexibility and higher total per student allocations than would be the case in a mainstream school. This funding model, with a higher per student funding arrangement and an additional amount targeted to disability support, is intended to capture the range of complexities found in this student cohort, including students with disabilities.

DHHS responded that early intervention is the best defence against a cycle of crime and disadvantage. DHHS considers that it is important to provide young people with opportunities and support to make positive choices for their futures, and to create pathways to employment and positive community participation. For these reasons, the delivery of education and rehabilitation programs is a key part of Victoria's youth justice system.

## The minimum age of criminal responsibility

The *Children, Youth and Families Act 2005* provides that it 'is conclusively presumed that a child under the age of 10 years cannot commit an offence'.<sup>31</sup> However, CCYP advocates for the age to be increased, noting that the current minimum age for criminal responsibility has a particularly adverse impact on Aboriginal children.

The Committee on the Rights of the Child has noted 'a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. State parties are encouraged 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>32</sup>

### Government response

DHHS and DJR noted they are aware of the view of some stakeholders that Victoria should raise the minimum age of criminal responsibility. This will be considered as part of the ongoing work across government to divert young people from the criminal justice system wherever possible.

## Aboriginal children and young people

CCYP expressed concerns about the overrepresentation and younger age profile of Aboriginal children and young people in the youth justice system. CCYP provided examples of Aboriginal children being required to appear before the Koori Court for theft of items of a very low value (including a child who was before the Court for the theft of a \$3 chocolate bar, even though it was his first offence).

CCYP is also concerned about the high rates and length of remand for Aboriginal children and young people, the rapid progression from out-of-home care (particularly residential care) to youth justice, inadequate diversion options, and the ability for children and young people to effectively participate in the criminal process or access effective legal representation.

<sup>31</sup> *Children, Youth and Families Act 2005* (Vic) s 344.

<sup>32</sup> Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's rights in juvenile justice*, 11.

## Cultural rights in the courts

The Children's Court commented that:

- the Koori Court Unit and Koori Court Officers continue to work with and reiterate to police the importance of cautioning young Koori people who come into contact with police. The Unit is working closely with Aboriginal Community Liaison Officers who are employed by Victoria Police to address this issue
- in recent times, young Koori people attending the Children's Koori Courts on very minor or first time offences have been given the option to adjourn the matter and attend the Ropes Program. If the Ropes Program is successfully completed, the Court may discharge the young person without making a finding of guilt.

The Supreme Court promoted the right to equality and cultural rights through the involvement of judges on initiatives to promote a greater understanding of cultural diversity. This includes the Indigenous Law Students Intern Program, Judicial Officers Aboriginal Cultural Awareness Committee (which developed the Koori Twilight Series to increase judicial awareness of issues facing Indigenous communities coming before the courts) and membership of the National Judicial Council on Cultural Diversity. Established in 2014, the Council has commenced projects to increase accessibility for court users from culturally diverse backgrounds, better meet the needs of women from CALD backgrounds using the court system, and develop a national protocol for court interpreters.

## Government response

DJR's Koori Justice Unit commented that over the past decade, preventing crime and intervening early have been major focus areas for the AJA. AJA3 continues to focus on reducing exposure to risk factors for crime, including helping to maintain families and communities that are free of substance misuse and enjoying a good standard of mental health and social and emotional wellbeing.

DJR noted that strengthening young Aboriginal people's connections to family, school, community and culture continue to be important protective factors against crime. Improved service coordination for at-risk Aboriginal youth and families across the justice, welfare, health and education sectors is also a priority. Closer collaboration between frontline workers is promoted across these areas, supported by integrated approaches to prevention and early intervention.

The Koori youth justice program proactively responds to young Aboriginal people involved with the youth justice service to support them in the community on bail where appropriate and agreed to by a Magistrate. DHHS recognises that addressing overrepresentation must include strategies specifically tailored to Aboriginal people.

DHHS actively promotes DJR's Aboriginal Visiting Scheme, which commenced in Inner Gippsland in 2014. The scheme enables a volunteer to be present when young Aboriginal people are remanded in custody. This helps to ensure that human rights are not breached and that the young person is supported.

## Aboriginal Victorians in the criminal justice system

With the high rates of incarceration of Aboriginal people, the disturbingly fast increase of Aboriginal women entering the prison system, and the links between out-of-care placements and juvenile justice, there is the greater need to ensure the issues facing Aboriginal people in prison are at front and centre of planning and delivery of prison and post-release services.<sup>33</sup>

Stakeholders are concerned about the significant overrepresentation of Aboriginal people in the criminal justice system in Victoria, including the increased rates of incarceration of Aboriginal women.<sup>34</sup> In 2014, these concerns were also reflected by international human rights bodies.<sup>35</sup>

The Charter recognises that human rights have special importance for Aboriginal Victorians.<sup>36</sup> Human rights that are particularly important for Aboriginal people in the criminal justice system include the right to equality, cultural rights, rights in criminal proceedings, and humane treatment when deprived of liberty.

### Quick facts<sup>37</sup>

- Aboriginal Victorians are 13 times more likely to be in prison than other people
- Aboriginal women are the fastest growing prison population in Victoria
- Half of all Aboriginal prisoners who are released return to prison within two years.

33 Victorian Aboriginal Legal Service, Response to the Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, October 2014.

34 Human Rights Law Centre, Liberty Victoria, Youthlaw, Victorian Council of Social Service and Victorian Aboriginal Legal Service.

35 For example, Human Rights Watch noted that while Indigenous Australians account for only 3 per cent of the population, they account for 27 per cent of Australia's prison population: Human Rights Watch, *World Report 2015* (2015), Australia. The UN Committee Against Torture also expressed concern at the overrepresentation of Aboriginal people in prison, including the serious impact on Aboriginal young people and women: UN Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia* (23 December 2014), 4.

36 *Charter of Human Rights and Responsibilities Act 2006* (Vic) preamble.

37 State Government of Victoria, *Victorian Government Aboriginal Affairs Report 2013* (2014), 10.

VALS commented that the overrepresentation of Aboriginal people in the criminal justice system is the result of a series of decisions made at different points – at arrest, being taken into custody, the determination of charges, the judicial process and sentencing. As a result, the criminal justice system needs to be more cognisant of the systemic disadvantage facing Aboriginal Victorians.

The County Court reported that it embedded more Aboriginal culture into the Court in recognition of Aboriginal cultural rights. For example, the Court provides cultural training, Aboriginal elders play a significant role in Koori Court processes, the Court displays Aboriginal paintings and flags, and the Court celebrates cultural events.

Additional Koori Courts have also been established at Melbourne and Dandenong Magistrates' Courts, where traditional smoking ceremonies were conducted.

## Government response

DJR's Koori Justice Unit responded that:

- The AJA continues to work on preventing and reducing Aboriginal overrepresentation in the justice system, with an increased focus on improving the safety of Aboriginal families and communities. Therefore, it is one of the government's main vehicles for delivering strategies to improve justice outcomes for Aboriginal women and to address violence against Aboriginal women.
- While the majority of Aboriginal prisoners are male, the number of Aboriginal women in prison has been increasing, highlighting a lack of diversion options for those women. The high proportion of Aboriginal women on remand who subsequently do not get a custodial sentence is of particular concern.
- The Koori Women's Diversion Project is proposing to develop two community-based diversion pilot projects in two locations that have high proportions of Koori women in contact with the criminal justice system. The pilot projects will be developed in partnership with Aboriginal Community Controlled Organisations to deliver an integrated 'wrap around' service for Koori women.

- A whole-of-government steering committee has been established to help respond to the recommendations in the Commission's 2013 report *Unfinished business: Koori women and the justice system*. The report provided evidence to support the implementation of diversionary programs for Koori women. Based on the development of a viable Koori women's diversion model, the Koori Justice Unit will determine the most effective approach to implementation.

### Victims of Crime Assistance Tribunal (VOCAT)

The Magistrates' Court reported that anecdotal evidence showed that Koori people were reluctant to apply to VOCAT as they believed that the standard of proof and police reporting requirements were too difficult to meet. There were also issues with private lawyers not adequately presenting cultural issues for the Tribunal, and Koori applicants not accessing Koori-specific law firms or Court resources such as the Koori family violence support workers or court officers.

Following meetings with Koori-specific law firms, the Court and VOCAT, a number of initiatives and activities were implemented, including:

- a 'Stakeholder Training Session' facilitated by the Koori List Deputy Chief Magistrate and supported by the Court's Koori Unit
- development of a formal referral process to ensure clients who linked in at Melbourne Magistrates' Court with the Koori FV Support Workers were also given information and support in any VOCAT application
- updating the 'Guide to VOCAT' information sheet to refer to Koori information
- incorporating the VOCAT Koori List into the Court's Koori Inclusion Action Plan, by identifying areas where VOCAT can provide a culturally appropriate service
- re-establishing links with relevant Koori support agencies.

## Cultural rights for Aboriginal prisoners

In her current investigation into the rehabilitation and reintegration of prisoners in Victoria, the Victorian Ombudsman reported that there is evidence that the delivery of Aboriginal cultural programs in Victorian prisons is inconsistent and intermittent, and that more programs are required for Aboriginal prisoners to address education, parenting, relationship, family violence and drug and alcohol issues.<sup>38</sup>

### Government response

DJR responded that:

- Corrections Victoria is committed to providing Aboriginal prisoners and offenders with access to a range of programs. A new Cultural Wrap Around Model will link cultural programs with mainstream Offending Behaviour Programs to maximise opportunities for behaviour change in a culturally appropriate way.
- Aboriginal cultural programs include the Aboriginal Cultural Immersion Program, and the Marumali program (to heal long-standing trauma associated with the Stolen Generations). These programs are available according to regional demand.
- DJR will be introducing a streamlined state-wide referral process for Aboriginal cultural programs in April 2015. This will enable a state-wide understanding of demand for cultural programs and maximise opportunities for access across prisons and Community Corrections. Nine Aboriginal Wellbeing Officers and two Aboriginal Liaison Officers (in private prisons) provide Aboriginal prisoners with cultural support and facilitate access to other supports, services and programs.
- DJR developed an Aboriginal Social and Emotional Wellbeing Plan, which aims to increase opportunities for Aboriginal prisoners to practice their culture and spirituality with a view to promoting positive social and emotional wellbeing.

<sup>38</sup> Victorian Ombudsman, 'Discussion Paper – Investigation into the rehabilitation and reintegration of prisoners in Victoria' (2014), 28.

The Charter protects cultural rights for Aboriginal people in Victoria, including Aboriginal prisoners. VALS is concerned that Aboriginal prisoners who create artwork as part of prison rehabilitation programs are unable to keep or sell their own artwork. In some cases, VALS reported that artwork has been kept on display at a prison or is sold. Art supplies are often provided through community organisations and art classes can involve Aboriginal Elders to help Aboriginal prisoners to connect with their culture. However, it is unclear who owns the artwork that is created as part of the rehabilitation program – the prison or the prisoner?

VALS also commented that it is important for prisons to recognise cultural practices and kin relations extending beyond immediate family for Aboriginal prisoners. This is particularly important when a community member passes away or when a community member who is not directly related to the prisoner wants to visit.

## Government response

DJR responded that subject to security requirements, Corrections Victoria supports participation in cultural practice through the provision of two TAFE courses across the prison system (although not all prisons provide both courses). At some locations, the TAFE courses are supplemented by art and craft programs run by programs staff or, in the case of Aboriginal prisoners, Aboriginal Wellbeing Officers.

Corrections Victoria also supports the statewide Indigenous Arts in Prisons and Community Program which runs across all Victorian prisons. The program explores cultural identity and connection to culture through the production of artwork. Offenders are engaged in skill development opportunities with a focus on building sustainable post-release pathways through the provision of arts-related economic development opportunities.

Corrections Victoria acknowledges that artwork produced by prisoners may have cultural, personal or religious significance. It responded that prisoners are able to keep their art works (with some limited storage in prison property) and are allowed to send their art to family members. However, Corrections Victoria does not currently permit a prisoner to operate a business from within prison. This prohibition extends to the generation of revenue from the sale of art produced while in custody.

## 2: Police and protective services officers

### Complaints against police

Community organisations continue to raise concerns that complaints against police are not always investigated by an independent body.<sup>39</sup> The Independent Broad-based Anti-corruption Commission (IBAC) has a statutory function to investigate police misconduct. However, stakeholders are concerned that IBAC does not currently have sufficient powers or resources to undertake this role effectively.

Last year, in *Horvath v Australia*, the United Nations Human Rights Committee (UNHRC) found that the International Covenant on Civil and Political Rights requires state parties, including the Australian Government, to investigate allegations of violations promptly, thoroughly and effectively through an independent and impartial body. The UNHRC also found that Victorian authorities breached the ICCPR by failing to pay compensation to Horvath after the police assault over 20 years ago. IBAC is currently undertaking a review of the Horvath case.

### Government response

Following the UNHRC's decision, the Chief Commissioner of Victoria Police apologised to Horvath and paid her compensation. Section 123 of the *Police Regulation Act 1958*, which was the subject of criticism in decision, was also replaced by a new scheme for state liability for police conduct (in the *Victoria Police Act 2013*). DJR noted that there are also a range of other laws and mechanisms that apply to police misconduct allegations, including a statutory framework for disciplinary action, criminal offences and civil remedies under anti-discrimination law.

The Coroners Court of Victoria has also made a number of recommendations for an independent person to be present at interviews following deaths associated with police contact.<sup>40</sup> These recommendations are yet to be implemented.

### Government response

Victoria Police responded that it frequently provides advice and guidance to the Coroner. Victoria Police is guided by a set of principles that include the need for independence and the management of any conflict of interest. The role of Professional Standards Command (PSC) officers is to provide oversight to ensure the integrity of the investigation. This is oversighted by IBAC and assessed in all cases by the Coroner.

Victoria Police noted that a key part of the role of PSC in this area is to be present during interview/statement taking of all witnesses as an independent observer, ensuring the integrity of these processes on behalf of the Coroner.

Victoria Police will continue to assist the Coroners Court when requested. Requirements to provide an independent person would require legislative change.

In *Bare v Small*,<sup>41</sup> the Court of Appeal is currently considering whether the right not to be treated in a cruel, inhuman or degrading way under section 10(b) of the Charter includes an implied procedural right to an effective and independent investigation of complaints in Victoria.

<sup>39</sup> Human Rights Law Centre, Flemington & Kensington Community Legal Centre, Federation of Community Legal Centres, and Youthlaw.

<sup>40</sup> For example, see Coroners Court of Victoria, Finding – *Inquest into the death of Tyler Cassidy* (23 November 2011), 124; Coroners Court of Victoria, Finding – *Inquest into the death of Samir Ograzden* (4 July 2014), 33-34; Coroners Courts of Victoria, Finding – *Inquest into the death of Craig Douglas* (8 December 2014), 30; and Coroners Court of Victoria, Finding – *Inquest into the death of Ling Gong Tang* (9 December 2014), 29.

<sup>41</sup> *Bare v Small* [2013] VSC 129. At the time of writing, the Court's decision is reserved.



## Complaints about police and protective services officers that raise human rights

IBAC reported that it received a number of complaints and notifications about people's dealings with police officers and protective services officers (PSOs) that had the potential to involve a breach of Charter rights. These included:

- belittling/degrading behaviour by police while person is in custody (sections 10 and 22)
- being refused access to medical assistance, legal rights, phone calls, blankets and food while in custody (sections 10 and 12)
- not given a change of clothes when wet (sections 10 and 22)
- privacy not provided while in police custody (sections 10 and 22)
- family member denied information about or access to the person in custody (sections 10 and 22)
- restriction of freedom of movement without lawful reason (sections 12 and 21)
- racial profiling/targeting/harassment of individuals by police due to race, sex or criminal history (sections 8 and 21)
- person not being taken seriously by police due to mental illness or criminal history (sections 8 and 21)
- people denied the right to peaceful assembly and freedom of association (section 16)
- person not properly informed of charges or date of hearing, or not informed promptly (section 25).

## How complaints are handled in practice

Community organisations also reported concerns about the way in which complaints against police are handled in practice.

### Referring complaints to Victoria Police for investigation

The *Independent Broad-based Anti-corruption Commission Act 2011* (IBAC Act) requires IBAC to dismiss, investigate or refer complaints and

notifications. IBAC reported that most complaints and notifications it receives are either dismissed or referred to agencies such as the Ombudsman or Victoria Police for investigation.

Flemington & Kensington Community Legal Centre (FKCLC) is concerned about complaints that are referred back to Victoria Police for investigation. For example, the Centre told us about a complaint that was referred to police for investigation, without any reference to the client's concerns under the Charter. FKCLC noted that in its experience, Charter rights are not always considered by IBAC.

## Government response

Victoria Police responded that investigations that it performs internally are conducted in a thorough and independent manner. For each complaint Victoria Police receives, it includes references to the Charter to ensure that investigators consider human rights at all times and, where appropriate, address these as part of the recommendations.

IBAC noted that when it refers matters to agencies, its standard practice is not to outline the specifics of the complaint in the letter of referral. Rather, it attaches a copy of the original complaint to the cover letter. IBAC also noted it assesses each allegation it receives regarding police officers to determine if it potentially involves a breach of a human right. This is consistent with IBAC's statutory obligation to ensure police officers and protective services officers have regard to Charter rights.<sup>42</sup>

IBAC also has the power to require agencies to whom it refers complaints, to provide information to IBAC to review. When reviewing Victoria Police matters, IBAC considers whether Victoria Police considered human rights in the course of its investigation and whether appropriate action was taken to address those issues.

<sup>42</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 15(3)(b)(iii).

## Case studies

### IBAC review revealed cultural issues

IBAC reviewed a matter in which eight police officers were accused of unlawful assault, disgraceful conduct, unlawful entry, racial discrimination and racial targeting while apprehending, arresting and detaining suspected juvenile offenders. IBAC reported that it considered the allegations in relation to the Charter and whether there was any evidence supporting the claims made against the officers, including whether the juveniles' human rights may have been breached.

IBAC found the police officers had failed to comply with procedures, but could not substantiate (or was unable to determine) allegations regarding their conduct. In advising the Chief Commissioner of the review outcome, IBAC noted racist remarks in subsequent emails between some officers involved, suggesting deeper cultural issues within the peer group that needed to be addressed. IBAC reported that the alleged breaches of the Charter were a factor in IBAC's decision to review the case.

### IBAC review of serious injury arising from police cells

IBAC also reviewed a case involving serious injury arising from police cells in regional Victoria. Concerns were raised regarding the adequacy of treatment and attention to the prisoner, calling into question the general demeanour of the police officers on duty and in charge.

IBAC identified deficiencies with the scope and conduct of the investigation, including the failure of the investigating officer to consider whether police conduct had breached the Charter. IBAC identified that the police conduct may have breached the right to protection from cruel, inhuman or degrading treatment and the right for all persons deprived of liberty to be treated with humanity and respect. At the time of writing, IBAC is liaising with Victoria Police regarding the review outcomes.

## Obtaining information about complaints

FKCLC is also concerned that once IBAC has referred a complaint to Victoria Police for investigation it can be difficult to obtain information about the investigation. FKCLC reported that Victoria Police rely on section 194(1)(b) of the IBAC Act to deny FOI requests for information on the basis that the documents 'disclose information that relates to an investigation' under the IBAC Act.

FKCLC disputes Victoria Police's interpretation of section 194(1)(b), instead taking the view that a complaint that has been referred to Victoria Police for investigation is no longer an investigation conducted under the IBAC Act. Therefore, documents relating to Victoria Police's investigation should not be exempt from the FOI Act.

## Government response

Victoria Police responded that there are complexities around the various Acts that interplay when accessing information in relation to a file. Section 194 of the IBAC Act removes certain types of documents from the ambit of the FOI Act and applies to any person in possession of such documents. Victoria Police interprets section 194 consistently with the decision of the Victorian Civil and Administrative Tribunal in *Luck v IBAC* [2013] VCAT 1805. Victoria Police noted that its interpretation has been accepted by the Freedom of Information Commissioner on review.

## Referring complaints to local police stations

FKCLC is concerned about Victoria Police's practice of referring complaints about police members to local police stations. In particular, it is concerned that these complaints are not formally investigated and the process for managing the complaints is not independent.

FKCLC is particularly concerned about more serious complaints that are referred to local service areas, including those that allege breaches of human rights. These complaints are investigated by police members who work in the same service area as the police member/s being investigated and sometimes by police from the same station as the police member/s being investigated.

## Government response

Victoria Police responded that:

- It takes all complaints seriously and it tries to ensure independence and impartiality as best as it can with respect to complaints. Independent investigators from outside the local police station are assigned to investigate complaints.
- The management of conflict of interest issues which arise is monitored by Conduct and Professional Standards Division and overseen by IBAC.
- The only matters that are referred back to stations are customer service complaints. Victoria Police considers that these matters are best dealt with by the respective stations as an opportunity to improve the service delivery to their local community.

IBAC considers that in many less serious complaints, it is more efficient and effective for the local work area to contact the complainant and discuss the issues to determine a resolution. However, this ultimately depends on the adequacy of the contact and discussion held by the regional Ethics and Professional Standards Officer with the complainant. It also ensures the officers in charge of the local work area are aware of concerns to assist with education and prevention strategies.

IBAC is also aware that some complainants do not wish to engage with the officer or station (or other local work area) and have a preference for the matter to be either fully investigated by Victoria Police Professional Standards Command (PSC) or IBAC. IBAC noted that in many cases this is not feasible or appropriate.

IBAC has identified some actual or perceived conflicts of interest in relation to cases it has referred to PSC and subsequently reviewed. This review may have been initiated by IBAC given the issue involved or because the complainant has sought assistance in what is perceived to be an inadequate approach to resolution.

## Deaths associated with police conduct

A number of community organisations reported that, in their view, there is a perceived lack of independence and impartiality when police investigate deaths associated with police conduct.<sup>43</sup> For example, in 2014, the Federation was concerned about comments made by police hours after a fatal police shooting in Endeavour Hills. The comments supported the officers' conduct.<sup>44</sup> The Federation considers that these types of comments diminish community confidence in the independent investigation of deaths associated with police conduct.

## Government response

Victoria Police noted that this example is currently the subject of a coronial inquest. More generally, Victoria Police takes its role of providing community reassurance seriously, while taking care not to pre-empt the finding of the coroner.

The Coroners Court of Victoria noted that most deaths associated with police contact are investigated by the Homicide Squad or the Major Collision Investigation Unit (on behalf of the Coroner) with oversight from Professional Standards Command (and ultimately, IBAC). The Coroners Court observed that this model may lack institutional independence from those potentially involved in the death.

The Coroners Court noted it has sought to review and improve police contact deaths to comply with the right to life (which has been interpreted to include a positive procedural obligation to undertake an effective investigation) and the need for an independent investigation into police-related deaths.

<sup>43</sup> Youthlaw, Flemington Kensington Community Legal Centre, and Federation of Community Legal Centres.

<sup>44</sup> Federation of Community Legal Centres, 'Police media comments must not prejudice investigation of police shooting fatality, lawyers warn' (Media release, 24 September 2014).

## Government response

IBAC commented that it has a standing own motion brief with respect to all deaths or serious injuries arising from police contact. IBAC conducts an independent analysis of all cases on immediate notification of the issue by Victoria Police.

To date, IBAC has found most situations do not warrant further action. Those which give rise to some concerns are reviewed by senior IBAC officers who thoroughly review the circumstances surrounding the incident to ensure all proper procedures and policies were adopted and make final recommendations for the IBAC Commissioner and Deputy Commissioner.

## Requests for information by PSOs

The Federation reported ongoing concerns about PSOs exceeding their powers. PSOs have the statutory power to request a person's name and address in some circumstances (such as if the PSO believes on reasonable grounds that the person is about to commit an offence).

The Federation gave examples of PSOs asking for personal information (including a person's full name, address and date of birth) without reasonable grounds to do so. In one instance, a student was asked by a PSO whether she was known to Child Protection.

The Federation considers that Victoria Police should amend its policy about transit PSOs to provide guidance on the limited circumstances in which PSOs can lawfully request a person's information.

## Government response

Victoria Police responded that it committed to reviewing its field contact policies and practices as part of the settlement terms in the Haile-Michael case in 2013 (see page 47). This commitment is included in the *Equality is not the same* Three Year Action Plan and is underway. To complement the policy and training changes, Victoria Police is conducting a receipting proof of concept where police and PSOs in designated areas will issue receipts when they initiate interactions that result in a request for a person's name and address (see page 48).

# 3: Discriminatory laws, policies and practices

## LGBTI Victorians

The Victorian Gay & Lesbian Rights Lobby (VGLRL) and HRLC raised concerns about laws and government policies that discriminate against people who are same-sex attracted, including:

- in **adoption law** – same-sex couples do not have the right to adopt a child together, despite being able to be foster parents or legal guardians of children
- in the **registration of births and deaths** – for example, VGLRL reported:
  - concerns by the surviving spouses of same-sex partners who were distressed to find their partners described as 'unmarried' on their death certificates
  - lesbian parents encountering difficulties and onerous processes when attempting to register the birth of their child. For example, one mother was not able to be registered because she had not attended the first counselling session that the birth mother had attended
  - that the non-birth mother of a lesbian couple registering the birth of their child is unable to be listed as a 'mother' on the birth certificate, only as 'parent'.
- the Victorian **relationship register** scheme does not provide for any form of domestic relationship recognition ceremony like the Victorian Marriage Registry does. Similarly, the City of Melbourne relationship register does not provide for a recognition ceremony
- non-therapeutic surgeries performed on intersex infants.

There were also reports of discriminatory practices towards transgender people who seek to obtain a birth certificate that reflects their affirmed gender.<sup>45</sup> Transgender people can only have their affirmed gender reflected on their birth certificate if they have had sex-affirmation surgery. Transgender Victoria explained that this means that transgender people in Victoria who choose not to or are unable (for example, for financial reasons) to undergo sex-affirmation surgery have official identification documents that do not match their affirmed gender.<sup>46</sup>

45 Victorian Gay & Lesbian Rights Lobby, Human Rights Law Centre, and Transgender Victoria.

46 Transgender Victoria.

Transgender Victoria also commented that where a person is part of or identifies with more than one group, there can be a greater chance of breaches of human rights.

These examples limit the right to equality for LGBTI Victorians. They also engage and potentially limit the right to protection of families and children, and the right to not have a person's family arbitrarily interfered with.

## Government response

DJR responded that the Government has made a number of policy commitments for LGBTI Victorians and has appointed a Minister for Equality, who will lead work on the Government's LGBTI agenda. The Government has also committed to:

- establishing a whole-of-government Ministerial Advisory Committee on LGBTI issues, which will advise the Government on the best way to implement its election commitments and bring issues of concern to the Government's attention
- appointing a Gender and Sexuality Discrimination Commissioner.

The Government has also commissioned a review to consider the legal changes required to permit adoption of children by same-sex couples under Victorian law. The review will examine the best way to legislate for adoption equality. Any legal changes will be based on the overarching principle that the welfare and interests of the child concerned will be the paramount consideration. The review must report to the Minister by 8 May 2015.

Other Government election commitments that relate to LGBTI Victorians include:

- providing a formal repudiation of, and apology for, prejudiced laws for homosexual acts prior to decriminalisation in 1981, to accompany the establishment of the scheme to expunge convictions under such laws
- repealing the discriminatory offence of intentionally causing HIV
- amending the Relationships Act so that it recognises couples who have formalised their relationships in other jurisdictions as relationships registered in Victoria (including same-sex couples who have married overseas)

- removing barriers to new birth certificates for transgender and intersex Victorians, and working to address the discriminatory automatic divorce consequence for transgender and gender diverse Victorians
- reviewing all Victorian legislation to identify provisions that unfairly discriminate against LGBTI Victorians.

## Youth infringements

Youthlaw is concerned that young people under the age of 18 are disproportionately affected by the infringement systems in Victoria. Youthlaw observed that issuing officers are increasingly issuing fines, rather than warnings or cautions, and that those fines are excessive. Young people, particularly those without the capacity to pay their fines, often end up in the court and criminal justice systems.

The Charter provides that every person in Victoria is entitled to the equal protection of the law (including young people). However, community organisations question the unequal treatment of people in the Victorian infringement systems depending on whether a person is under or over the age of 18.

In Victoria, there is a 'special circumstances' infringements system for adults that takes into account the circumstances of vulnerable people, including homelessness, mental illness or intellectual disabilities, and drug or alcohol dependence. However, registrars dealing with fines for young people under the age of 18 in the Children and Young Persons Infringement Notice System (CAYPINS), are not required to have regard to 'special circumstances'. This means that young people who may otherwise fall within the adult definition of 'special circumstances' and have their fines dismissed, are fined and treated less favourably than people in the adult system.

Youthlaw has suggested that the infringements system for people under the age of 18 should avoid unnecessarily bringing young people into contact with the court or criminal justice systems. In particular, it suggests that the system should be reformed so that:

- enforcement agencies develop guidelines and policies to direct issuing officers to use their discretion to give warnings in the first instance
- young people receive discounted fines that reflect their capacity to pay
- the law is amended to consider 'special circumstances' in the youth infringements system.

## Government response

DJR responded that under the *Infringements Act 2006*, a child who has been served with an infringement notice is afforded the same rights as an adult for dealing with an infringement notice at any time prior to default. This includes the ability to apply for internal review with 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.

DJR noted that under CAYPINS, the Children's Court may consider the totality of a child's circumstances that are put before the Court. Following registration of an infringement penalty with the Children's Court, a child can provide written information to the registrar about the child's employment or school attendance and the child's personal and financial circumstances.

While 'special circumstances' as defined under the *Infringements Act 2006* are not specifically referred to in the CAYPINS procedure set out in Schedule 3 to the *Children, Youth and Families Act 2005*, DJR noted that information about mental or intellectual disability; a serious addiction to drugs, alcohol or a volatile substance; or homelessness, can be provided to a registrar. DJR commented that under the CAYPINS procedure, the legislation is clear that a registrar must take into account the child's personal and financial circumstances, which is broad enough to include any matters that would be included under the special circumstances test.

DJR noted that the giving of infringement notices or official warnings are currently guided by internal policies developed by individual enforcement agencies, who have prosecutorial responsibility for infringement offences. The discretion exercised by officers is affected by the regulatory context in which infringements are issued (that is, the offences are usually 'on the spot'). DJR commented that it does not have legislative authority to restrict those prosecutorial decisions taken by enforcement agencies. However, the department does play a role in educating enforcement agencies on their responsibilities under the *Infringements Act* and is always willing to consult with agencies on their operating guidelines.

Infringement Management and Enforcement Services (IMES) noted that the Sentencing Advisory Council has recently raised whether young people should receive discounted fines. DJR noted that infringement penalties are set in a range of legislative instruments, for which multiple ministers have ultimate portfolio responsibility.

DHHS noted that CAYPINS was specifically developed for the Children's Court to respond to young people who have unpaid fines. Delivering this scheme in the Children's Court means it is child specific and treats children differently to adults.

## Children in out-of-home care

### Aboriginal children

Stakeholders raised a number of concerns about Aboriginal children in out-of-home care,<sup>47</sup> including a significant and increasing overrepresentation of Aboriginal children in care, the need to address family violence as the single largest driver of Aboriginal children into care, and the safety of Aboriginal children in care (including reports of sexual and other abuse by carers, co-residents and others). VALS is also concerned that Aboriginal children may be removed from their families for non-parenting reasons – such as housing or civil issues – not because of abuse or neglect.

These stakeholders noted the link between Aboriginal children in care and youth justice, which they say contributes to the overrepresentation of Aboriginal children on remand and in detention. Other concerns raised include that Aboriginal children in care are often disconnected from other Aboriginal children, families and community, and may be separated from their siblings; and that there is inadequate cultural awareness training for child protection workers and non-Aboriginal carers.

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47 Commissioner for Aboriginal Children and Young People, Victorian Aboriginal Child Care Agency, Victorian Aboriginal Legal Service, and Victorian Council of Social Service.

## Government response

DHHS responded that:

- It has initiatives underway to tackle the overrepresentation of Aboriginal children in care, including the Aboriginal Child Specialist Advice and Support Service (ACSASS) and the establishment of Taskforce 1000 (see page 28).
- As well as establishing the Royal Commission into Family Violence (see page 41), the Government will engage in longer term policy reform to strengthen the family violence response and service system, including for Koori families.
- It acknowledges that there are issues in the compliance and quality of cultural support plans. To address these issues, a dedicated project has been established to redesign the culture support planning program and ensure compliance with the new legislative reforms that are due to commence in 2016. This project is due to conclude in mid-2015.
- The Koori youth justice program proactively responds to young Aboriginal people involved with the youth justice service to support them in the community on bail where this is assessed as appropriate and agreed to by a Magistrate.
- Decisions to place siblings in the same placement or in separate placements are case planning decisions.
- It provides a range of cultural awareness training programs, including training with a focus on Aboriginal cultural competency. These are delivered to child protection workers and kinship, residential and foster carers.

## The Aboriginal Placement Principle

Stakeholders are concerned that the statutory Aboriginal Child Placement Principle is not always observed in the placement of Aboriginal children in care.<sup>48</sup> Stakeholders observed that a high number of Aboriginal children are placed with non-Aboriginal carers, when safe and appropriate placement with family may have been achieved. CCYP is currently conducting an inquiry into the Aboriginal Placement Principle.

## Government response

DHHS responded that the Aboriginal Child Placement Principle provides a hierarchy of preferred placement options for Aboriginal children. Placement with Aboriginal kinship carers is the preferred option, and placement with unrelated non-Aboriginal carers is the least preferred. The principle requires that the options are worked through in order of preference and in consultation with an Aboriginal agency.

DHHS noted that the placement of an Aboriginal child or young person with non-Aboriginal carers is not necessarily a failure to apply the principle. Placement with non-Aboriginal kin is the second option in the hierarchy and is preferred to placement with unrelated Aboriginal carers. DHHS noted that even where children are placed with unrelated non-Aboriginal carers, the principle may still have been complied with if the decision is made having regard to factors including: that any non-Aboriginal placement must maintain the child's culture and identity through contact with the child's community; whether the child identifies as Aboriginal; and their expressed wishes.

DHHS considers that compliance with the principle cannot be determined by identifying outcomes, as it is compliance with the process that is required. Child protection practitioners are all trained in the requirements of the principle. DHHS noted that problems can arise if an emergency placement is required and the relevant Aboriginal agency is not available to provide advice, but practitioners generally make reasonable efforts to comply with the requirements of the principle.

<sup>48</sup> Commissioner for Aboriginal Children and Young People, Victorian Aboriginal Child Care Agency, and Victorian Council of Social Service.

## Aboriginal culture for children in care

*The right to culture is not a 'nice to have', it has more meaning than ticking a box on a database saying this child has attended a cultural event – it is about how you belong, about your identity and it is a tool for survival.*

– Andrew Jackomos, Commissioner for Aboriginal Children and Young People<sup>49</sup>

In Victoria, the Charter explicitly protects Aboriginal cultural rights.<sup>50</sup> This includes the right for Aboriginal people to enjoy their identity and culture, to maintain and use their language, and to maintain their kinship ties. Stakeholders stressed the importance of protecting and promoting the right to culture for Aboriginal children who are placed in out-of-home care, including the right to retain ties with family, kin and culture.<sup>51</sup>

DHHS has a statutory obligation to prepare a cultural plan for every Aboriginal child placed in out-of-home care under a guardianship order.<sup>52</sup> From 1 March 2016, this will apply to all Aboriginal children in out-of-home care.<sup>53</sup> CCYP welcomed this as a significant change but noted that genuine investment will be needed to deliver on this initiative in a meaningful way. In particular, CCYP reported that the implementation of the more limited current requirement has been poor.<sup>54</sup>

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49 Andrew Jackomos, 'Listening to our children', *Insight Magazine*, (2014): <<http://insight.vcross.org.au/listening-to-our-children>>.

50 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(2). The right to culture is also protected by the United Nations Convention on the Rights of the Child and the United Nations Declaration on the Rights of Indigenous Peoples.

51 Commission for Children and Young People, Commissioner for Aboriginal Children and Young People, and Victorian Aboriginal Legal Service.

52 *Children, Youth and Families Act 2005* (Vic) s 176(1).

53 *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic).

54 For example, an audit completed in August 2013 found that only 15 out of 194 Aboriginal children (or eight per cent) under a guardianship order had a completed cultural plan in place. See, Department of Human Services, *Information about cultural support plans for child protection clients 2012-13*, 2.

## Taskforce 1000 – reviewing the experiences of Aboriginal children in care

*There appears to be a systemic failure to implement effective and meaningful cultural plans for Aboriginal children in out-of-home care.*

– Andrew Jackomos, Commissioner for Aboriginal Children and Young People

Taskforce 1000 is an initiative between DHHS and CCYP. It was established in 2014 to consider the circumstances of 1000 Aboriginal children and young people in care. To date, the Taskforce has considered the circumstances of more than 200 Aboriginal children and young people.

The Commissioner for Aboriginal Children and Young People's initial observations from the Taskforce are that cultural support plans are often absent or lacking in substance and integrity. The lack of and/or inadequacy of cultural plans has also been raised by other stakeholders who consider that many plans are not meaningful or effectively implemented.<sup>55</sup>

The Commissioner has commenced an inquiry into Aboriginal children in care that will include data and information obtained from the Taskforce 1000 process. The inquiry has a focus on the right to culture for Aboriginal children.

DHHS noted that through the Cultural Support Plan Program, Aboriginal Community Controlled Organisations are funded to prepare a cultural plan for each Aboriginal child placed in out-of-home care subject to a guardianship order, in partnership with child protection. Taskforce 1000 has a role in monitoring and considering the effectiveness of the program.

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55 Victorian Aboriginal Legal Service and Victorian Aboriginal Child Care Agency.



## Children from CALD and refugee backgrounds

Children from CALD and refugee backgrounds have the same rights as all children under the Charter, including the right to enjoy their culture, practise their religion, and use their language.<sup>56</sup> The Ethnic Communities Council of Victoria (ECCV) observed that CALD children face significant barriers in out-of-home care because they are often placed with foster parents lacking cross-cultural competence.

ECCV considers that foster parents need better briefing and ongoing support to provide a culturally safe environment for children from CALD backgrounds. ECCV explained that a child may feel isolated in care and when they return to their family because they can lose their culture and language. This creates a loss of cultural identity for families. For example, a Chinese child living in an English speaking foster care placement forgot how to speak Chinese, which meant the family lacked a common language.

ECCV recommends cultural competence training and increased recruitment of bilingual staff. ECCV supports the Victoria Police model of multicultural liaison officers as a best practice model for DHHS to adopt.

## Government response

DHHS noted a number of initiatives to address the needs of children and young people from CALD communities who are placed in out-of-home care, including:

- cultural competence training for practitioners who work with children, young people and families from CALD communities
- commissioning the University of Melbourne to undertake research on the prevalence of young Victorian CALD kinship carers
- a new approach to the recruitment and retention of foster carers (the Victorian foster carer recruitment and retention project), which will be flexible, responsive and supportive of local, demographic, cultural and carer type needs. The needs of carers, children and young people from CALD backgrounds are expected to be identified and addressed as part of this project.

*Victoria's Vulnerable Children – Our Shared Responsibility Strategy 2013–2022* commits to reporting annually against stated outcomes. The whole of government Vulnerable Children Reform Unit based in DHHS is working with key stakeholders, including CCYP, to develop additional indicators including for social and cultural connectedness. Where possible, DHHS noted that indicators will be developed that measure outcomes for children from CALD and refugee backgrounds. This is a significant piece of work which will take place over the next 12 months and beyond.

DHHS has recently received a report from the Victorian Multicultural Commission concerning Child Protection CALD data. The report makes six recommendations to improve data collection, train and support practitioners to more effectively engage with children and families from CALD backgrounds, and more effectively utilise, monitor and report CALD data. DHHS noted that it will respond to the recommendations by the end of May 2015.

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<sup>56</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(1).

In 2014, CCYP, in partnership with ECCV, established the CALD Strategic Partnership Advisory Committee to identify the strategic responses required to enable government and non-government agencies to improve the lives of vulnerable children and young people from CALD and refugee backgrounds.

Of particular concern to the Committee is the failure in both the Victoria's Vulnerable Children Strategy and the Victoria's Vulnerable Children Out-of-Home Care: A Five Year Plan to address the specific needs of children and young people from CALD backgrounds. More broadly, in the consultation process for the development of child safe standards for organisations, CCYP has advocated for the cultural safety of children from CALD backgrounds to be embedded in the application of the standards.

### **The right to be safe from abuse and exploitation in the care of the state**

All children and young people have a fundamental right to be safe and to feel safe. CCYP noted that the Parliamentary Family and Community Development Committee's Betrayal of Trust report and the work of the Royal Commission into Institutional Responses to Child Sexual Abuse have demonstrated how governments, institutions and the community as a whole have failed to ensure that all children enjoy this fundamental right. While much has been done to enhance the right of children and young people to be safe, there is still much more that needs to be done.

In Victoria, CCYP has supported consultations being undertaken by DHHS for the development of minimum child safe standards for organisations. CCYP has advocated for the standards to apply to a broad range of organisations, to focus on the creation of a culture of child safety, and for an approach to safety which recognises the fundamental rights of children, including the right to cultural safety for Aboriginal children.

Of great concern to CCYP is the fact that abuse, including sexual abuse and exploitation, continues to occur to children and young people who are in the care of the state. For many years, CCYP has expressed concern about the safety and wellbeing of children who reside in residential care in Victoria. As noted in CCYP's 2013/14 annual report, it receives and reviews Category One critical incident reports about children in out-of-home care. The largest proportion of the critical incidents reported involved children and young people who reside in residential care, even though residential care is the smallest proportion of care.<sup>57</sup>

Similar concerns have been raised by other authorities and reviews, including the *Protecting Victoria's Vulnerable Children Inquiry Report* and the Victorian Auditor-General's 2014 report *Residential Care Services for Children* which notes that:

In 2012/13, the percentage of abuse allegations from residential care was 30.4 per cent of the total OOHC abuse in care allegations, yet residential care accounts for less than 10 per cent of the OOHC population. Of the allegations that were investigated and substantiated, 22 per cent were from residential care, and were for physical, emotional and sexual abuse.<sup>58</sup>

In 2014, CCYP commenced a systemic inquiry into the adequacy of the provision of services and of the response to children and young people who have been subjected to sexual exploitation or sexual abuse in residential care. The inquiry will also consider the immediate response in protecting the child or young person from further abuse, the investigation of allegations, the supports and services made available to the victim, and any learnings or improvements to procedures that resulted.

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57 The Commission for Children and Young People reported that at January 2014, 9 per cent of children and young people who reside in out-of-home care are in residential care.

58 Victorian Auditor-General's Office, *Residential care services for children* (2014), 12.

## Government response

DHHS responded that the Government is working to ensure that residential care provides a supportive and safe environment for children and young people. A \$16 million investment was announced in 2015 to provide children in residential care with extra security and safety.

For example, from April 2015, standard four-bed residential care facilities will have extra protections for children, including a staff member who remains awake at night.

DHHS noted that it has a range of specific policies and procedures in place to support agencies in undertaking the care function. This includes incident reporting, management of quality of care concerns, the registration of foster carers, de-accreditation and disqualification of a carer, and safety planning in residential care.

DHHS and Victoria Police have an extensive governance framework, from the Secretary and Chief Commissioner through to the operational level, which is working to address a range of issues, including the sexual exploitation of children in care. DHHS also has a range of multidisciplinary centres in place that co-locate services such as child protection and police (for example, Sexual Offences and Child Abuse Investigation Teams and Centres Against Sexual Assault, which work on a range of issues including abuse response, and prevention and reduction strategies).

## Social housing

The role of the Charter is tangible in social housing. It aims to protect the rights of vulnerable tenants in Victoria, including the right to equality, the right for a person not to have their home unlawfully or arbitrarily interfered with, protection of families and children, and cultural rights.

## Case study

### Using the Charter to negotiate culturally appropriate crisis accommodation

Aaminah contacted the Homelessness Advocacy Service (HAS) at the Council to Homeless Persons for assistance. Aaminah had been to a service to get crisis accommodation because she had to flee her home. Aaminah is a practising Muslim woman and advised the service that she cannot live or reside in premises with men. Unfortunately the service referred her to a backpacker's hostel where the majority of residents were men. Aaminah felt intimidated and harassed having to share bathrooms and kitchen facilities with men. It was also Ramadan, which made the situation worse for her.

The HAS advocate contacted the service and advised that under the Victorian Charter, Aaminah's cultural and religious rights had been breached. The service agreed to find Aaminah suitable crisis accommodation and was able to find her an all-women rooming house that is long term. Aaminah is still at the all-women rooming house and advises that she is happy there.

## Evicting transitional housing tenants

Justice Connect Homeless Law and the Council to Homeless Persons are concerned that social housing providers are returning to the practice of issuing transitional housing tenants with 120 day 'no-reason' notices to vacate at the start of their tenancies.<sup>59</sup>

Although short-term leases are often rolled over, issuing tenants with a notice to vacate at the start of a tenancy enables the housing provider to apply to VCAT for a possession order at the end of the 120 day period. Given the acute shortage of affordable long-term housing in Victoria, this practice results in some of Victoria's most vulnerable tenants being placed under considerable pressure and in some instances being evicted into homelessness.

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<sup>59</sup> Justice Connect commented that this practice also occurs in relation to social housing tenants and social rooming house residents.

Community organisations consider that the return to this practice is compounded by two factors:

1. the ongoing lack of clarity by a court or tribunal about whether the Charter applies to outsourced social housing providers (including those providers who are outsourced to provide temporary housing by DHHS)
2. the impact of the Court of Appeal's decision in *Director of Housing v Sudi*<sup>60</sup> which found that a tenant can only challenge a notice to vacate on Charter grounds by judicial review in the Supreme Court.

Anecdotally, stakeholders noted this has resulted in social housing providers being more resistant to negotiations based on the Charter because there is a perception of less accountability. It has also made it difficult for transitional housing tenants to challenge notices to vacate on human rights grounds because of limited resources to challenge the eviction in the Supreme Court.

## Government response

DHHS responded that:

- The Victorian Government funds over \$200 million per annum to community service organisations to provide accommodation and support services to people who are homeless or at risk of homelessness, including transitional housing.
- Transitional housing models operate on the principle that a person's situation and support needs are stabilised in transitional accommodation while they seek stable housing.
- It is expected that community housing providers should first assess an individual and comply with human rights principles when making decisions to issue a notice to vacate.
- The actions of the community housing sector to sometimes issue notices to vacate to ensure the availability of the premises for future clients is consistent with the underlying principles of the transitional housing model. The efficacy of this model and approach to homelessness are currently being considered and opportunities for improvement are being explored.

- It has been exploring new and innovative approaches to homelessness that focus on rapid re-housing or Housing First, which seek to place people in stable housing quickly. The provision of supports are driven by individual need rather than by virtue of the person's accommodation.

## Case studies

### A human rights approach to public housing

DHHS reported that it used the Charter to support the rights of vulnerable tenants in the following case studies:

- DHHS was considering whether to take action against a client's tenancy due to unpaid rental arrears. Through liaison with Child Protection, staff discovered that the client was not living at the property. However, the client's mother had moved in to care for the client's children. Although the department proceeded with the eviction of the client, it worked with Child Protection to re-house the grandmother and grandchildren in her care in another public housing property. This enabled the department to act compatibly with the Charter and to make a decision which protected the human rights of the grandmother and her grandchildren.
- DHHS managed a tenancy matter involving a male tenant who was required to move out of his public housing property, leaving behind his partner and children. The partner was not a tenant, and did not meet the public housing eligibility criteria due to not being an Australian permanent resident or Australian citizen. None of her children were eligible to become tenants either. Staff considered the Charter and decided that the negative impact on the family if they were not granted a tenancy would outweigh the achievement of the policy objectives. The department decided to approve the transfer of tenancy to the mother.

<sup>60</sup> *Director of Housing v Sudi* [2011] VSCA 266.

## Government response

Where action is being taken which affects the sustainability of a client's public housing tenancy, DHHS noted that staff consider and ensure compliance with the Charter at each stage of the process, including liaising with other areas of the department (such as Child Protection, Disability Services and Youth Justice) to ensure that the human rights of all parties affected are considered and that vulnerable people and children are not put at risk.

## Revision of policies and guidelines

Justice Connect Homeless Law is concerned that DHHS has removed a number of its policies and guidelines about tenancy management from its website, which in its view makes it more difficult to negotiate with DHHS and to ensure compliance with DHHS policies. For example, this includes:

- the chapter in the Tenancy Management Manual, which dealt with 'illegal drug activity' in public housing
- a comprehensive manual on tenant property damage, that has been replaced with a shorter fact sheet. Justice Connect is concerned that the new fact sheet does not include important information about tenants' rights, including how DHHS makes decisions in relation to victims of family violence.

Justice Connect understands that this is part of a broader strategy by DHHS to make its policies more clear and accessible. However, it considers that although simple fact sheets are useful, these should not replace publicly available policies and guidelines that include practical and detailed guidance on how DHHS makes decisions. Rather, the fact sheets should be available alongside publicly available policies and guidelines.

Justice Connect considers that existing DHHS policies and guidelines help ensure accountability and transparency, and make it more efficient to negotiate outcomes for vulnerable tenants and prevent matters proceeding to the Victorian Civil and Administrative Tribunal unnecessarily. Justice Connect noted that:

The public availability of the policies or guidelines has an important role to play in encouraging the accountability of decision-makers because workers and advocates can point to particular provisions, which housing officers may not have been aware of or may

not have properly applied when making their decision. It reduces the risk that inexperience, bias or deteriorated relationships between individual housing officers and tenants will impact on fair decision-making.

From a human rights perspective, the policies provide practical guidance about how to make decisions that are compatible with the Charter (including how to consider the tenant's circumstances, hardship, likelihood of homelessness and the needs of any children) and to balance these against competing obligations of the Director of Housing (for example, its waiting list, the safety of other tenants and their fiscal requirements in relation to the payment of rent).

Ultimately, this transparency leads to more consistent decision-making, early resolution of matters and better outcomes for vulnerable tenants.

## Government response

DHHS responded that the Public Housing manuals are currently on the department's intranet (accessible by departmental staff) and its website (accessible by the public).

Since March 2014, a project has been undertaken to streamline the manuals and redevelop the information into two separate products:

- internal operational guidelines for departmental public housing staff
- policy statements for public housing tenants and community agencies about tenants' rights, responsibilities and key information. The policy statements also outline key principles and frameworks which guide decision-making or actions made or undertaken by DHHS (for example, information on consequences and decisions that may be made by the department in responding to antisocial behaviour or breaches of tenancy agreements).

These policy statements are placed, through a staged approach, on the integrated housing website (accessible by the public on the department's website), to ensure all parties have access to clear, concise and consistent information in relation to rights and responsibilities of public housing tenants in accordance with the *Residential Tenancies Act 1997*.

## Government response

DHHS noted that it has engaged stakeholders, including the Victorian Public Tenants Association, Tenants Union Victoria and Justice Connect, to provide feedback about the review of the guidelines and the development of the policy statements. DHHS noted that feedback on issues such as considering the impact on victims of family violence in managing tenant property damage, or priority being given to victims of family violence in housing allocation or transfer, has been or will be incorporated in the revised guidelines and policy statements.

## Case study

### Human rights based negotiations in social housing

Jessica contacted Justice Connect Homeless Law and instructed that her landlord, a community housing provider, had recently obtained a possession order from VCAT, and would soon be purchasing a warrant for her removal from the premises. Jessica's landlord was concerned about the condition of the premises, and in particular, the accumulation and cluttering of personal items at the property which had become an issue for several neighbours.

Jessica had previously told her landlord that clutter was a symptom of her mental illness and that she was continuing to see medical professionals to assist with this. Jessica instructed that her previous housing manager was aware of her mental health issues and had not sought to evict her as a result of the clutter. Her new housing manager, however, had decided to take legal action against Jessica for breach of a compliance order. Without local family supports or other long-term accommodation options, Jessica was fearful of losing her housing as the instability of homelessness would significantly exacerbate her mental health issues.

Homeless Law assisted Jessica by negotiating with her landlord not to purchase a warrant to remove her from the property. Homeless Law's negotiation encouraged the social housing provider to explore other options that might help address their concerns. Homeless Law asserted that, as a provider of low-cost housing to vulnerable tenants on behalf of the government, the community housing provider was a functional public authority under the Charter. Under section 38 of the Charter, the housing provider was required to give proper consideration to Jessica's Charter rights, particularly the right to privacy, and to act compatibly with those rights.

Homeless Law argued that the housing provider had failed to adequately take Jessica's mental health issues and inevitable homelessness into account prior to deciding to evict her, noting that no effort had been made to contact Jessica's two mental health support workers to better understand the reasons for non-compliance, or the effect that eviction would have on her. As a result of the negotiations, a detailed agreement was entered into between Jessica and her landlord. The agreement allows Jessica to remain in the premises provided she continues to engage with relevant support services, and to make efforts to address her landlord's concerns in relation to the premises. Jessica has kept her housing and this stability has allowed her to continue engaging with relevant support workers.

## Emergency management

Following the Hazelwood mine fire in 2014, the Victorian Council of Social Service (VCOSS) expressed concerns that emergency planning and management in Victoria does not always adequately consider the needs of particular people in the community who are more 'at risk' than others. This includes people with disabilities, children and young people, older people, and people from a CALD background.

In July 2014, Emergency Management Victoria (EMV) and the role of the Emergency Management Commissioner was established. DJR reported that this provides the legislative mandate to build a sustainable emergency management system that adopts an 'all hazards, all agencies' approach and ultimately reduces and mitigates the impact of emergencies on Victorian communities. DJR noted that this is a critical change in Victoria's emergency management arrangement. The Emergency Management Strategic Action Plan will drive this reform agenda, and deliver improved community-centric emergency management outcomes.

One of the key actions in the Strategic Action Plan is a Community Emergency Management Planning Framework. This approach encourages communities, agencies, councils, business and other stakeholders to develop local plans for emergency events through developing shared solutions to local problems, strengthening relationships and sharing local knowledge and experience. A pilot project has been undertaken in Harrietsville, and the outcomes are currently being reviewed for inclusion in the Framework.

It is essential that emergency planning and management supports human rights because 'disasters are profoundly discriminatory when they strike – people facing disadvantage are more vulnerable and can be overwhelmed by such events'.<sup>61</sup> People in emergencies have the right to expect that public authorities will implement measures to protect their rights, including the right to equality, the right to life, and the right to seek and receive information (such as communication designed to protect people in emergencies).

VCOSS reported that there have been some effective reforms to emergency services, including the use of Auslan in emergency warnings. However, substantial gaps remain, including a lack of engagement and communication with local community organisations as part of emergency planning and during emergencies.

For example, VCOSS commented that during the Hazelwood mine fire, the local multicultural centre was not consulted to ensure that the community understood the nature and extent of the emergency and that the needs of the community were met.

## Government response

DJR responded that the state's response to the Hazelwood Mine Fire Inquiry Report includes a commitment to review whole of Government communications for emergencies and to develop a community engagement model. Principles of the community engagement model have been developed.

Regarding relief and recovery, DJR noted that the reform agenda is looking at enhancing community outreach and expanding partnerships with community organisations to ensure that the needs of all, including those most at risk, are considered. The Strategic Action Plan will deliver a community outreach model to ensure consistency of approach in the delivery of relief and recovery services, and review the model for communication with disaster affected communities.

## Auslan interpreting access before and during bushfire emergencies

Vicdeaf has partnered with EMV to provide Auslan interpreting access during emergencies. This initiative won a National Disability Award and Fire Readiness Award in 2014. Outside times of emergency, regular weekly Auslan updates are provided on social media networks via video about weather conditions, alerts and potential threats to community safety.

During a bushfire emergency, EMV is committed to providing media conferences and updates in Auslan. Prior to this initiative, briefings and updates lacked Auslan content. This meant that many people in the Deaf community had to rely on other people to access information about emergencies.

61 Victorian Council of Social Service, *Emergency Management, Disaster and disadvantage: social vulnerability in emergency management* (2014), 2.

The Ready2Go Early Relocation Program matches volunteers with people living independently who are unable, due to age, frailty or mental health, to protect themselves adequately from the effects of heat wave conditions, bushfire threat or other emergencies such as severe thunderstorms. The program aims to reduce the potentially fatal impacts of heat or other threats to people at risk by providing a means of transportation and early relocation. Piloted in Cockatoo last summer, it is now expanding to include Emerald, Gembrook and Upper Beaconsfield.

## Government response

The DHHS Vulnerable People in Emergencies Policy was developed in response to a recommendation in the Victorian Bushfires Royal Commission Final Report. The purpose of the policy is to improve the safety of vulnerable people in emergencies, by supporting emergency planning with and for vulnerable people, and developing local lists of vulnerable people who may need consideration in an emergency.

In 2014, DHHS reported that its Emergency Management Branch expanded the number of languages on its Emergency Relief and Recovery website to better target residents who do not speak English as a first language and who have been impacted by emergencies. It also included new audio translations on the website to address the high level of illiteracy among new arrivals.

## Emergency management and privacy

The Commissioner for Privacy and Data Protection noted that the Information Privacy Principles set out in the *Privacy and Data Protection Act 2014* (PDP Act)<sup>62</sup> permit the use and disclosure of personal information for purposes that are unrelated to the primary purpose of collection in some circumstances.<sup>63</sup> The Commissioner noted that invariably, these exceptions are sufficient to cover the necessary sharing of personal information in emergency situations.

There are also new mechanisms in the PDP Act – including public interest determinations, information usage arrangements and certification – that may provide additional assistance in emergency situations. For further information on the new PDP Act, see page 55 of this report.

62 The Information Privacy Principles were previously set out in the *Information Privacy Act 2000* (Vic).

63 *Privacy and Data Protection Act 2014* (Vic) IPP 2.1(d).

# 4: The rights of Victorians with disabilities

## Abuse in the disability sector

One of the most significant human rights issues raised by stakeholders and the broader community in 2014 was the abuse and neglect of people with disabilities who are clients of disability services or who live in residential facilities.<sup>64</sup> Part of this concern is the barriers that people with disabilities face reporting abuse.

### Quick facts

- Around 300 organisations are funded by the Victorian Government to deliver disability services in Victoria.<sup>65</sup>
- In 2013/14, the Disability Services Commissioner (DSC) reviewed 309 incident reports relating to allegations of staff-to-client assault and unexplained injuries in disability services.<sup>66</sup>
- In 2013/14, 14% of complaints reported directly to the DSC related to physical and psychological health and safety.<sup>67</sup>
- In 2013/14, 19% of a total of 1855 complaints directly to disability service providers in Victoria related to physical and psychological health and safety.<sup>68</sup>
- In 2013/14, the Office of the Public Advocate's Community Visitors reported 147 cases of abuse, neglect and assault in the disability sector.<sup>69</sup>

64 Office of the Public Advocate and Office of the Disability Services Commissioner.

65 Victorian Ombudsman, 'VO to investigate disability abuse reporting' (Media Release, 8 December 2014).

66 Office of the Disability Services Commissioner, *Annual Report 2013-14*, 12.

67 Office of the Disability Services Commissioner, *Annual Report 2013-14*, 19.

68 Office of the Disability Services Commissioner, *Our year in review* (2014), 3.

69 Victorian Ombudsman, 'VO to investigate disability abuse reporting' (Media Release, 8 December 2014).



The Charter requires public authorities to act compatibly with human rights when they deliver services to people with disabilities. This includes when service providers respond to allegations of abuse and conduct investigations. Relevant rights include the right to equality, the right to privacy, the right to protection from cruel, inhuman or degrading treatment, and the right to liberty and security of person.

### **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. People at greater risk include people with intellectual and mental health disabilities, communications disabilities and women with disabilities.

Despite one in five Australians having a disability, data shows that people with disabilities comprise between two and five per cent of recorded victims of crime in Victoria.<sup>70</sup> This under-representation suggests that cases are either not reported, are not making it through the justice system or that disability has not been identified.

The Commission's research found that people with disabilities face serious and complex barriers when reporting crimes to the police. This includes negative assumptions and attitudes, a lack of support, and minimal provision of necessary adjustments. It also found that staff who abuse people with disabilities are able to move from service to service.

Victoria Police accepted the recommendations in the report and committed to working to achieve changes to support people with disabilities to report crime.

The Judicial College of Victoria (JCV) is working with the Commission to develop educative resources that specifically address adjustments to court processes for people with disabilities. Over time, this will form part of a broader suite of resources to assist courts to meet the diverse needs of people across all attribute groups.

Since 2012, the Disability Services Commissioner (DSC) has had a role in monitoring and reviewing critical incidents involving allegations of staff-to-client assault and unexplained injury in disability services. Even where criminal allegations are not substantiated – which in its experience, is often the case – the DSC can consider how an incident was handled by the service provider. In 2014, the DSC identified key themes in relation to critical incidents, including:<sup>71</sup>

- a lack of focus on people's outcomes and safeguarding people's rights during investigations
- the need for proactive engagement with Victoria Police
- the requirement for advocacy organisations to report critical incidents
- a lack of clarity and shared understanding of the definition of 'assault' and 'poor quality of care' – for example, it is not clear whether the definition of 'assault' may extend to the use of restraint or serious verbal abuse
- the need to regulate the suitability of staff who work in disability services.

In its 2013/14 annual report, the DSC reported that:

The common thread through all of these themes is the right of people with a disability to be heard, to be proactively supported along with their family members, to participate in any investigations relating to allegations and to access the justice system. Our reviews have again highlighted concerns about whether investigations into incidents give equal weight to substantiating an allegation regarding a staff member and considering the potential abuse of the person's human rights and the impact of the trauma they experienced.

<sup>70</sup> Information provided to the Commission by the Victims Support Agency (28 October 2013).

<sup>71</sup> Office of the Disability Services Commissioner, *Annual Report 2013-14*, 12.

## Case study

### Shelly's story: investigation of injury<sup>72</sup>

Shelly lives in supported accommodation and accesses the community with support from a disability service provider. When visiting Shelly one day, her parents noticed she had bruising around her chin. Shelly has limited verbal communication skills and was unable to tell them what had happened. The incident had not been reported to DHHS.

Shelly's parents contacted DSC concerned that she may have been assaulted and that the service was not taking the matter seriously. DSC assessed that:

- the complaint related to Shelly's right to live safely and free from abuse according to section 10 of the Charter
- the service did not understand their obligations to report incidents
- the service failed to consider Shelly's human rights in making decisions that impacted on her quality of life.

DSC supported the service to develop an investigation plan. Shelly was supported to give her account of what may have caused the injury. Shelly's parents were included in the process.

Although the cause of the injury remained unexplained, Shelly's parents were satisfied that Shelly would be better supported by the provider in the future to communicate any concerns. Following advice from DSC the service provider is now clear about considering the human rights of individuals they support and their obligations in reporting incidents.

In 2014, the Office of the Public Advocate (OPA) identified serious incidents of abuse and neglect of people with disabilities living in group homes.<sup>73</sup> This included reports of residents being sexually, physically and emotionally abused by other residents who were inappropriately placed in group homes, a resident being kicked and choked by a staff member (who delayed reporting the incident because they felt intimidated), and residents being left in bed for many hours due to under-staffing. OPA calls for 'full public reporting of all incidents and allegations of abuse and neglect, to ensure transparency in incident reporting'.<sup>74</sup>

## Government response

In 2014, DHHS introduced the Disability Worker Exclusion Scheme. It excludes disability residential service workers from employment who have been identified as posing a risk to the safety and wellbeing of clients. By strengthening existing pre-employment screening processes, the new scheme better protects people living in government and non-government managed disability residential homes.

## Case study

### Ombudsman makes link between good record keeping and transparency in safeguarding human rights for people in a mental health facility

In 2013, the Ombudsman commenced an investigation after concerns were raised by OPA's Community Visitors about excessive force being used to restrain patients, and the failure to allow Community Visitors access to incident reports.

The Ombudsman's investigation considered whether:

- injuries were caused by excessive force used by staff during restraint
- incident reports were provided to Community Visitors
- treatment plans were created and provided to Community Visitors.

<sup>72</sup> Case study provided by the Disability Services Commissioner.

<sup>73</sup> Office of the Public Advocate, 'Community visitors call inquiry into abuse and neglect of people with disability in group homes' (Media Release, 18 September 2014).

<sup>74</sup> Ibid.

Following her investigation, the Ombudsman highlighted a number of issues agencies must consider to meet their obligations under the Charter to treat all persons deprived of their liberty with humanity and respect.

The Ombudsman expressed concern that incident reports were not being released to Community Visitors. She recommended the Department of Health give directions as necessary to any mental health facility refusing to provide incident reports. She also recommended that all mental health facilities conduct regular random audits of treatment plans to ensure their completion in a timely manner.

The Ombudsman was concerned that allegations of excessive use of force were poorly documented and therefore not resolved after investigation. She also found under-reporting of patient injuries relating to restraint.

The Ombudsman noted that good record keeping practices foster a culture of transparency and accountability that needs to be in place to ensure that people deprived of their liberty are protected. In addition, effective systems for capturing and analysing information regarding incidents should enable early identification and responses.

Stakeholders welcome recent initiatives to address these issues, including the Victorian Government's commitment to establish a Parliamentary Inquiry into systemic failures in Victoria's disability services, the Victorian Ombudsman's investigation into how allegations of abuse and neglect are reported and investigated, and the Federal Senate Inquiry into violence against people with disabilities in institutional and residential settings. Stakeholders expressed the view that these initiatives need to focus on the conduct of staff who allegedly abuse people with disabilities, as well as how abuse is reported and investigated.

DHHS noted that the Parliamentary Inquiry will examine why abuse is not reported or acted upon and how it can be prevented. It will cover a range of disability services, including group homes, and will examine systemic issues arising from allegations of abuse, assault and neglect. The inquiry will also examine the roles, powers and processes of Victorian investigation and oversight bodies whose jurisdiction covers abuse of people with disabilities.

## Government response

The Victorian Government welcomed the Ombudsman's investigation into abuse in the disability services sector in Victoria. DHHS is committed to addressing all forms of abuse against vulnerable people and continues to build a strong culture in promoting the rights of people with disabilities free from abuse and neglect and making it clear to all staff that abuse, neglect and violence to clients is not tolerated.

DHHS is working to improve safeguards for people with disabilities by:

- introducing the Disability Worker Exclusion Scheme on 29 September 2014, which requires disability service providers to screen potential disability residential service workers, and report workers who have been identified as posing a risk to the safety and wellbeing of clients. The scheme ensures that workers who endanger the safety and wellbeing of people with disabilities will no longer be able to work with people with disabilities
- working collaboratively with law enforcement through the establishment of a joint committee to improve responses to allegations of abuse and neglect involving individuals with disabilities
- commencing a program of work to support more effective identification, management and mitigation of risks to clients.

DHHS noted that this work will strengthen and integrate existing safeguards and build a comprehensive approach to safeguarding vulnerable people accessing human services.

DHHS has also worked with the Disability Services Commissioner and advocacy organisations to confirm critical incident reporting requirements.

## Restraint and seclusion in Victorian schools

In September 2012, the Commission published its Held Back report into the experiences of students with disabilities in Victorian schools. The report examined in part the use of restraint and seclusion on students with disabilities. The Commission found there was no independent oversight over the way that staff in Victorian state schools use restraint and seclusion, and no mandatory reporting on its use to monitor how often it was used and why.

As raised in the Commission's report, community organisations have ongoing concerns that the use of restraint and seclusion under Regulation 15 of the Education and Training Reform Regulations 2007 (as supported by the Restraint of Student policy) could amount to an unreasonable limit on the rights of students with disabilities.<sup>75</sup>

Stakeholders are also concerned that the Commission's recommendations from the 2012 report have not been implemented – including transferring the regulation of restrictive practices on students with disabilities to the jurisdiction of the Office of Professional Practice, adding additional safeguards to the Restraint of Student policy, and prohibiting the use of seclusion in state schools.

Community organisations have also raised concerns about the existing Restraint of Student policy, including that the language is too vague, that it gives staff too much discretion to determine what constitutes an 'emergency' or 'harm', and that it does not require staff to contact the parent of a child who has been restrained. Stakeholders have also noted that some mandatory steps under the policy are not occurring in practice – such as offering appropriate supports to a student who has been restrained and making a written record of the incident.<sup>76</sup>

In 2014, the Department of Education and Training (DET) invited the Commission to provide feedback on the development of new policy guidance as part of a broader suite of guidance for schools around managing complex behaviours. However, the new policy has not been released and accordingly, there is still a lack of clear guidance for schools. The Government has since made an election commitment that the Senior Practitioner (Disability) will regulate the use of restrictive interventions in Victorian schools in the future. This will require legislative amendment.

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<sup>75</sup> Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service.

<sup>76</sup> Disability Discrimination Legal Service.

## Government response

DET responded that:

- The Victorian Government's Special Needs Plan for Victorian Schools commits to extend the scope of the Senior Practitioner (Disability) in relation to the use of restraint and seclusion in schools.
- Since the publication of Held Back, DET noted that it has continued to work with the Commission, including reporting on departmental initiatives and strategies to address the concerns and recommendations in the report. This includes working in partnership with the Commission through a standing Consultative Committee, to consider the issues and recommendations in the report and opportunities to strengthen current practice, including matters related to restraint.
- Since 2014, DET noted that it has been working on extended guidance related to restraint, and the management of behaviours of concern. This work will complement the existing School Policy and Advisory Guide, and include a comprehensive suite of resources and information. The guidance will provide clear and detailed information about the requirements for the use and reporting of restraint, the requirement for record keeping, and proactive and preventative approaches to behaviours of concern.
- In relation to oversight of restraint, DET commented that further work is underway to ensure that the work of the Commission continues to inform future planning and initiatives across DET.
- DET recognises that schools balance common law and legislative obligations to students and staff to provide a safe learning environment. DET noted that all students have a right to attend school safely, and Regulation 15 provides that it is lawful for a member of staff of a Government school to take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour dangerous to the member of staff, the student, or any other person.

# 5: Family violence

In the first half of 2014, a number of high profile family violence related deaths in Victoria prompted the Victorian Government and community to prioritise action on family violence. Family violence is a violation of human rights and undermines equality for women and their children.

Stakeholders have welcomed the Victorian Government's Royal Commission into Family Violence, which will inquire into and provide recommendations on how Victoria's response to family violence can be improved. The Commission is due to deliver its report and recommendations by 29 February 2016.

## Quick facts

- Every year, more than 360,000 Australian women are subjected to violence.<sup>77</sup>
- More than one woman a week is killed by a current or former partner.<sup>78</sup>
- In Victoria, over 60,000 family violence incidents were reported to police in 2013/2014.<sup>79</sup>
- In Victoria, family violence accounted for over a third (41.7%) of all crime against the person offences in 2013/2014.<sup>80</sup>
- In 2013/14, 22,213 women sought help from homelessness services due to family violence.<sup>81</sup>

Violence against women by their partners is the biggest contributor to ill health, disability and death in Victorian women aged 15–44.<sup>82</sup> It is also one of the leading causes of homelessness, poverty and disadvantage, and is a factor in more than half of all cases where children are removed from their families in Victoria.<sup>83</sup>

77 Women's Legal Service Victoria, *Annual Report 2013-14*, 6.

78 Ibid, 9.

79 Ibid, 9.

80 Victoria Police, *Crime Statistics 2013/2014*, 24: <[http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media\\_ID=72176](http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=72176)>.

81 Australian Institute of Health and Welfare, *Specialist homelessness services 2013–14*, Victoria supplementary table.

82 VicHealth, *The health costs of violence: Measuring the burden of disease caused by intimate partner violence. A summary of findings*, Victorian Health Promotion Foundation (2004), 10.

83 Victorian Government, *Vulnerable babies, children and young people at risk of harm: Best practice framework for acute health services* (2006), 3.

Governments have human rights obligations to prevent and respond to family violence and to ensure that the human rights of women and their children are protected.<sup>84</sup> At international law, this means that governments must take effective measures to prevent family violence and to investigate, remedy and punish family violence.<sup>85</sup> This includes providing appropriate protective and support services for victims of family violence.<sup>86</sup>

In Victoria, the Charter protects a number of human rights that may be limited for people who experience family violence, including the right to equality before the law, the right to life, the protection of families and children, the right to liberty and security of person, and the protection from cruel, inhuman or degrading treatment.

## Case study

### Local governments making family violence a priority

In 2014, Yarriambiack Shire Council adopted a Prevention of Violence Against Women Leadership Statement and a family violence policy and procedure. The statement encourages 'all community members to endorse Council's action and to say 'no' to violence against women in all forms including physical, verbal, sexual, emotional, discriminative, financial and psychological abuse'. It also recognises 'the important and critical role that the everyday, equitable treatment of women plays in changing the culture that contributes to violence against women'.

The City of Melbourne also developed a Response to Family Violence Policy and Procedure. The policy outlines a consistent approach for responding to family violence disclosures, including access to support. It recognises that 'family violence can affect anyone in the community – regardless of gender, age, location, socio-economic and health status, culture, sexual identity, ability, ethnicity or religion'.

84 For example, see the *Convention on the Elimination of All Forms of Discrimination Against Women*.

85 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women* (1992), 9.

86 Ibid, 24.

Stakeholders told us that family violence has a disproportionate impact on women and children from CALD backgrounds,<sup>87</sup> Aboriginal women and children,<sup>88</sup> older Victorians,<sup>89</sup> women with disabilities,<sup>90</sup> and LGBTI people.<sup>91</sup> Transgender Victoria commented that LGBTI people can be reluctant to report family violence for fear of lack of understanding. Family violence is also the number one driver of homelessness for women in Victoria.<sup>92</sup>

CCYP has identified the right of children to be safe in their own home and family as a significant area of concern and a focus for ongoing work. The incidence of family violence and its impact on children and young people continues to be a significant issue in the inquiries conducted by CCYP, including child death inquiries.

### Women's Homelessness Prevention Project<sup>93</sup>

The Women's Homelessness Prevention Project (WHPP) is an initiative by Justice Connect Homeless Law that aims to prevent women and children being evicted into homelessness through a combination of legal representation and social work support. It runs a weekly outreach clinic at a library in the Melbourne CBD.

During its first six months of operation in 2014, 98% of the women who had been assisted by WHPP had a history of family violence, with 41% having experienced family violence within the past 12 months. By taking a holistic approach to legal services, including intensive social work support, 83% of WHPP's clients sustained their housing.

## Elder abuse

*Women and children suffer enormously from family violence, but thousands of older people are severely impacted too. Elder abuse must be recognized as a real family violence issue. It is only going to increase as our population ages*

– Seniors Rights Victoria.<sup>94</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. The abuse may be physical, social, financial, psychological or sexual.<sup>95</sup> Elder abuse is often carried out by a child or grandchild, which can create challenges for an older person who wants to maintain a relationship with the perpetrator.<sup>96</sup>

The impact of elder abuse on older Victorians 'can be life changing, leading to poor physical and mental health outcomes, poverty and homelessness'.<sup>97</sup>

## Family violence for Aboriginal Victorians

Stakeholders raised ongoing concerns about the high rates of family violence for Aboriginal Victorians, which is linked to an increasingly high rate of Aboriginal children in care.<sup>98</sup> In 2014, the Commissioner for Aboriginal Children and Young People commented that 'the biggest threat to our children, our families and our culture is family violence'.<sup>99</sup>

The Taskforce 1000 initiative which commenced in 2014 will provide the Commissioner and DHHS with unique insights into the experiences of 1000 Aboriginal children in out-of-home care. From over 200 children reviewed so far, the Commissioner reported that male perpetrated family violence and alcohol and drug abuse were present in more than 90 per cent of cases. This suggests family violence is far more prevalent for Aboriginal children in care than previously reported.

87 Victorian Council of Social Service, COTA Victoria, Victorian Aboriginal Legal Service, Office of the Public Advocate, and Ethnic Communities' Council of Victoria.

88 Victorian Aboriginal Legal Service.

89 COTA Victoria and Seniors Rights Victoria.

90 Voices Against Violence, *Paper One: Summary report and recommendations* (2014), 14 revealed that women with disabilities experience high levels of family violence.

91 Transgender Victoria.

92 Council to Homeless Persons.

93 Women's Homelessness Prevention Project, *Six month report* (September 2014).

94 Seniors Rights Victoria, 'Elder abuse a forgotten election issue' (Media Release, 26 November 2014).

95 Seniors Rights Victoria, *Online Elder Abuse Toolkit* (2014).

96 COTA Victoria and Seniors Rights Victoria.

97 Justice Connect, *Demand for elder abuse legal help set to rise* (14 August 2014): <<http://www.justiceconnect.org.au/demand-for-elder-abuse-legal-help-set-rise>>.

98 Victorian Aboriginal Legal Service and Commissioner for Aboriginal Children and Young People.

99 Andrew Jackomos, 'Listening to our children', *Insight Magazine*, (2014): <<http://insight.vcross.org.au/listening-to-our-children>>.

## Koori Family Violence Police Protocols

Since 2006, reports of family violence by Aboriginal Victorians have almost tripled, reflecting an increased level of confidence to report and seek the support of police services.<sup>100</sup>

However, DJR noted that the need for improvements to police responses to Aboriginal family violence has been identified in a number of community forums and detailed in a range of Victorian Government policy frameworks.

In 2008, DJR provided funding to Victoria Police to undertake a project to address identified issues in the police response to Aboriginal family violence. The Koori Family Violence Police Protocols project was subsequently piloted in Mildura and Darebin. In 2011, the project was expanded to Ballarat, Shepparton and Dandenong.

In 2014, the Koori Family Violence Police Protocols were launched as a partnership between Victoria Police, DJR, and the Aboriginal Family Violence Prevention & Legal Service Victoria (FVPLS). FVPLS noted the initiative 'forges relationships between police, communities and service providers in order to build Aboriginal people's trust and confidence in disclosing family violence to police'.<sup>101</sup>

DJR noted the protocols promote a holistic response to all parties involved in a family violence incident, make police aware of local Aboriginal support services, and enable police to make referrals to these services. The protocols also specify that police officers must undertake cultural awareness training and that services should develop and sustain strong partnerships with local organisations.

## Family violence in CALD communities

ECCV commented that people from CALD communities experiencing family violence often feel burdened by an attitude held in the wider community that family violence is more common among CALD groups. This means that people may avoid approaching service providers because they fear perpetuating stereotypes. Therefore, it is important that service providers and the general public understand that family violence is not caused by a person's ethnicity but by people who make an unacceptable choice to be violent.<sup>102</sup>

ECCV is of the view that many mainstream service providers lack cultural competence or awareness of the significant hurdles facing people from CALD backgrounds dealing with family violence. For example, a woman may not leave her partner due to fears of social isolation, economic barriers, or for concerns about her residency status.<sup>103</sup>

### Family Violence Audio Visual Guide – Neighbourhood Justice Centre

The Magistrates' Court observed that making an application for a family violence intervention order can be a complex process, particularly for people from CALD communities. These applicants typically work through the process one question at a time, with the assistance of a telephone interpreter, as the form is only available in written English. This procedural obstacle can have an impact on a person's right to equality and cultural rights under the Charter.

The Neighbourhood Justice Centre, in partnership with the Brotherhood of St Laurence, developed an online audio and text information resource in local community languages. Applicants now have online access to a text and spoken word 'facsimile' of the application form, together with an outline in their home-language, prior to submitting their application to registry staff.

100 Department of Premier and Cabinet, *Victorian Government Aboriginal Affairs Report 2013* (2014), 48.

101 Aboriginal Family Violence Prevention & Legal Service Victoria, *FVPLSS Victoria: Standing strong in 2014* (2014).

102 Ethnic Communities' Council of Victoria, *Women Surviving Violence: Cultural Competence in Critical Services* (2013), 13.

103 InTouch, Multicultural Centre Against Violence, *Barriers to the justice system faced by CALD women experiencing family violence* (2010), 17.

# Chapter 2: The Charter in public decision-making and services

Public authorities must consider human rights when they deliver services, make decisions, develop policies and create laws.

Section 38 of the Charter requires public authorities to act compatibly with human rights by providing that it is unlawful to:

- act in a way that is incompatible with a human right
- in making a decision, to fail to give proper consideration to a relevant human right.

The Charter also recognises that, in some cases, human rights have to be limited or balanced with other rights. However, a public authority may only limit a right if the limitation is lawful, reasonable and proportionate.<sup>104</sup>

This chapter profiles some of the ways that public authorities, including state government departments, statutory agencies and local governments, engage with human rights in practice, including in the development, revision or implementation of policies, procedures and practices.<sup>105</sup> It also considers the work of statutory agencies that provide oversight of the operations of government, and human rights education and training by public authorities.

## Who is a public authority under the Charter?

- A public official within the meaning of the *Public Administration Act 2004* (such as a public servant employed in a department or agency)
- A body established by a statutory provision that has functions of a public nature (such as VicRoads or WorkSafe)
- A body whose functions are, or include, functions of a public nature, when it is exercising those functions on behalf of the state or a public authority (such as an organisation contracted by the state government to deliver disability services)
- Victoria Police
- Courts and tribunals, and parliamentary committee members, when they are acting in an administrative capacity
- Local councils, councillors and council staff
- Government ministers
- Any entity declared by government regulations to be a public authority.

<sup>104</sup> *Charter of Human Rights and Responsibilities Act* (Vic) s 7(2).

<sup>105</sup> Appendix A includes a full list of the public authorities consulted for this report.



# Human rights in policies, procedures and practices

After eight years of working with the Charter, Victorian public authorities reported an ongoing commitment to making human rights part of everyday business. Public authorities continue to promote and protect human rights by using the Charter to inform new or revised policies and procedures, displaying posters about the Charter in the workplace, and including information about the Charter on their websites. This can help foster a human rights culture in the work of public authorities.

In some cases, public authorities embed the Charter and human rights in business plans and corporate plans. For example, DJR's Koori Justice Unit Business Plan 2014/2015 states that its vision is to be:

a Koori community, as part of the broader Victorian community, living free from racism and discrimination, enjoying the same access to human, civil and legal rights, and experiencing the same justice outcomes through a justice system free of inequalities.

Some public authorities also demonstrated that the Charter is an integral tool to improve decision-making and to assist staff to act compatibly with human rights:

- Victoria Police used its human rights impact assessment tool to ensure that a program for managing recidivist alcohol offenders was human rights compliant by taking a therapeutic and multi-disciplinary approach to the program, rather than simply a criminal justice focused approach.
- Disability Services updated its Managing Performance and Conduct policy to raise awareness of the Charter when managing discipline processes.
- At each team meeting in Inner Gippsland, Youth Justice discusses one human right, what it means and how it applies in practice. Youth Justice reported that this is a 'great way to promote and embed human rights awareness in practice.'
- Charter objectives form part of DHHS' 2013/2014 staff performance plans. Staff are required to demonstrate an understanding of their obligations under the Charter, and provide evidence of the application of the Charter to their work.
- Community Correctional Services in the South East Metropolitan region ensures that human rights are taken into account in developing appropriate community work sites. Each

program is designed to ensure inclusivity and give offenders the opportunity to successfully participate in and complete community work. Programs specifically targeting diverse offender groups include for example, women's programs that provide flexibility with child care responsibilities.

- The Children's Court and the Magistrates' Court incorporated the Charter into their client service charters.
- The former Department of Transport, Planning and Local Infrastructure (DTPLI) published a human rights intranet article as part of a series of articles highlighting the seven standards in the VPS Code of Conduct. The article outlined how public sector employees can demonstrate a commitment to human rights by making decisions and providing advice that is consistent with human rights, and by implementing and protecting human rights.

## Promoting diversity and inclusion

### Anzac Centenary – supporting diversity

The Department of Premier and Cabinet's (DPC) Veterans' Branch commemorates and supports veterans in Victoria through a range of initiatives that promote understanding of the service and sacrifices tendered by veterans in war and peace.

In preparing for the Anzac Centenary, Veterans' Branch ensured that citizens from non-Christian backgrounds felt able and encouraged to participate in the remembrance activities. For example, the Anzac Centenary Information and Education pack contains a booklet on how to conduct your own commemorative service which specifically directs people to have regard to the diversity of Victoria's population.

### Recognising Aboriginal soldiers

Working closely with the Office of Aboriginal Affairs Victoria, the Anzac Centenary program supports research to identify Victorian soldiers who were of Aboriginal background, but whose identity has been obscured in history. The program also supports the presentation of the play *Black Diggers* at the Victorian Arts Centre, to ensure that the unique experience of Aboriginal Australians in the First World War is better understood.

### New diversity and inclusion strategies

In 2014, the former DTPLI and Department of Environment and Primary Industries (DEPI) developed operational drafts of diversity and inclusion strategies. Both strategies address how services, policies and programs will be delivered in a way that is inclusive of all population groups including people from CALD communities, Aboriginal people, people with disabilities, youth and mature age workers, transgender people, and LGBTI people.

Both drafts provided the strategic direction for diversity and inclusion in the operations of the departments. The strategies included action plans which identified data collection, reporting and specific performance indicators. Regular reporting is also required to government on CALD communities, Aboriginal people, and people with disabilities.

### **LGBTI Victorians**

The former Department of Health supported the work of the LGBTI Health and Wellbeing Ministerial Advisory Committee. The Committee recognised that members of the LGBTI community experience significantly higher ill-health compared with the general population. This can be attributed to the discrimination and stigma members of the community face in their daily lives, including in interactions with the health system.

In 2014, the Department of Health consulted with the Victorian LGBTI community and health sector to better understand the health and wellbeing issues experienced by LGBTI people. The consultation process informed the development of the department's LGBTI Health and Wellbeing Action Plan, and a background paper on transgender and gender diverse health and wellbeing.

Victoria Police reported that it made a formal and sincere apology for the Tasty Nightclub raid incident that occurred 20 years ago. Victoria Police consulted extensively with LGBTI community leaders to develop an appropriate and acceptable apology. Members of the community present at the raid attended the apology, along with other prominent LGBTI community advocates, police officers and public service staff. LGBTI and mainstream media was engaged to ensure the apology was received across the community at large.

### **Refugee and asylum seeker health and wellbeing**

In 2014, the former Department of Health launched its new Victorian Refugee and Asylum Seeker Health Action Plan 2014–2018. The plan outlines Victoria's long-term strategic vision for how the health system can best meet the health and wellbeing needs of refugees and asylum seekers.

The plan has five priority actions: accessibility, expertise in refugee health, service coordination, cultural responsiveness, and health literacy and communication. These priority actions will help ensure all refugees and asylum seekers receive healthcare in the right setting, at the right time, regardless of how they arrived in Victoria.

### **Embracing cultural diversity**

*The Victorian Government is committed to protecting the cultural rights of all Victorians*

*– Department of Premier and Cabinet*

The Magistrates' Court Support and Diversion Services developed a Cultural Diversity Action Plan to ensure that cultural rights are respected.

### **African Australian Leadership Development Program**

In 2014, the Office of Multicultural Affairs and Citizenship (OMAC) funded the African Think Tank and Leadership Victoria to deliver the African Leadership Development Program to 30 participants with diverse backgrounds from the African Australian Community. The comprehensive leadership program included collaborative community projects, a focus on peer support and networking, and a mentoring program. The program develops the leadership skills of the African Australian community to improve their ability to represent their community in public affairs.

### **Unity through partnership (UTP) grants**

The UTP grants program funds major multicultural festivals and events that foster cross-cultural connections, showcase the vibrancy of Victorian multiculturalism, and promote awareness and acceptance of racial and religious diversity. The UTP grants program, which was audited in 2014 to identify opportunities for greater compliance with Charter rights, encourages the participation of the whole community in celebrating and valuing cultural diversity, while supporting Victoria's diverse multicultural communities to maintain many distinct cultures, religions and languages.

### **Development of a prohibited name policy**

Births, Deaths and Marriages (BDM) is currently reviewing its policy on prohibited names that allows BDM to refuse to register a name that falls within the definition of a prohibited name under the *Births, Deaths and Marriages Registration Act 1996*.

BDM reported that it is actively considering Charter rights in the development of the policy 'to ensure that the policy strikes the right balance in protecting human rights in the context of the Act'. Those rights include freedom of religion, freedom of expression, protection of families and children, and cultural rights. The draft policy notes that in deciding whether to refuse to register a name, the Registrar may consider the Charter, including but not limited to, considerations of cultural or religious reasons for choosing a name.

### **Coroner's Court examples**

A coroner made a non-publication order after a family asserted that the name of the deceased should be de-identified on cultural and religious grounds.

Following an appeal from a coroner's decision, the Supreme Court directed that no autopsy be performed. Part of the objection raised religious grounds.

## Update on Equality is Not the Same

*We want to support all our police members and employees to be good decision makers, and to deliver a quality service that protects human rights, enables social cohesion and values diversity.*

– Ken Lay<sup>106</sup>

In late 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.

As part of the development of the report, Victoria Police reviewed its field contact policies and cultural and community education. It also undertook extensive community consultation to better understand community concerns. The resulting report signalled a significant investment in cultural change by Victoria Police.

Stakeholders, including Justice Connect and the Flemington & Kensington Community Legal Centre (FKCLC), welcomed Victoria Police's genuine commitment to community engagement – noting that it was clear that community views were considered and incorporated into the action plan. This reflected an open approach to community feedback and a strong commitment to human rights consistent policing.

### **Year one report**

In December 2014, Victoria Police published its Year One Report on *Equality is not the same*. The report includes progress against the action plan and what more Victoria Police needs to do to achieve its goals.

As part of its Year One commitments, Victoria Police:

1. drafted 'Human Rights, Equity and Diversity Standards' for incorporation into the Victoria Police Policy Manual and Guidelines
2. drafted an Interactions with the Public policy to provide guidance for police on good practice that is non-discriminatory and respectful when engaging with the public, including casual interactions and stops where a person's name and address is requested
3. developed a Cultural, Community and Diversity Education Strategy that sets out an organisation-wide framework for the education, delivery and development of Victoria Police cultural capabilities. Human rights principles, respect and understanding and awareness of diversity are critical features of this strategy
4. developed a human rights and bias training framework to increase the awareness of bias and enhanced decision making in a complex and dynamic policing environment
5. established the Human Rights Strategic Advisory Committee, whose first strategic priority is to develop human rights performance indicators
6. established Community Portfolios to ensure a human rights compliant community engagement process is built into service delivery, practice and response to priority communities (including Aboriginal people, multicultural and multi-faith, LGBTI people, people experiencing mental health issues, older people, youth, and people with disabilities).

Justice Connect commented that it is important that Victoria Police's policies are translated into practice – noting that human rights need to be part of the day-to-day work of police officers 'on the ground'. Victoria Police acknowledges that a key challenge is developing easy tools to assist frontline members in the identification and assessment of human rights impacts in their everyday duties.

<sup>106</sup> Victoria Police, *Equality is not the same, Year one report*, foreword (December 2014).

In 2014, Victoria Police also engaged the Commission to conduct a Charter review of its Field Contact Policy. Victoria Police reported that it has amended its Field Contact Policy in line with the Commission's recommendations and created additional policies to provide clear guidance for officers when interacting with the public.

FKCLC commends the establishment of the Human Rights Strategic Advisory Committee, but is concerned that it sometimes fails to provide practical and substantive engagement on issues, with insufficient time for Committee members to review and provide input on important initiatives (such as the receipting trial).

### ***Receipting trial***

FKCLC has concerns about the implementation of the receipting trial that commenced in 2015. Of particular concern is Victoria Police's decision not to collect data on ethnicity, which it believes is critical to ensure that police act with transparency when engaging the public.

FKCLC also considers that the trial should be conducted for a minimum of 12 months, independent experts should be engaged to ensure that the right information is collected, the trial should be extended to stops by protective services officers, and data collected from the trial should be subject to independent review and reporting.

Victoria Police reported that the purpose of the Receipting Proof of Concept (RPOC) is to design and test a process to provide a person with a tangible record of their interaction with police and PSOs as part of a public contact.

In relation to the collection of data on ethnicity, Victoria Police noted that stakeholder discussions highlighted the complexities associated with this task, due in part to the subjective and changing nature of ethnic identification. Also, differing perspectives were presented as to whether ethnicity data should be captured or not.

Victoria Police noted that in response to community feedback, including by FKCLC, a 'Reason for Contact' has been included on the receipt. PSOs operating within the RPOC locations have also been included in the proof of concept. Although the proof of concept will be conducted over nine months, the expansion to four sites will greatly assist evaluation by involving a far greater number of police and PSOs and a much larger volume of receipts.

Victoria Police convened a Data Working Group for the purpose of providing advice and recommendations on data collection, compliance, monitoring and reporting about the RPOC and other key areas of data collection, monitoring and reporting as required. Comprised of key internal and external stakeholders, members of the group provided a broad range of perspectives on issues relevant to the accurate and responsible collection and reporting of data.

Given that the objective of the RPOC is to design and test a process to provide a person with a tangible record of their interaction with police and PSOs, Victoria Police considers it important that evaluation is conducted in the context of operational policing practices and considers both organisational and community needs and expectations. The evaluation of the RPOC forms a key action in the third year of the action plan, and therefore needs to be considered with regard to the wider program of work. The evaluation will be informed by information that is collected as part of the RPOC. A public report will be released following the evaluation and this will outline key findings relevant to the RPOC design, implementation and review.

The year ahead is a crucial time to ensure that Victoria Police's action plan – including revision of its field contact policies and development of its receipting trial – is put into practice and addresses original community concerns about discriminatory policing and racial profiling that led to this significant piece of work. It is important that the implementation of the report does not undermine the purpose of the initiative.

## Improving decision-making for older Victorians

### Supportive Discharge Planning Project<sup>107</sup>

The Supportive Discharge Planning Project (SDPP) aims to build the capacity of Victorian health services to improve responses to guardianship-related issues and complex hospital discharge decisions for older Victorians. The Charter was considered in the development of the project.

The SDPP commenced due to concerns raised by clinicians, patients and carers through Seniors Rights Victoria. Those concerns included poor outcomes for older people discharged from hospital, and a lack of support for patient and family rights, autonomy and decision-making, leading to guardianship applications.

The Health Services Guardianship Liaison Officer (HSGLO) at the Office of the Public Advocate is funded for two years by DHHS to coordinate the project. The project aims to help hospitals:

- improve decision-making processes to support the best use of guardianship applications
- better manage decision-making processes to improve discharge options and timelines
- make timely decisions for older people with complex discharge planning needs with the support of resources developed by the HSGLO.

## Women in leadership

In 2014, the Secretary and senior executives of the former DEPI announced a new initiative to achieve a better balance of women in leadership positions. The *Supporting DEPI Women in Leadership* initiative set a 50 per cent target of women in senior leadership positions – an equal representation of men and women. A gender equity plan was developed to counter barriers along the total employment journey that prevented women from aspiring to, attaining and excelling in leadership positions. Three areas were identified as a focus:

1. to review systems, including recruitment and appointment
2. to build advocacy for advancing women
3. to develop and support women's skills and abilities.

VicRoads' Strategic Leadership Team signed a Diversity and Inclusion Commitment, with identified targets to increase the representation of women in senior leadership roles over the next three years.

<sup>107</sup> Office of the Public Advocate, Supportive Discharge Planning Project, *HSGLO project update* (January 2015).

## Aboriginal Victorians

In 2014, several public authorities developed Aboriginal inclusion plans.<sup>108</sup> Department of Treasury and Finance (DTF) reported that the development of its Aboriginal employment and inclusion action plan demonstrated a commitment to increasing the representation of Aboriginal people in its workforce – including a commitment to increasing employment opportunities, raising awareness and DTF's role in government and the community. DTF is confident that by implementing the actions in this strategy it will promote a greater understanding and awareness of issues faced by Aboriginal Victorians, leading to a more inclusive workplace.

The former DTPLI, in consultation with Aboriginal community members, developed an Aboriginal Inclusion Action Plan that committed the department to working in partnership with Aboriginal people and communities to drive improved inclusion and access to services. The plan promoted human rights through events aligned with key dates of significance to the Aboriginal community including Reconciliation Week.

### Meerreeng Wanga Aboriginal Inclusion Plan 2014–2019

In May 2014, the former DEPI launched its Aboriginal Inclusion Plan during Reconciliation Week. The plan identified three long-term outcomes to increase the involvement of Aboriginal Victorians in land, water and natural resources management, and in food and fibre industries:

- to improve recognition of Aboriginal cultural and customary interests in land, water and natural resources
- to contribute to development and growth in Aboriginal natural resource management and primary industries businesses
- to increase access by Aboriginal Australians to training and employment in natural resource management, primary industries and the department.

As part of the plan, the former DEPI undertook the following actions:

<sup>108</sup> These include, for example, the Department of Treasury and Finance, the Department of Environment, Land, Water and Planning, the former Department of Transport, Planning and Local Infrastructure, and the former Department of State Development, Business and Innovation.

- An Acknowledgement of and Welcome to Country guideline was endorsed by the senior executive and incorporated into the department's business rules. The guideline provides staff with information on when and how an acknowledgement of country or a welcome to country should be conducted.
- The 'Mildura Bark Canoe Project', a week-long program for 25 year 9 and year 10 Aboriginal students to work on country. The project allowed students to gain first-hand experience of traditional resources use by constructing a traditional bark canoe. Through this activity, students learnt about education and employment opportunities in natural resources management and primary industries.

As the result of machinery of government changes, DELWP and the Department of Economic Development, Jobs, Transport and Resources (DEDJTR) have committed to delivering the outcomes from this plan over the next 12 months, while also developing plans for the new departments.

In 2014, DHHS undertook a number of activities to ensure that the rights of Aboriginal Victorians are recognised and met, including:

- the Wirrigirri (Messenger) program, with volunteer messengers across the department undertaking activities in their respective division or region to raise awareness, knowledge and respect for Aboriginal history and culture
- Aboriginal cultural awareness training
- presentations at department orientations about the importance of consulting with and forging strong relationships with Aboriginal people and program areas
- guidance on the correct terminology to use when referring to Aboriginal people in the department's writing style guide
- exceeding the Department of Health's 1.5% target of Aboriginal staff
- regular consultation with the Victorian Aboriginal Community Controlled Health Organisation, Aboriginal community controlled health organisations, and the Victorian Expert Panel on Aboriginal Health.

The Registry of Births, Deaths and Marriages (BDM) reported that significant research is being undertaken on the difficulties some Aboriginal people in Victoria have encountered in registering births and obtaining a birth certificate. These people may face difficulties later in life accessing proof of identity documentation, which is essential to enjoying the right to recognition as a person before the law and in exercising the right to vote and participate in public life.

BDM is implementing an engagement strategy to promote Aboriginal birth registration. This has included BDM's participation in events in 2014 such as Welcome Baby to Country ceremonies to promote and support birth registration.

### **Report Racism – new initiative to encourage the reporting of racism**

In an initiative to encourage the reporting of racism, the Commission has partnered with the Victorian Aboriginal Legal Service (VALS) and Victoria Police to pilot a safe mechanism for the reporting of racism. Report Racism is being trialled in Northern Melbourne (Cities of Yarra, Darebin and Whittlesea) and Shepparton.

This is Australia's first ever third-party reporting mechanism for the Aboriginal community. Victims, witnesses and third parties can report racism online, by phone, or at local community organisations instead of directly to police or the Commission. Reports may be anonymous.

Reports may relate to any kind of racism, including violence, graffiti, harassment, racially motivated crime, racial abuse at sporting events, refusal of or bad service, discrimination at work or school. Reports can also be made about police treatment.

Once a report is made, a person can discuss their options with the Commission, including referring the matter to Victoria Police for investigation.

## Improving outcomes for Victorians with disabilities

### Case Study

#### Using the Charter to advocate for appropriate housing<sup>109</sup>

A client who was aged in her 40s and had an acquired brain injury was on a waiting list for more than eight years for a transfer to modified public housing. DHHS originally placed her in a facility that had been converted into bedsit accommodation.

Many of the residents at the facility were elderly, which made it unsuitable for a younger woman with an acquired brain injury. The bedsit was very small and there was not enough space for her to perform an exercise program to alleviate her disability. This exacerbated her medical condition.

The woman's advocate argued that DHHS, as a public authority, had an obligation to give proper consideration to the right to equality under the Charter and not to discriminate against the client in its decision about where to place her. The department subsequently found her a more suitable place in a modified, accessible, ground-floor detached residence with no stairs.

### Improving accessibility

Parks Victoria provided specialised wheelchairs for visitors with disabilities, including:

- An all-terrain wheelchair, called a TrailRider, at the Great Otway National Park (NP), in partnership with the Colac Otway Shire and the Alpine NP (managed by the Alpine Shire)
- A children's beach wheelchair was purchased in partnership with the Mornington Peninsula Shire. This wheelchair which is managed by OzChild makes it possible for children with physical disabilities to access the many park and shire managed beaches in the Mornington Peninsula
- A children's beach wheelchair for Coolart Wetlands and Homestead. The wheelchair makes it possible for children with disabilities attending the bush kinder in Coolart to participate in beach and bush-based kinder activities.

During a major refurbishment of the Accident Compensation Conciliation Service's (ACCS) office, the ACCS provided:

- a new dual-height reception counter so that people with wheelchairs can access the counter
- a new accessible toilet in the public area
- adjustable height desks, dual-height utility tables and wide office corridors to ensure people with wheelchairs are able to work at ACCS
- a new hearing loop in the public reception area
- two bariatric chairs for morbidly obese people – these chairs are designed to seat people weighing up to 300kg and are made available to clients.

### Making courts and tribunals more accessible

In 2014, VCAT undertook a major refurbishment of its premises, including a review of the acoustic performance of hearing rooms, introduction of speech reinforcement speakers and a review of its hearing augmentation systems. As a consequence of the building refurbishment, VCAT is undertaking a review of the signage relating to all available hearing augmentation systems.

VCAT is also reviewing its application forms so that people with special needs have adequate opportunity to inform VCAT of any special requirements. Staff and Tribunal members will also receive education and training on the hearing augmentation systems and the requirements of Tribunal users with special needs.

The Broadmeadows Children's Court, which is currently under construction, engaged a Disability Discrimination Act (DDA) consultant, and building surveyors to undertake a DDA assessment.

DHHS is currently translating the Australian Charter of Healthcare Rights in Victoria (ACHRV) into Auslan to provide in video format. The ACHRV describes and promotes the rights of patients, consumers and family members using the Victorian healthcare system, and is aligned with the Charter.

<sup>109</sup> Case study supplied by Disability Justice Advocacy.

## The journey to public transport accessibility

Public Transport Victoria (PTV) reported it has continued to improve access to public transport for people with disabilities in Victoria. PTV seeks to incorporate Charter rights and responsibilities into all aspects of public transport service delivery.

PTV provides public transport services through various operators, including Metro Trains, Yarra Trams and V/Line. Service delivery agreements require each operator to comply with the Charter as if it were a public body. Each operator has developed an Accessibility Action Plan outlining how it will comply with its legal responsibilities and broader objectives to achieve accessibility for all passengers.

New and continued projects to improve accessibility in 2014 included:

- raising boarding platforms to assist wheelchair and scooter passengers to board trains independently
- upgrading access paths, ramps, platforms and installing tactile ground surface indicators
- increasing the number and availability of accessible toilets and metropolitan railway stations
- installing passenger information displays at a number of metropolitan and regional railway stations
- improving the accessibility of existing bus routes by upgrading bus stops to meet requirements in the Disability Standards for Accessible Public Transport
- major station redevelopments at Springvale, Mitcham and Footscray incorporating accessibility features such as tactile ground surface indicators, shelters, seating and passenger information
- the continued rollout of raised boarding platforms to assist wheelchair and scooter passengers to board trains independently. Raised Boarding Platforms are located at Flinders Street, Box Hill, Newport, Mooroolbark, Boronia and Carrum, with another 28 locations to have the platforms installed by June 2015

- the continued purchase and rollout of low-floor buses and trams (17 trams are currently in operation with a total of 50 to be delivered by 2018)
- upgrading Route 96 through the construction of level access stops and the rollout of new trams that will make it the first fully accessible tram route in Melbourne.

PTV also reported it continues to actively engage with a range of stakeholders – including people with disabilities, mobility restrictions and older people – about ways to improve public transport accessibility.

## Supporting decision-making

The United Nations Convention on the Rights of Persons with a Disability recognises that people with disabilities are entitled to enjoy legal capacity on an equal basis with others. It obliges states to take appropriate measures to provide support for people with disabilities as required to exercise their legal capacity. Supported decision-making is also recognised in Victorian laws such as the new *Powers of Attorney Act 2014* that will come into force in September this year.

The Office of the Public Advocate is piloting a supported decision-making project to enable people with impaired decision-making to exercise their rights and make choices about how they live. The project will train and provide ongoing support to volunteers to support adults with cognitive impairments to make decisions relating to accommodation, lifestyle or health.

Supported decision-making enables people with disabilities to exercise legal capacity to the greatest extent possible. The pilot project aims to establish an effective model to implement supported decision-making in practice.

## Supported residential services

Following the commencement of the *Supported Residential Services (Private Proprietors) Act 2010* in July 2012 – which included overarching principles consistent with the Charter – DHHS has focused on providing education and guidance to SRS proprietors and their staff to help them implement practices that reflect the principles.

New training modules are presented with introductory statements about the rights of residents being the same as other members of the community, dignity of risk and the right to make decisions about their own lives. The training covers practical strategies on how to support residents with complex support needs to exercise choice.



## Case Studies

### A human rights approach to disability services

DHHS reported that the Inner Gippsland Area Disability Services Case Management Team provided support and advocacy to ensure that three brothers with disabilities were able to remain living in their own home and local community following the death of their mother. The care team considered the rights of the family to remain together and to not enter the child protection system. They worked with extended family to provide a package of support for the family that was the least restrictive of their rights and allowed the family to remain engaged with their local supports.

DHHS also reported that a client of Disability Services was assisted to communicate his preferences and choices to the department, and expressed a desire to have the restrictive practices in place significantly reduced. The department worked intensively with the client to reduce the amount of intervention in his life and promote his independence and human rights. The client was housed in a public housing property with appropriate supports in place to ensure his wellbeing and to sustain his tenancy. DHHS reported that with more control over his life, the client's disability impacts him less and his quality of life has improved.

94 capital projects will have been allocated funding across 16 mental health services to improve the safety of women and transgender patients in care in psychiatric facilities, and in some youth and aged facilities, through defined female areas, bedrooms able to be locked by the consumer, designated female bathrooms and other improvements to facilities.

'Building gender-sensitive and safe practice' training has been delivered to 74 practice leaders, and each service has developed an implementation plan outlining how they will deliver the training program to the adult IPU settings, undertake practice, system, policy and environmental changes to comply with departmental guidelines, and make improvements for gender sensitive care.

## Case Study

### Holistic support for housing tenant

DHHS reported that using its Service Connect model, it supported a person with chronic mental health issues and long-term substance abuse who was living in departmental housing. Services Connect applies a 'people and place' approach to develop an integrated, holistic response to an individual and their family's needs.

The client had a history of property damage and rental arrears. He had limited contact with his children due to family violence. The client's key worker engaged all relevant service providers to develop a coordinated plan to prioritise and address his needs. A medication review and planned hospital admission stabilised the client's mental health issues, which then enabled his other needs to be addressed.

The client was supported to: address his angry behaviour which was isolating him from informal and formal supports; reduce high risk substance abuse and emergency visits; reconnect with his estranged mother; re-engage with child protection workers; and stabilise his accommodation and finances.

## Improving outcomes for people in mental health facilities

### Reducing Restrictive Interventions initiative

DHHS reported that a Reducing Restrictive Interventions (RRI) initiative was undertaken to support mental health services to implement Victoria's *Mental Health Act 2014* and to support services to comply with the Charter. The aim of the initiative was to reduce, and where possible eliminate, the use of restrictive interventions such as seclusion and restraint in mental health services.

### Safety of Women in Mental Health Care

DHHS reported that the safety of women patients in psychiatric facilities is being enhanced through more than \$6.1 million in Victorian Government funding for a range of capital improvements. The government has also directed health services to make women's safety a priority in mental health services.

The Victorian Mental Illness Awareness Council reported that the Charter is a useful advocacy tool for patients receiving involuntary in-patient treatment. For example, in 2014, an advocate became aware that a psychiatrist at a mental health facility was denying an involuntary patient access to family visits because at an earlier visit, a family member had given them cigarettes. The advocate raised the patient's Charter rights with the psychiatrist, who subsequently allowed family visits to resume.

## Supporting the rights of Victorian students

In 2014, the Department of Education and Training (DET) developed a number of new policies and information sheets that consider the human rights of students in Victorian government schools. These include:

- a significantly revised policy on Special Religious Instruction (SRI) that sets out clear guidelines and responsibilities for how SRI is delivered in Victorian government schools. The Charter was instrumental in developing aspects of the policy that intersected with the religious freedoms of students
- a policy to support students' gender identity and intersex students. DET reported that consideration of students' human rights informed and shaped the development of the policy, which is due to be finalised in 2015
- two new information sheets to support school principals in decision-making consistent with Charter obligations. The information sheets provide guidance on 'Gender identity, Intersex Students and Discrimination Law', and 'Student Requests to Pray at School'.

## The right to a fair hearing in practice

The Taxi Services Commission (TSC) reported that it created an internal review function providing an independent merits review of decisions made about disciplinary matters and temporary and/or permanent exclusion from the taxi and hire car industry. From September 2014, these decisions are now subject to independent internal review on application.

The Offence Management Unit (OMU) at the Department of Economic Development, Jobs, Transport and Resources is responsible for prosecuting offences under laws such as the *Fisheries Act 1995*. OMU prosecutors apply the Charter in the assessment, determination and management of matters that the OMU administers. By applying the policy on prosecutorial ethics (which requires prosecutors to act independently and assist the court to achieve justice), OMU

reported that it acts consistently with the right to a fair hearing. OMU also acts consistently with Charter rights in criminal proceedings by conducting prosecutions within statutory timeframes and ensuring all charges are properly described and detailed.

## Initiatives in courts and tribunals

The right to a fair hearing, along with related procedural rights to equal protection before the law without discrimination, the right to be brought promptly before a court on arrest and the right to be tried without reasonable delay, are relevant to the administration of the courts. The Supreme Court said these rights inform the administrative operation of the Supreme Court at a fundamental level.

### Court Services Victoria

Court Services Victoria (CSV) is a new statutory body that started operating on 1 July 2014. It provides administrative services and facilities to support the performance of the judicial, quasi-judicial and administrative functions of the Victorian courts and the Victorian Civil and Administrative Tribunal. As a public authority, CSV is taking the Charter into account in the review of its policies.

The establishment of CSV further supports the right to a fair and public hearing by a competent, independent and impartial court. The Honourable Chief Justice Warren commented that the establishment of CSV was a significant achievement in reinforcing the independence of the Supreme Court.

The Supreme Court has responded to the ongoing challenge of timely access to the Court by adapting its processes. The Court has adopted the International Framework of Court Excellence as its management model, a key value of which is timeliness. In 2014, 24-hour access to the Court for urgent applications in the Practice Court was utilised heavily. To facilitate timely case management more generally, the Court developed a new Commercial Court structure and registry and a new specialist list structure in the Common Law Division, and the Criminal Division changed its process to hold post-committal directions within 24 hours of concluded committals.

The County Court responded to an increasing number of self-represented litigants by introducing a number of initiatives to ensure people have the right to a fair hearing along with rights in criminal proceedings and the right to equality. These include:

- a permanent Self-Represented Litigant Coordinator and a room with accessible computers and telephones where people can meet privately with the coordinator
- fact sheets for self-represented litigants addressing common questions
- a short video for self-represented litigants in civil proceedings.

At the time of writing, the Self-Represented Litigant Coordinator is working with the Law Institute of Victoria and Justice Connect to improve pro-bono assistance to self-represented litigants in the County Court.

Public access to court proceedings and the decisions of courts and tribunals is an important part of the right to a fair hearing. The Supreme Court improved public access to its decisions by increasing its social media use and introducing real time audio and web streaming of significant decisions and sentencing.

## Protecting privacy

### New Commissioner for Privacy and Data Protection

In September 2014, the Commissioner for Privacy and Data Protection (CPDP) was established to strengthen the protection of information held by the Victorian public sector, including personal information.

The new Privacy and Data Protection Act 2014 (PDP Act):

- preserves the Information Privacy Principles (IPPs), which regulate the way personal information is handled in the public sector
- introduces new mechanisms – public interest determinations (PIDs) and information usage arrangements (IUAs) – to provide flexibility in the application of some IPPs and, in the case of IUAs, information handling provisions of other Acts. The Commissioner may only approve a PID or issue a certificate for an IUA where he is satisfied there is a substantial public interest in doing so

- empowers the Commissioner to certify that a specified act or practice of an organisation is consistent with an IPP, approved code of practice, or an information handling provision in another Act
- empowers the Commissioner to develop, implement and oversee a comprehensive protective data security framework in Victoria.

In 2013/14, CPDP noted that enquiry and complaint statistics from its predecessor, Privacy Victoria, revealed that people have significant concerns about the way their personal information is used and disclosed, as well as the security of their personal information.<sup>110</sup> Surveillance and tracking of individuals through electronic devices also continues to be a significant concern, which appears to coincide with the escalating use of CCTV and GPS technology. CPDP noted that:

These and other surveillance and tracking technologies, such as smart phones used to covertly record conversations, can undermine the notion of anonymity and a right to privacy free from government and corporate interference. Surveillance and tracking technologies also have significant implications for freedom of thought, conscience, religion and belief, freedom of expression, and freedom of association.

Many enquiries received by Privacy Victoria during 2013/14 related to the privacy of property.<sup>111</sup> For example, 58 enquiries concerned the practice of real estate agents and landlords photographing or filming rental properties for the purpose of sale and rental inspections. This figure is nearly a 300% increase on the number of enquiries received about this issue in the previous year. These practices can undermine the right to privacy, and the right to protect families and children when information about their living conditions and arrangements might be exposed.

110 Privacy Victoria, *Annual Report 2013-14*, 11 and 14. These complaints were made under the previous *Information Privacy Act 2000* (Vic).

111 Privacy Victoria, *Annual Report 2013-14*, 11.

## Considering the right to privacy in public services

In 2014, it was alleged that the Department of Human Services had breached the privacy and dignity of a client residing at a Disability Accommodation Service because photos had been taken of the client's injuries and emailed to other staff. An investigation confirmed that the photos were appropriately sent to authorised staff only and that the photos were securely stored. However, the investigation also established that the method of taking the photos was not in accordance with the client's rights under the Charter or the *Disability Act 2006*. An apology was provided, and a review and advice to staff on procedures for taking photos was undertaken.

The Registry of Births, Deaths and Marriages (BDM) is developing a proposed agreement to share Victorian death data with the Queensland registry. The Queensland registry has established a coordinating registry for collating death data from each jurisdiction and determining applications by researchers and government departments to access the data. In the development of an intergovernmental agreement to share Victorian death data, BDM carefully considered the privacy protections in the PDP Act 2014 and the *Health Records Act 2001* and consulted the Office of the Health Services Commissioner (OHSC) and the CPDP.

The Victorian Government Reporting Service implemented tools into its electronic transcript management system that utilise pseudonyms – as directed by the courts – to protect the identities of victims, the accused and witnesses and to allow for the safe publication of sentencing remarks.

In 2014, the County Court also introduced a Pseudonym and Anonymisation Protocol for sexual offence cases. The purpose of the protocol is to protect the identity of victims in sexual offence cases and to facilitate the safe publication of sentencing remarks. This helps protect a victim's right to privacy.

From 2014, the Taxi Services Commission (TSC) had a new statutory mandate to publish the names and addresses of taxi and hire car industry participants on a public register. The TSC received 879 requests from participants to have their details withheld from inclusion in the register on the basis of privacy concerns. A number of these requests specifically referred to the Charter right to privacy. The TSC reported that it developed robust processes and policies for considering the requests, including consideration of Charter principles.

## Tools to improve compliance and lead to better outcomes

### Charter guide for Victorian public sector workers

Victorian public sector employees must understand and comply with the Charter in their work. In 2014, the Commission launched *The Charter of Human Rights and Responsibilities: A guide for Victorian public sector workers*.<sup>112</sup> The guide is a general introduction to the Charter for employees of Victorian local government and state government departments and agencies. It aims to help public sector employees understand and comply with the Charter in their work. It provides guidance on how to identify relevant human rights, how to consider them in the decision-making process, and when human rights may be limited.

### Public participation in government decision-making

The Victorian Auditor-General's Office (VAGO) recently published a Better Practice Guide called *Public Participation in Government Decision-making*. The Charter is referenced in the guide as part of the legislative framework that creates the 'mandate' for public participation in the Victorian public sector.

The guide will help ensure involvement of those affected by government decisions in the decision-making process. This reflects the right of every person to participate in the conduct of public affairs. The guide provides a high-level framework for public sector agencies to use when deciding how to involve the public in government decision-making and implementation.

The guide also sets out the principles and elements that VAGO will use to audit the effectiveness and efficiency of public sector engagement. Future audits will identify good practice and areas where improvement is required and will be used to update the guide to ensure that it remains current and useful.

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112 Victorian Equal Opportunity and Human Rights Commission, *The Charter of Human Rights and Responsibilities, A guide for Victorian public sector workers* (2014).

# Oversight and accountability

In Victoria, a number of statutory agencies provide oversight of the operations of government. Because the Charter does not provide an independent cause of legal action, these agencies often hear about people's human rights concerns.

## In 2013/14:

The **Health Services Commissioner** reported it received many Charter-related complaints and reported a significant rise in complaints from prisoners. The most common rights identified were the right to life, the right to equality, protection from torture, cruel, inhuman or degrading treatment, and the right to privacy.<sup>113</sup>

The main issues raised with the **Disability Services Commissioner** were about service delivery and quality standards, followed by communication or relationship issues (including insufficient communication from service providers).<sup>114</sup>

The **Mental Health Complaints Commissioner** identified that a significant number of complaints concern treatment, medication and communication of information.

The most common complaints to the **Victorian Ombudsman** were from people in prisons and youth justice facilities. The most common rights raised in these environments were the right to humane treatment when deprived of liberty, property right, the right to liberty and security of person, and cultural rights.

The main complaints to the former **Victorian Privacy Commissioner** were about the way personal information is used and disclosed, closely followed by concerns about the security of personal information.<sup>115</sup>

The most common complaints to the **Independent Broad-based Anti-corruption Commission** with the potential to involve a breach of a human rights are about people's dealings with police officers and protective services officers while in custody, under arrest or in the care of officers.

The most common attribute of complaint to the **Victorian Equal Opportunity and Human Rights Commission** was disability discrimination, followed by race, employment activity, sexual harassment, sex, age, physical features, carer status and parental status.<sup>116</sup>

In 2014, two new oversight bodies were established that consider complaints about the human rights of people in Victoria:

1. The Mental Health Complaints Commissioner (discussed below)
2. The Commissioner for Privacy and Data Protection (see page 55).

## New Mental Health Complaints Commissioner

The Mental Health Complaints Commissioner (the MHCC) was established by the new *Mental Health Act 2014* and commenced operation on 1 July 2014. The Charter was one of the key drivers for reforming mental health legislation in Victoria, with human rights being central to the work of the MHCC.

The Mental Health Act authorises significant restrictions on a person's rights, such as compulsory treatment and limitations on a person's liberty and freedom of movement. However, the power to limit rights includes an obligation to ensure that any restriction is justified, proportionate and includes effective oversight and safeguards, in line with the objectives of the Act. This is reinforced by the mental health principles in the Act, which include that people receiving mental health services should have their rights, dignity and autonomy respected and promoted.

<sup>113</sup> Office of the Health Services Commissioner, *Annual Report 2014*, 22.

<sup>114</sup> Office of the Disability Services Commissioner, *Annual Report 2013-14*, 19.

<sup>115</sup> Privacy Victoria, *Annual Report 2013-14*, 10, 14.

<sup>116</sup> Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013-14*, 22.

The MHCC is one of the new oversight and safeguard mechanisms established by the Act. The functions of the MHCC include to receive and resolve complaints about public mental health services, to assist services to resolve complaints directly, and to make recommendations for improving mental health services. The MHCC has the power to conduct investigations into a complaint, and to issue compliance notices specifying action to be taken to comply with an undertaking or with the Act.

An example of complaints made to the MHCC that raise human rights issues are where compulsory patients raise concerns about the treatment they are receiving without their consent. The MHCC may assist a person to exercise their rights under the Mental Health Act, including to communicate their views and preferences about treatment, and to obtain a second psychiatric opinion. In response to one complaint, the MHCC obtained a detailed response from the service about the reasons why it was treating the person by injection rather than oral medication, and the service arranged a second psychiatric opinion as requested.

Complaints that raise serious human rights issues are given priority attention by the MHCC. The MHCC considers whether an investigation is required if there is an allegation that raises a breach of the Mental Health Act or the Charter (for example, if a complaint raises the right to humane treatment when deprived of liberty, such as an alleged assault by a staff member in an inpatient setting).

## **The right to privacy – complaints from a person who is not the consumer**

The MHCC reported that the right to privacy has informed its approach to dealing with complaints from a person who is not the consumer.

Under the Mental Health Act, the MHCC can accept a complaint from a person who is acting at the request of the consumer, or has satisfied the Commissioner that they have a genuine interest in the wellbeing of the consumer, if the consumer consents to the complaint being made.

The MHCC can also accept a complaint without obtaining the consent of the consumer if the Commissioner is satisfied that:

- there are special circumstances that warrant the Commissioner accepting the complaint without the consumer's consent
- accepting the complaint will not be detrimental to the wellbeing of the consumer.

The MHCC has adopted the following principles to ensure any interference with a person's privacy is lawful and not arbitrary:

- A consumer should be presumed to have capacity to consent to a complaint being made, and should be supported to make a decision about whether or not to provide consent.
- A consumer has capacity to consent to a complaint being made if the consumer understands what it means to make a complaint to the MHCC and the consequences if the MHCC accepts a complaint.
- Whether there are special circumstances which warrant accepting a complaint without the consent of the consumer needs to be determined on a case-by-case basis having regard to the mental health principles in section 11 of the Mental Health Act and the human rights in the Charter.
- Every effort must be made to involve the consumer in the resolution of the complaint at the earliest appropriate opportunity if the complaint is accepted in circumstances where the consumer is not well enough to provide consent.

## Performance audits

The Victorian Auditor-General's Office undertakes performance audits that assess whether an agency is meeting its aims effectively, using its resources economically and efficiently, and complying with legislation – which can include the Charter.

In 2014, VAGO tabled a number of audits that considered equity in service delivery and services for vulnerable communities.<sup>117</sup>

## Complaint mechanisms

Effective complaint mechanisms can help public authorities improve decision-making and comply with their obligations under the Charter. They can also provide a forum for people to raise concerns about the protection of their human rights when they access government services. This can lead to better outcomes for public authorities and the people who access their services.

In 2014, DJR's Human Rights Unit commenced developing guidelines to further incorporate human rights considerations into existing government complaints mechanisms. The Human Rights Unit intends to consult the Commission and the Victorian Ombudsman about the guidelines in 2015, before distributing the guidelines for managing human rights complaints across government.

Last year, a number of public authorities developed new or revised complaint mechanisms. For example:

- The Office of the Health Services Commissioner (OHSC) introduced a new complaint resolution process to make its service more flexible, accessible and responsive to the Victorian community. The OHSC noted that the development of the new process was influenced by the right to equality for all people in Victoria, including people with disabilities, people from CALD backgrounds, and people with communication difficulties.
- Victoria Police reviewed its complaint process to make sure it was more accessible and structured. In particular, it developed a complaints process map and brochure to be translated into eight priority languages and an Easy English guide. Victoria Police also redesigned its website for easier and clearer communication of information, and revised the information to be provided at key stages of the complaints process.

<sup>117</sup> These include Residential care services for children, Access to education for rural students, Accessibility of mainstream services for Aboriginal Victorians, Access to services for migrants, refugees and asylum seekers, Prisoner transportation, and Mental health strategies for the justice system.

- DET reviewed its parent complaints policy, noting the importance for all staff to be aware of and to comply with obligations under relevant legislation, including the Charter. The revised policy is expected to be published in 2015.
- Since the introduction of penalty fares as a 12 month trial in August 2014, Public Transport Victoria has been responsible for all complaints about issuing a penalty fare. During the first three months, complaint data and customer insights supported fortnightly working group meetings with representatives from public transport operators. Allegations of rude or intimidating behaviour by Authorised Officers are reported to and investigated by the Authorised Officer's employer.

### Examples of complaint resolution

- Adult Migrant Education Services (AMES) conducts a settlement project for migrants and refugees. AMES contacted Consumer Affairs Victoria (CAV) in the North West Metro Area about complaints of discrimination by migrants and refugee groups trying to find suitable rental accommodation. In response, CAV held a workshop to provide real estate agents a better understanding of the issues migrants and refugees encounter. CAV reported that AMES and real estate agents now have a better working relationship and placements appear to be less problematic.
- PTV recently introduced new barrier gates at a railway station. It subsequently received a complaint from a vision-impaired customer who regularly uses her Vision Impaired Travel Pass as a flash pass to move through the barriers. The customer stated she was being discriminated against on the basis of her disability because there were significant delays moving through the barriers. This was because staff were not located at the gates to open them immediately.

In partnership with the operator, a site assessment was undertaken, resulting in proposed solutions for better management of queues, improvements to line of sight from the ticket office, an increase in staffing levels and an introduction on site for the customer to the customer service staff. These actions are still underway.

# Human rights training and education

In 2014, staff training on the Charter and human rights continued to be delivered by public authorities as part of induction or refresher training and/or as part of targeted training. Some public authorities, such as DTF and DET, have a webpage dedicated to human rights or run seminars with a Charter component.

Most human rights training continues to be part of general staff induction processes. This can be face-to-face or part of an online training module, which includes or is dedicated to human rights. Online training modules are often voluntary but public authorities encourage staff to participate (for example, DET encourages all of its staff to complete its online Charter module annually).

In 2014, some public authorities provided targeted training on the Charter, including 'train the trainer' sessions, or developed new human rights initiatives. For example:

- DET developed a Principal Induction Toolkit as a resource for new school principals. The toolkit contains information on the Charter and explains human rights and responsibilities in a school context.
- Victoria Police piloted a human rights and bias training session with officers working in North West metropolitan areas with significant diversity. A key feature of the training was the development of a 'ready reckoner' by the Commission that outlined the 20 Charter rights and was used as a tool to guide police decision-making in high risk scenarios such as arrests and road intercepts.
- The PTV Transport Accessibility Unit continued to deliver an ongoing program called 'Travelling in the shoes of others' to raise staff awareness about the barriers faced by people with disabilities using public transport.
- Victoria Legal Aid developed a compulsory training module on the Charter to educate its lawyers about how the Charter can strengthen their advocacy work.

- DJR's Human Rights Unit collaborated with the Commission to run Charter training for 90 Victorian Public Service graduates. Graduates were given resources such as a 'Think Charter' brochure and information on statements of compatibility.
- DHHS ran a Person Centred Active Support (PCAS)/Charter forum for staff in the Barwon area which stimulated discussion about human rights in practice.
- The Office of Correctional Services developed a research guide for staff, which includes information on human rights and where to find further information.
- The former DEPI identified new minimum standards for the recruitment and training of authorised officers. A key capability that must be demonstrated under the new standards is that authorised officers 'understand and apply the Charter'.



# Chapter 3: The Charter in law-making

Human rights accountability in the law-making process is a fundamental part of the dialogue model in the Charter. A minister tabling a Bill must provide a statement of compatibility, explaining whether and how a Bill is compatible with human rights, and the nature and extent of any incompatibility. This model helps identify possible impacts on rights at the start of the legislative process.

This chapter considers parliamentary scrutiny in 2014. The Commission has observed over many years that the Charter's parliamentary scrutiny mechanism can promote oversight and transparency. Eight years since the introduction of the Charter, parliamentary scrutiny is now a normal part of the legislative process to reflect on the human rights raised by Bills. The eight-year review of the Charter is an opportunity to consider how this model is working and how it may be improved to ensure that Bills promote and protect human rights (see page 5).

## Quick facts

### In 2014:

- 100 Bills were introduced into Parliament
- 124 Bills and statements of compatibility were debated in Parliament
- There were no statements of incompatibility
- There was 1 override declaration.

## Override declarations

In 2014, Victoria's second override declaration was introduced. An override declaration allows the Government to declare that it intends to introduce a law that is incompatible with human rights, provided there are exceptional circumstances to justify it. This signals to courts and public authorities that a law does not need to be interpreted compatibly with human rights and public authorities do not need to act compatibly with human rights when implementing it.

Examples of exceptional circumstances envisaged by the Explanatory Memorandum to the Charter included 'threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria'.

### Victoria's second override declaration: the Corrections Amendment (Parole) Bill 2014

In 2014, the Corrections Amendment (Parole) Bill 2014 led to an amendment to the *Corrections Act 1986* to restrict the capacity of the Parole Board to grant convicted mass murderer Julian Knight parole unless he is 'in imminent danger of dying, or seriously incapacitated'. The Bill explicitly excluded the application of the Charter and the need for the override declaration to be re-enacted after five years.

The override statement in the Minister's second reading speech stated that:

Although the government considers that the Bill is compatible with the Charter, it is possible that a court may take a different view. In this exceptional case, the Charter is being overridden and its application excluded to ensure that the life sentences imposed by the Supreme Court for these egregious crimes are fully or almost fully served and to protect the community from the ongoing risk of serious harm presented by Julian Knight.

SARC commented that 'whether the amendments sought to be made by the Bill constitute grounds for an 'exceptional circumstance' is a matter for Parliament.

SARC noted that although Parliament can pass laws that are incompatible with the Charter, the Bill nonetheless engaged and potentially limited three Charter rights:

1. The right to equality before the law, because the Bill only applied to Knight. SARC noted that European courts have recently supported the principle that all prisoners, including those serving life sentences, should be offered the possibility of release if rehabilitation is achieved
2. The right to protection from cruel, inhuman or degrading punishment, because Knight will remain ineligible for parole at least until he is either close to death or permanently incapacitated
3. The right to have a sentence for a criminal charge decided by an independent court after a fair hearing, because the practical effect of the Bill was to replace the order that Knight would be eligible for parole after 27 years with an order that his sentence not include any parole eligibility date.

In considering whether these rights were reasonably limited, SARC noted that the Statement of Compatibility did not discuss whether there were any less restrictive means reasonably available to achieve the Bill's intended purpose. SARC referred to Parliament the question of whether extending Victoria's existing laws for the continued detention of serious sex offenders otherwise eligible for release to include high risk murderers would be less restrictive on Charter rights due to their 'general terms, provision for regular court review and non-penal character'.

Last year, the Commission commented on Victoria's first override declaration in the Legal Profession Uniform Law Application Bill 2013. We observed that the use of an override declaration for a law to create a national scheme to regulate the legal profession did not relate to a threat to national security or state of emergency.

In parliamentary debate in 2014, opposition members noted that the Bill excluded new authorities from the oversight of the Charter, and expressed the view that this reflected a lack of commitment to a framework of openness and accountability.<sup>118</sup> SARC also questioned whether the override was a reasonable means of achieving the goal of preventing inconsistency in the law's interpretation and implementation<sup>119</sup>.

The Commission considers that resorting to an override should only occur in extreme situations, particularly where there is an evidence-base and urgent serious risk to public security or a state of emergency. Any override should remain constrained by the existing sunset clause that ensures the provision expires no later than five years after it was introduced. In this way, any decision to re-enact the override would be subject to review and public scrutiny.

## Positive law reform

In 2014, a number of important legislative reforms were introduced that help to protect and promote the human rights of people in Victoria.

### Victorian mental health reforms – the Mental Health Bill 2014

The review of Victoria's Mental Health Act has been one of the most significant law reform endeavours in Victoria in recent times. Consultation over six years provided an important opportunity for government, service providers and the community to consider the serious human rights issues in mental health treatment and care.

The new Act takes a significant step forward in protecting the rights of Victorians with psycho-social disabilities, including:

- having as an objective that people receive assessment and treatment in the least restrictive way with the least possible restrictions on human rights and dignity

<sup>118</sup> For example, see Mr Pallas, Legislative Assembly, 19 February 2014, page 398.

<sup>119</sup> SARC Alert Digest No 2. of 2014, page 16.

- setting out a principle that restrictive interventions (bodily restraint and seclusion) may only be used after all reasonable and less restrictive options have been tried or considered and found to be unsuitable
- establishing Victoria's first Mental Health Complaints Commissioner, and the Mental Health Tribunal to exercise oversight and accountability
- providing for a statement of rights to be developed.

The Commission welcomed the placement of human rights at the heart of the new mental health principles. This is essential in a legislative regime that can give service providers extensive control over the most fundamental rights of individuals.

The Department of Health and Human Services (DHHS) observed that the Act:

has significantly changed the way persons with mental illness are receiving compulsory treatment in particular. It has strengthened the focus on individual rights and safeguards in relation to mental health assessment, treatment and care in general. Through increased reporting requirements ... the legislation is driving a reduction in the use of seclusion and restraint in the treatment of compulsory patients. This is in line with the expectations of consumers, carers and the community about contemporary standards and best practice in mental health treatment and support.

During the passage of the Bill through Parliament, a number of important amendments were made to improve human rights protections, including gender identity being added to the list of things that are not mental illness and additional safeguards around the use of electroconvulsive therapy on young people. Some issues remain, which may be addressed by a review of the new Act.<sup>120</sup>

## Other positive reforms

The Powers of Attorney Bill 2014 initiated a number of positive reforms. As explained by DJR:

The bill provided clear duties for attorneys making decisions that seek to enhance the autonomy of principals as far as possible. This includes that the attorney must give appropriate effect to a principal's wishes, decisions must be the least restrictive (a consideration under section 7(2) of the Charter) and requiring attorneys to involve principals in decision-making to the greatest extent possible. The bill also introduced the ability to appoint a 'supportive attorney' for people who still have capacity to make their own decisions but may need assistance in accessing or weighing up information. This option may prevent the need for the appointment of a full substitute decision maker. In these circumstances, the appointment of a supportive attorney is a less restrictive option, and enhances the right to the recognition of the person.

The Sentencing Amendment (Historical Homosexual Convictions Expungement) Bill 2014 will amend the Equal Opportunity Act to prohibit discrimination on the basis of 'expunged homosexual conviction' (a conviction that has been removed from a criminal record). Victoria is the first jurisdiction in Australia to erase unjust criminal convictions for consenting homosexual sex before 1981. This sends an important message that historic discrimination must be undone to the greatest extent possible.

The introduction of the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 reduced the risk of young people involved in the practice of 'sexting' being charged and convicted of possession of child pornography and related offences for sending sexual images of themselves on their mobile phones.

The Bill created exceptions to prevent non-exploitative, consensual sexting between teenagers aged less than 18 years from being a criminal offence. This decreased the risk of children being subjected to the stigma of a criminal conviction and possible registration as sex offenders, which may breach the right to protection of their best interests under section 17(2) of the Charter.

<sup>120</sup> In the second reading speech for the Bill, the government 'committed to a review of the legislation five years after commencement to ensure that Victoria's mental health legislation keeps pace with innovation and clinical best practice developments'.

## Scrutiny of Acts and Regulations Committee

A bipartisan parliamentary committee, the Scrutiny of Acts and Regulations Committee (SARC) provides independent scrutiny of Bills, publishing Charter reports on all new Bills in an Alert Digest during sitting weeks of Parliament. This can help ensure vital bi-partisan analysis of Bills, by identifying all relevant human rights and whether any proposed limitations in a Bill are reasonable.

### Quick facts

#### In 2014:

- SARC identified 16 Bills that it considered were incompatible with Charter rights. When SARC identifies possible incompatibilities, it normally refers questions to the Minister or to Parliament
- House amendments were made to three Bills as a result of questions raised by SARC about human rights issues<sup>121</sup>
- SARC received 15 submissions made about six Bills. 10 of these submissions were in relation to the proposed expansion of move-on laws (see page 65). SARC notes submissions in its Alert Digests and posts public submissions on its website.

Concerns included that:

- SARC generally reports on a bill within two weeks of it being introduced into Parliament – community organisations often do not have the time or resources to prepare a submission to SARC on issues of genuine concern.
- The SARC process needs to be more transparent and set out clear timelines and processes for engagement.
- It is difficult to find out information about proposed Bills, without actively monitoring Parliament.
- SARC does not actively consider submissions in its Alert Digests, despite the fact that drafting submissions takes considerable time and effort.
- Organisations often find it more effective to raise the human rights impacts of Bills by engaging in media advocacy and public campaigning.
- Non-legal NGOs sometimes struggle to engage with Charter issues raised by Bills. Therefore, having time to view an exposure draft would make the process more accessible.

In the Commission's view, it would be useful for SARC to actively consider community submissions on Bills in its Alert Digests. This would enhance SARC's human rights analysis of Bills and the accountability of Parliament.

## Community concerns about the SARC process

A number of community organisations made submissions to SARC on the human rights implications of Bills and statements of compatibility in 2014. However, a number of organisations expressed concern to the Commission that although the SARC process should be a mechanism for human rights accountability and challenge, they have concerns about its effectiveness and utility.

SARC generally does not comment directly on the content of submissions, even when they relate to vital reforms and raise significant human rights issues (for example, the Mental Health Bill 2014 and the Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014).

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<sup>121</sup> Crimes Amendment (Sexual Offences and Other Matters) Bill 2014, Family Violence Protection Amendment Bill 2014, and Sentencing Amendment (Emergency Workers) Bill 2014.

## SARC review of expanded move-on laws<sup>122</sup>

Community organisations raised particular concerns about the SARC review process for the Summary Offences and Sentencing Amendment Bill 2013. In the *2013 Report on the Operation of the Charter of Human Rights and Responsibilities*, the Commission reported on the Bill, which expanded the grounds on which police members and protective services officers could direct a person to move on from a public place in certain circumstances.

The Bill was the subject of significant public debate, which voiced concerns about the erosion of fundamental rights of freedom of assembly, speech and movement. Ten organisations made submissions to SARC, raising concerns about the human rights implications of the Bill. For example, the Law Institute of Victoria cautioned that the legal effect of the Bill would be to make protesting a criminal offence in all but the most symbolic of protests, and the Human Rights Law Centre criticised the Bill's statement of compatibility, noting that it failed to provide evidence-based justification for why measures were necessary or proportionate.

During consultation for this report, the Human Rights Law Centre also noted that the Centre was 'concerned that the SARC review process was not robust and effective and did not result in any amendments to the legislation'. Similar concerns were reflected by other community organisations who were disappointed that significant community concerns about the Bill were not addressed by SARC.

## Federal scrutiny process

The federal system allows for a longer period of scrutiny and community consultation where appropriate. The Federal Parliamentary Joint Committee generally performs its analysis of legislation on the papers, but has held public hearings and private briefings to assist it to consider Bills raising significant human rights issues.<sup>123</sup> The Committee observed that this has provided an avenue to place evidence about human rights issues in bills on the public record. Some stakeholders have noted that the federal process allows for more engagement from community and Ministers.

### Public consultation

Public consultation during the development of significant legislative proposals can help identify and consider potential human rights impacts at an early stage of the development of a law. It also helps ensure that it takes into account the views of people who may be directly affected by the proposal, as well as advocates and experts.

A number of departments reported they engaged in public consultation regarding proposed legislation. However, for the most part, no human rights issues were raised in these processes. Positive examples of public consultation for legislative proposals are considered on the next page. These examples considered the views of a broad range of stakeholders and the rights of the people who may be affected.

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122 Note: *The Summary Offences Amendment (Move-on Laws) Act 2015* repealed certain amendments made to the *Summary Offences Act 1966* in 2014 in relation to move-on powers.

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123 Parliamentary Joint Committee on Human Rights, *Annual Report 2012-13*, 4.

## Case Studies

### Healthcare Quality Commissioner Bill

DHHS reported that the Healthcare Quality Commissioner Bill 2014 was the product of significant policy development and implemented the recommendations of an independent Expert Panel. The Expert Panel reviewed existing health complaints legislation and was made up of representatives of health service providers, users and clinical experts and undertook extensive consultation during 2012 and 2013.

The panel sent a discussion paper to more than 870 stakeholders. The Health Services Commissioner also wrote to about 6000 recent participants in the complaints process to advise them of the review. A total of 352 submissions were received from individuals and organisations. The panel was also informed by a study of 436 past complaints made to the Victorian Health Services Commissioner. Meetings were also held with key stakeholders including the Commission.

### Mandatory Code of Practice for the Employment of Children in Entertainment

In 2014, the former DSDBI undertook public consultation on subordinate legislation made under the *Child Employment Act 2003*, including the Mandatory Code of Practice for the Employment of Children in Entertainment. The changes to the Code were based on extensive consultation with employers, children's advocates and others involved in the employment of children in the entertainment industry.

A submission on the draft Code proposed a change to ensure parents and guardians can make an informed decision about a child's employment. The department amended the Code so that an employer must ensure the parent or guardian has sufficient information about the intended role and duties that the child will perform and the intended employment hours and workplaces to make an informed decision; and the parent or guardian has consented in writing to the proposed employment. This promotes the protection of a child's best interests under section 17(2) of the Charter by ensuring they will not be exploited.

## Scrutiny by Parliament

Statements of compatibility are a vital means of allowing SARC and Parliament to examine human rights issues raised by legislation. Preparing statements of compatibility can promote reflection about the human rights implications of legislative proposals, including amendments to existing legislation.

Departments reported they consulted DJR's Human Rights Unit and the Victorian Government Solicitor's Office when drafting statements of compatibility. Other resources that departments refer to include the Victorian Government's Human Rights Portal, DJR's Charter Guidelines for Legislation and Policy Officers in Victoria, SARC practice notes, and Australian and international jurisprudence on human rights.

DJR's Human Rights Unit (HRU) reported that all policy areas consider Charter rights as part of the legislative process in the following ways:

- the template for Cabinet to approve drafting a bill has a mandatory Charter Impacts section
- the HRU advised on approximately 80 bills/statements of compatibility in 2014
- non-legislative policy proposals that are approved by Cabinet must also be assessed for Charter impacts
- consulting with stakeholders and seeking further input on Charter impacts.
- The HRU also advises on the analysis in a Human Rights Certificate for new regulations.

DJR's Civil Law Policy reported it routinely considers human rights issues when providing policy advice and options to the Attorney-General and when drafting legislation and regulations. For example, the Justice Legislation Amendment (Succession & Surrogacy) Bill 2014 provided that certain criteria must be met before a court can recognise an interstate surrogacy order, including the court being satisfied that the order is in the best interests of the child. This supports the right to families and protection of the child under the Charter.

In amendments to the *Road Safety Act 1986* made by the Road Safety Amendment Bill 2014, VicRoads assessed that a reverse onus clause did not unreasonably limit the presumption of innocence. VicRoads also contemplated how to minimise impacts on the right to privacy imposed by new alcohol interlock devices that record the identity of a person using the interlock by capturing their photograph. VicRoads reported that appropriate labelling inside vehicles fitted with such interlocks will ensure that any driver entering the vehicle is warned of the presence of an identity recording function.

In a practice note in May 2014, SARC noted its concern about certain drafting practices, including the provision of insufficient or unhelpful explanatory material to explain limitations on rights (for example, about powers of arrest or detention, reversal of onus of proof, freedom of speech, assembly, movement or association). In such circumstances, SARC noted it expects Parliament will be provided with an explanation why the provision is desirable or necessary. This does not always occur.

As noted in previous reports, there can be inconsistency in the quality of analysis of Charter rights raised by Bills. Some statements contain scant reasoning about whether a human right is raised by a Bill and if so, whether it is limited and any limitation is reasonable. For example:

- The statement for the Children Youth and Families Amendment (Permanent Care and other matters) Bill 2014 concluded that the Bill was compatible with all the rights it raised. The statement did not consider whether those rights were reasonably limited under section 7(2) of the Charter. This Bill is discussed in the breakout box below.
- The statement for the Corrections Amendment (Further Parole Reform) Bill 2014 identified that the rights to liberty, to be presumed innocent and not to be punished more than once were relevant because the bill potentially decreased the likelihood of particular prisoners being granted parole. The statement concluded that the rights were not limited for the reasons set out in a different statement of compatibility for a bill introduced in 2013 (that dealt with a similar issue of restricting parole).<sup>124</sup> This required a person to return to the statement for the earlier bill to access the analysis of Charter rights.
- The statement accompanying the Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 was brief, despite its complex subject matter. The statement did not consider the right to equality in the context of how abolishing defensive homicide may impact on women who kill abusive male partners.

The Children, *Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* relates to the protection and permanent care of children and will introduce a number of new protection orders from March 2016. DHHS noted it undertook consultation with stakeholders (including the Children's Court) and that the issues raised in consultation were taken into account in the development of the Act. In particular:

- the need to balance the rights of children, permanent carers and birth parents
- the need to preserve the child's identity, culture (including Aboriginal culture) and relationship with their birth family if this can be safely done
- the need to promote the permanent care family as the primary relationship to normalise the child's experience.

DHHS noted that it structured the new orders to promote human rights by ensuring a focus on timely decision-making and permanency planning. It considers that orders can address a spectrum of situations, to promote a child's care and protect them from harm. Where family reunification cannot happen within a reasonable timeframe, orders can aim to achieve permanency and stability for a child.

The Law Institute of Victoria (LIV) made a submission to SARC, expressing concern that the Bill may be in breach of the Charter and the United Nations Convention on the Rights of the Child.<sup>125</sup> Amongst other things, the LIV was concerned about the diminished ability for the Children's Court to exercise its statutory functions and to review DHHS decision-making.<sup>126</sup>

<sup>124</sup> *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013*.

<sup>125</sup> Law Institute of Victoria, Submission, Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014 (11 September 2014).

<sup>126</sup> Ibid. See, also, Law Institute of Victoria, 'Law Institute concerned by watering down of Children's Court oversight of vulnerable kids' (Media Release, 22 August 2014).

The LIV concluded there was a significant risk the proposals breached certain requirements set out in the Charter in relation to the right to a fair hearing, and the protection of families and children. The LIV was also gravely concerned about the Bill's compliance with Australia's obligations under the United Nations Convention on the Rights of the Child.<sup>127</sup>

In its Alert Digest, SARC noted it had received a submission from the LIV, which it would consider at a future meeting but nevertheless concluded that the Bill was compatible with the Charter.<sup>128</sup> The Bill subsequently passed without amendment.

## Omnibus Bills

The Criminal Organisations Control and Other Acts Amendment Bill is an example of an omnibus Bill, which amended numerous Acts that covered extensive subject matter and raised substantial human rights issues. In the Commission's submission to SARC, we noted that the Bill, amongst other things:

- extended police powers to protective services officers (PSOs) to apprehend a person at a railway station who 'appears to have a mental illness'.<sup>129</sup> This limits equality rights and freedom of movement. It may also be arbitrary, subject to the discretion of PSOs, who receive significantly less training, supervision or support than police officers
- enabled a child found not guilty of an offence due to mental impairment to be detained with children convicted and sentenced.<sup>130</sup> This may unreasonably limit the right of a person detained without charge to be segregated from those convicted of offences, except where reasonably necessary and the right of children to protection of their best interests.

- broadened the circumstances in which declarations and control orders can be made against individuals and organisations.<sup>131</sup> A declaration may be made about an entire organisation based on activities of a small number of former, current or prospective members of a declared organisation, based on the future possibility a member will engage in or facilitate serious criminal activity
- removed derivative use immunity to allow evidence obtained as an indirect consequence of an answer given or document produced in coercive questioning to be admitted in proceedings against that person.<sup>132</sup> The statement justified this as a means of countering difficulties detecting and prosecuting organised crime. This, however, may unreasonably limit the right to a fair hearing and privilege against self-incrimination.

SARC referred to Parliament for its consideration the question of whether or not removing a derivative use immunity was a reasonable limit on the Charter right of people facing criminal charges not to be compelled to testify against themselves, 'in light of the clause's purpose of enabling serious organised crime to continue to be investigated and prosecuted'. SARC noted it had received a submission from the Commission, but did not engage with the issues raised in our submission.

Parliamentary debate in the Legislative Council expressed concern about the size and complexity of the legislation, which incorporated a large range of subject matter into a single omnibus bill.<sup>133</sup> In particular, there were concerns raised about the Bill amending a large number of Acts of Parliament which are referred to as 'other acts', even though the amendments dealt with serious matters. There were calls for Bills to be clearly labelled and to only include amendments to Acts that are related to each other. It was also noted that it is difficult for community organisations to interpret and provide valuable feedback about omnibus Bills<sup>134</sup>.

The Bill passed without amendment.

## Sentencing laws

In 2014, a number of Bills lead to significant changes to sentencing laws and have been the subject of debate by legal commentators concerned that the laws limit judicial discretion. The bills include the Sentencing Amendment (Baseline Sentences) Bill 2014, the Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014 and Sentencing Amendment (Emergency Workers) Bill 2014.

127 Ibid.

128 Scrutiny of Acts and Regulations Committee, *Alert Digest* No. 10 of 2014. As far as the Commission is aware, SARC did not report on its consideration of the submission at a future meeting.

129 The Bill amended the *Mental Health Act 2014* (Vic).

130 The Bill amended the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

131 The Bill amended the *Criminal Organisations Control Act 2012* (Vic).

132 The Bill amended the *Major Crime (Investigative Powers) Act 2004* (Vic).

133 Legislative Council, 19 August 2014, Sue Pennicuik, page 2516.

134 Ibid.



# Chapter 4:

## The Charter in the courts

Courts and tribunals play an important role in the Charter's human rights protection framework. The Charter requires courts and tribunals so far as possible to interpret and apply legislation consistently with human rights (section 32). The Supreme Court has a power to declare that a law cannot be interpreted and applied consistently with human rights and can issue a declaration (section 36).

The Charter also sets out the legal options that may be available when a public authority's acts or decisions are allegedly unlawful. It is unlawful for a public authority to act incompatibly with human rights or to fail to give proper consideration to relevant human rights in any decision-making process (section 38).

There is no freestanding cause of action for a breach of the Charter. However, where a person has another legal action arising from an unlawful act or decision of a public authority, then any unlawfulness arising from a breach of the Charter may be a further ground in the action (section 39).

As well as considering the application of the Charter in proceedings, Victoria's courts and tribunals, their registrars and staff are themselves public authorities bound to act compatibly with human rights when they act in administrative capacity (for example when listing proceedings, issuing warrants or making other administrative decisions).

In reporting on consideration of the Charter by courts and tribunals in 2014, the Commission has focused on:<sup>135</sup>

- decisions where a declaration of inconsistent interpretation has been sought
- decisions finding a breach of the Charter
- decisions about the consequences of a breach of the Charter
- decisions guiding how the Charter operates
- decisions on the meaning of Charter rights
- key areas where the Charter was raised
- interventions by the Commission and Attorney-General in Charter cases.

## Overview

Consideration of the Charter by courts and tribunals in 2014 demonstrates that the Charter plays an important role in the conduct and decision-making processes of public authorities, including in the areas of mental health, child protection, education, policing, criminal justice, housing, council services and planning.

The 2014 decisions considered in this chapter contribute to a growing body of Charter case law that clarifies the human rights in the Charter and the responsibilities held by each arm of government to protect them.

The obligation of public authorities to consider and act compatibly with human rights and the power of courts to interpret and apply legislation compatibly with the Charter became effective on 1 January 2008.

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<sup>135</sup> The Commission does not seek to identify or examine every matter before a court or tribunal in which the Charter has been referred to in 2014.

During a 2014 conference on the development of human rights law in Victoria,<sup>136</sup> the Supreme Court observed that the Charter has been raised in a diverse range of areas including 'post-sentence detention, the best interests of the child principle, criminal law, actions by public authorities, legislation affecting the imprisonment of intellectually disabled people for failure to pay fines, bail and the treatment of prisoners'.<sup>137</sup> The Supreme Court, which collaborated with other organisations in leading the conference, said that the conference was a success in developing judicial capacity around Charter issues and developing the capacity of the profession to use the Charter for the benefit of their clients in courts and tribunals.

Court and tribunal decisions referring to the Charter in 2014 are mostly civil or administrative cases rather than criminal cases. This is consistent with previous years.<sup>138</sup>

## Human rights consistent interpretation of legislation

### Declarations of inconsistent interpretation

The Supreme Court made no declarations of inconsistent interpretation in 2014.

However, there were three Supreme Court decisions in cases in which it was argued that the Court should make a declaration of inconsistent interpretation.

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<sup>136</sup> Human Rights Under the Charter: *The Development of Human Rights Law in Victoria*, 7-8 August 2014.

<sup>137</sup> The Hon Chief Justice Marilyn Warren AC and The Hon Justice Pamela Tate, 'Editorial' in Judicial College of Victoria, Online Journal, *Human Rights Under the Charter: The Development of Human Rights Law in Victoria* (Special Edition, Vol 2, 2014), 2.

<sup>138</sup> The Law Institute of Victoria reports that of court and tribunal decisions in 2014 that referred to the Charter, 77 per cent were civil and administrative cases and only 23 per cent criminal cases: Law Institute of Victoria, *Charter Case Audit*, <<http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/Charter-Case-Audit>>. To compare with previous years, see Victorian Equal Opportunity and Human Rights Commission, *2012 Report on the Operation of the Charter of Human Rights and Responsibilities*, p 30.

### Human rights compatibility of post-sentence detention

In *DPP v JPH* (No 2), the Director for Public Prosecutions applied for the first post-sentence detention order under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (SSODSA) to detain JPH in purpose-built accommodation within prison grounds.<sup>139</sup>

The SSODSA creates a civil scheme for the post-sentence supervision and detention of serious sex offenders. The scheme is aimed at enhancing community protection while facilitating offender treatment and rehabilitation. Under the SSODSA the Court can make an order that an offender, who has served a custodial sentence for certain sexual offences and who presents an unacceptable risk of harm to the community, be subject to ongoing supervision or detention. While orders are not intended to be punitive, they subject people to significant restrictions.

JPH argued the detention order regime was inconsistent with the rights to freedom from arbitrary arrest and detention and to humane treatment when deprived of liberty. In particular he argued that the conditions of detention would be inconsistent with his rights.

The Court found the detention order regime was not inconsistent with the Charter because it was possible for correctional authorities to administer JPH's detention compatibly with his Charter rights. It was relevant that the SSODSA says that a person on a post-sentence detention order must be treated in a way appropriate to their status and be detained separately from prisoners serving custodial sentences.

The Court said it must assume the correctional authorities would comply with their Charter obligations unless there was contrary evidence. If there were allegations of conduct or decisions violating human rights, JPH could seek judicial review and raise the Charter at that time.

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<sup>139</sup> *DPP v JPH* (No 2) [2014] VSC 177.

In *Rich v The Queen*,<sup>140</sup> Mr Rich argued that amendments to the *Evidence (Miscellaneous Provisions) Act 1958*, which allowed evidence obtained as a result of improperly sworn affidavits to be admitted at trial, were inconsistent with his right to a fair trial and that the Court should make a declaration. The Court of Appeal found that the amending act was not inconsistent with his right to a fair hearing because the admission of the evidence would not deprive him of a fair trial. This conclusion took into account that the impropriety of the affidavits was due to the failure to make the required oaths and affirmations in accordance with statutory formalities and not because improper methods were used to gather the evidence.

In *Magee v Wallace*,<sup>141</sup> Mr Magee appealed against a charge of posting bills under the *Summary Offences Act 1966*. He argued that the offence should not apply to legitimate forms of expression protected by the right to freedom of expression and that the Court should make a declaration of inconsistent interpretation if the offence could not be interpreted in that way.

The Supreme Court considered that the bill posting offence was compatible with the right to freedom of expression because the limits on the right were permissible. The offence was reasonably necessary for the protection of public order (section 15(3)(b) of the Charter) and a reasonable limit that could be demonstrably justified in a free and democratic society (section 7(2) of the Charter).

## The requirement to interpret legislation compatibly with rights

In *Christian Youth Camps v Cobaw Community Health Services*,<sup>142</sup> the Court of Appeal found that the requirement in section 32 of the Charter to interpret legislation compatibly with human rights does not apply where a court is looking at how legislation applied to an event that occurred before section 32 came into force on 1 January 2008. In that case, section 32 did not apply to the interpretation of the *Equal Opportunity Act 1995* because the case concerned discrimination alleged to have occurred in 2007.

140 [2014] VSCA 126, [295]-[302].

141 *Magee v Wallace* [2014] VSC 643.

142 [2014] VSCA 75.

# Breaches of the Charter

There were two Supreme Court findings in 2014 that public authorities acted unlawfully in breach of the obligation to act compatibly with human rights and to give proper consideration to human rights in making a decision (section 38):

- In *DPP v Kaba*,<sup>143</sup> the Supreme Court found that Victoria Police acted incompatibly with the human rights to privacy and freedom of movement (see case study below).
- In *Burgess v Director of Housing*,<sup>144</sup> the Court found that the Director of Housing failed to give proper consideration to human rights in the decision-making process to evict a tenant (see case study below).

### Police questioning incompatible with human rights

Police conducted a random stop and search of a car Mr Kaba was travelling in. Mr Kaba, a young black African man, walked away from the car and was repeatedly asked by police for his name and address. Not suspected of wrongdoing, he protested about racist harassment and refused. Police arrested Mr Kaba on a number of charges arising from the stop,<sup>145</sup> but the Magistrates' Court ruled that the police officer's evidence was inadmissible under section 138 of the *Evidence Act 2008* because the police had acted unlawfully and in breach of the Charter.

The Magistrate ruled that the police had acted unlawfully because section 59 of the *Road Safety Act 1986* did not give police a power to conduct a random traffic stop without cause and because the police conduct was incompatible with the rights of the driver and Mr Kaba in breach of the Charter.<sup>146</sup>

143 [2014] VSC 52. The Commission intervened in this proceeding.

144 [2014] VSC 648.

145 Including using offensive language, failing to state his name and address and for allegedly assaulting one of the officers.

146 *Watson v Kaba*, Unreported Magistrates Court decision, 20 June 2013. See *2013 Report on the operation of the Charter of Human Rights and Responsibilities*, p#.

In *DPP v Kaba*,<sup>147</sup> the Supreme Court set aside the Magistrate's decision that the evidence was inadmissible. Contrary to the Magistrate, the Supreme Court found that police do have a power under section 59 of the Road Safety Act to conduct random vehicle stops for licence and registration checks. It considered that this interpretation of the Road Safety Act was compatible with human rights because the limit on the rights to privacy and freedom of movement of drivers and passengers is reasonable and proportionate to the important purpose of the legislation to regulate road safety.

However, the Court found that police had acted incompatibly with Mr Kaba's rights to privacy and freedom of movement in repeatedly demanding his name and address in breach of the Charter (section 38). The Court said that the line of permissible police questioning is crossed when questioning becomes coercive. That is when a person feels they cannot choose to cease cooperating or leave. The Charter requires any limit on human rights to be 'subject to law'. This coercive questioning was incompatible with rights because it was not authorised by any law.

The case will be returned to the Magistrate to reconsider whether the evidence should be inadmissible in light of the Supreme Court's findings.<sup>148</sup>

While no allegations of racial profiling were raised in Mr Kaba's case, Flemington & Kensington Community Legal Centre (who acted for Mr Kaba) have commented that a general police power to carry out random vehicle stops can lead to racial profiling and other forms of discrimination'.<sup>149</sup>

## Eviction decision failed to consider human rights

In *Burgess v Director of Housing*,<sup>150</sup> the Supreme Court found that the Director of Housing breached the Charter by failing to give proper consideration to the human rights of a tenant and her teenage son before issuing a notice to vacate and applying for a warrant to possess the public housing premises where they lived.

Ms Burgess had lived in the same public housing since 2006. Following a police search of the premises in 2011, she was charged with drug trafficking and served a prison sentence, returning to reside there in 2012. In 2013, the Director of Housing gave a notice to vacate to Ms Burgess under the *Residential Tenancies Act 1997* on the basis she had used the premises for an illegal purpose. Following this, VCAT made an order for possession of the property, the Director applied for a warrant of possession and VCAT issued the warrant.

In the circumstances of the case, the Director was obliged to consider the rights of the tenant and her household to comply with section 38 of the Charter and with the Director's Tenancy Management Manual, which required relevant Charter rights to be considered. Her right to protection of the family group and the best interests of any child affected by the decision should have been considered.

The decision highlights the obligation in the Charter and the Tenancy Management Manual to consider human rights. It also demonstrates that, subject to the conditions in section 39 of the Charter, eviction decisions by public authority housing providers can be successfully challenged in the Supreme Court where they fail to give proper consideration to the human rights impacts of decisions.

The Supreme Court set aside the Director's decision to apply for the warrant of possession. However, it found that it could not set aside the decision to issue the notice to vacate because it was of no legal effect once VCAT had issued a possession order.

147 [2014] VSC 52. The Commission intervened in this proceeding.

148 At the time of writing, the matter has not concluded.

149 See '*DPP v Kaba* – Additional commentary from Flemington & Kensington Community Legal Centre' in *Rights Agenda: Monthly Bulletin of the Human Rights Law Centre*, Edition 103, February 2015, 23-24.

150 [2014] VSC 648.

Justice Connect observed that this aspect of the decision narrows the window where a person can challenge eviction decisions for a Charter breach. It means that 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).<sup>151</sup>

DHHS commented that it considers this case to be an isolated incident among the many tenancy decisions its staff make. DHHS reported that it is taking measures to address the issue, including Charter training at the operational management level and developing issue-focused practice instructions for staff.

## Consequences of a breach of the Charter

Where a person brings a legal action seeking relief or remedy because the act or decision of a public authority breached a law other than the Charter, they can seek that relief or remedy because the act or decision breached the Charter (section 39).

In *Slattery v Manningham City Council*,<sup>152</sup> VCAT made a declaration that Mr Slattery's human rights had been breached and ordered Manningham City Council provide Charter training for its Councillors, Chief Executive Officer and Directors.<sup>153</sup>

This order followed VCAT's finding that the Council had breached the Charter by banning Mr Slattery (a man with multiple disabilities) from attending all council buildings on the basis he posed a health and safety risk to Council staff. The ban was

151 See further the Case Note of Justice Connect, who acted for Ms Burgess in the case: Justice Connect, 'A landmark decision on housing and human rights', 22 December 2014, available at <<http://www.justiceconnect.org.au/landmark-decision-housing-and-human-rights>>.

152 *Slattery v Manningham City Council* [2014] VCAT 1442. The Commission intervened in this proceeding.

153 Although a person does not have a right to be awarded damages for a breach of the Charter (section 39(3)), this does not affect any right a person may have to damages apart from the operation of section 39 (section 39(4)). As remedy for the discrimination in breach of the Equal Opportunity Act, the Tribunal ordered the council pay Mr Slattery \$14,000 and revoke the ban.

disproportionately excessive and incompatible with Mr Slattery's human rights to take part in public life, freedom of expression and the right to enjoy his human rights without discrimination.<sup>154</sup>

VCAT said that a declaration that human rights have been breached is an important vindication for the individual and the community. The order for training to assist the Council to understand and take account of Mr Slattery's human rights was not punitive but intended to help redress the affects of the ban on Mr Slattery. VCAT said the order would also support the work of the Council generally.

## Guidance on the operation of the Charter

### The Charter in proceedings against public authorities

Section 39 of the Charter sets out when a person can raise the Charter in proceedings against a public authority. Section 39 is not easy to understand, however two Supreme Court decisions in 2014 helped clarify how it applies.

***Burgess v Director of Housing*** (see above at page 72), demonstrates how the Charter can be raised in judicial review proceedings challenging the decision of a public authority.

Even though in this case Ms Burgess was successful on both non-Charter and Charter grounds, the Supreme Court said that relief or remedy on the ground of Charter unlawfulness is available even where the non-Charter ground is unsuccessful. The Court clarified that section 39 only imposes a condition that a person is able to seek relief or remedy on the ground the public authority acted unlawfully independently of the Charter.

***Goode v Common Equity Housing***<sup>155</sup> demonstrates how the Charter can be raised in other legal proceedings against public authorities.

154 *In Slattery v Manningham City Council* [2013] VCAT 1869, [149]-165].

155 [2014] VSC 585. The Commission intervened in this proceeding.

# Key areas of consideration in 2014

## The Charter in the Mental Health Tribunal

Human rights are a central consideration in the decisions of the Victorian Mental Health Tribunal. The Tribunal replaced the Mental Health Review Board in 2014.<sup>157</sup> Like the Board before it, the Tribunal is a public authority under the Charter and required to consider human rights in its decisions.

The Tribunal's primary function is to determine whether the criteria for compulsory mental health treatment in the *Mental Health Act 2014* apply to a person.

The objectives of the Act include 'to provide for persons to receive assessment and treatment in the least restrictive way possible with the least possible restrictions on human rights and human dignity'.<sup>158</sup> This principle is central to the Tribunal's decisions. For example, in determining whether to grant a treatment order, the Act requires the Tribunal to be satisfied there is no less restrictive means reasonably available to enable a person to receive treatment.

Victoria Legal Aid raised the Charter in a number of cases before the Mental Health Tribunal in 2014, highlighting the impact of compulsory treatment on the human rights of their clients.

The Tribunal considered the Charter in all its published decisions in 2014.<sup>159</sup> Its decisions on whether to make a treatment order consider the limits an order will place on a person's rights to privacy, liberty, freedom of movement and freedom from medical treatment without consent and whether those limits are lawful and reasonable.<sup>160</sup>

Ms Goode appealed a VCAT decision, which dismissed her application alleging that Common Equity Housing Limited had discriminated against her in breach of the *Equal Opportunity Act 2010* and acted in breach of her human rights in the Charter. VCAT dismissed Ms Goode's discrimination claim and found that, in accordance with section 39 of the Charter, it could not consider the alleged Charter breaches if it dismissed her non-Charter claim.

The Supreme Court found that VCAT was wrong to dismiss the Charter claim without independent consideration. It found that, so long as an application is made on a ground of non-Charter unlawfulness (in this case, a breach of the Equal Opportunity Act), the Tribunal can still consider the person's Charter claim even where their non-Charter claim is rejected or not determined.

The Court considered that section 39 only allows courts and tribunals to consider alleged Charter breaches that arise from the same acts or decisions that are the subject of the non-Charter claim.

## Definition of a 'public authority'

The Charter has a wide definition of public authority, with two broad categories: core public authorities, which are bound by the Charter generally, and functional public authorities, which are only bound by the Charter when they are exercising functions of a public nature (section 4).

One decision in 2014 considered the obligations of a functional public authority. In ***AGL Loy Yang v Construction, Forestry, Mining and Energy Union***,<sup>156</sup> it was argued before the Fair Work Commission that requirements in AGL Loy Yang's Code of Conduct to complete a training module and a declaration of completion were unlawful because they breached employees' rights to freedom of expression and association. AGL Loy Yang is a power station and mine with more than 3000 employees that supplies approximately 30 per cent of Victoria's power requirements. It is part of AGL, a private owner and operator of energy assets in Australia.

The Fair Work Commission found that AGL Loy Yang was not a public authority under the Charter when determining matters relating to the employment of its employees because it was not exercising public functions on behalf of the state when it did so. This is in contrast to when the company is performing its function to supply electricity, which may be the exercise of a public function on behalf of the state.

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<sup>156</sup> *AGL Loy Yang v Construction, Forestry, Mining and Energy Union* [2014] FWC 8093.

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<sup>157</sup> The Mental Health Tribunal is established by the *Mental Health Act 2014*, which replaced the *Mental Health Act 1986*.

<sup>158</sup> *Mental Health Act 2014*, section 10(b).

<sup>159</sup> Edited versions of the Tribunal's statement of reasons in decisions, which de-identify the patient for privacy reasons, are available at <<http://www.austlii.edu.au/au/cases/vic/VMHT/2014/>>.

<sup>160</sup> See, for example, RWU [2014] VMHT 20, [52]-[56].

## Human rights and involuntary treatment orders

In *XX v WW and Middle South Area Mental Health Service*,<sup>161</sup> the Supreme Court considered a patient's challenge to a doctor's decision to re-recommend a patient for involuntary psychiatric treatment immediately after the Mental Health Review Board had decided the patient no longer met the criteria for involuntary treatment and discharged her from an involuntary treatment order.

The patient, represented by Victoria Legal Aid (VLA), sought judicial review of the doctor's decision on grounds including that it was incompatible with her human rights to be free from medical treatment without full, free and informed consent, not to have privacy unlawfully or arbitrarily interfered with and liberty and security.

VLA argued that the *Mental Health Act 1986* (now replaced by the *Mental Health Act 2014*) did not allow the doctor to make an involuntary treatment recommendation after the Board had allowed the patient's discharge from involuntary treatment in the absence of new information. VLA argued that the doctor's decision removed the Board's independent oversight of the involuntary treatment, which was essential to ensure human rights limits were justified.

The Court found that a doctor must have regard to a Board's decision and could not make an order where to do so would make the Board's oversight ineffective.

In this case, there was a change in circumstances that justified the doctor's decision. As a public authority, the doctor was required to consider the human rights impact in making his decision. The Court found that the doctor had not breached the Charter because he had considered the Board's decision and had believed circumstances had changed.

VLA commented that the decision clarifies the limits of a doctor's powers following an order by the Board (now the Mental Health Tribunal) that a patient be discharged from an involuntary treatment order.<sup>162</sup>

## The Charter in local government decisions

Councils, councillors and members of Council staff are public authorities under the Charter (section 4(1)(e)). A number of decisions in 2014 show how the Charter's obligation to consider and act compatibly with human rights applies across a range of local government activity.

### Access to local government

*Slattery v Manningham City Council* (above at page 73), highlights that councils must consider relevant human rights when making decisions that limit a person's ability to access services or participate in activities to ensure any decision is compatible with rights. Victoria Legal Aid, who represented Mr Slattery, commented that council minutes showed no consideration of human rights when the decision to ban Mr Slattery from attending council premises was made. VCAT found the council had breached section 38 of the Charter.

In contrast, in *Richardson v City of Casey Council*,<sup>163</sup> a council's ban of Mr Richardson from public question time did not breach the Charter. VCAT said that while participation in public question time is protected by the Charter's rights to freedom of expression and participation in public affairs, the question time ban was a justifiable limit on the rights. This took into account the limited extent of the ban (he was still able to ask two questions per council meeting through other people) and its legitimate purpose (he had been taking up significant council resources, his behaviour was not concerned with political belief or activity, and he had failed to respect the rights of others).

161 [2014] VSC 564.

162 See E Fritze (Victoria Legal Aid), 'Change in circumstances required before re-certifying discharged involuntary patients: *XX v WW* in *Rights Agenda: Monthly Bulletin of the Human Rights Law Centre*, Edition 103, February 2015, 26.

163 [2014] VCAT 1294.

## Planning

In *Rutherford & Ors v Hume City Council*,<sup>164</sup> VCAT considered the Charter in determining whether a proposed development should go ahead. A local council had granted a planning permit for the development of a Shi'ite mosque on land adjacent to an Assyrian Christian Church, the membership of which included people who had suffered traumatic experiences in Iraq due to the actions of Islamic extremists. Mr Rutherford and other objectors sought review of the decision in VCAT.

VCAT affirmed the council's decision to grant the permit. VCAT shared Council's concern about the broad social impacts of any decision that seeks to separate places of worship from one another, and reached the view that the development would allow potential for both faiths to practice at places they wish to do so. The human rights to religious freedom and equality and cultural rights were key considerations in VCAT's decision.

Compatibly with Charter rights, VCAT emphasised that all religious groups are free to practise their faith and are entitled to facilities to make this possible. It stated that town-planning decisions should not separate people or land use based on ethnicity or religion and should provide the opportunity to support Victoria's diverse multicultural society and promote tolerance within it.

## Making and enforcing local laws

In *Kerrison v Melbourne City Council*,<sup>165</sup> the Full Court of the Federal Court found that the council did not breach the rights to peaceful assembly, freedom of association and freedom of expression in making and enforcing the local laws it relied on to demand 'Occupy Melbourne' protestors leave public gardens and to remove tents and other items.

The Court considered the argument that the council had breached the Charter because it acted incompatibly with human rights when it made the local law. The Court found that the Charter's obligation to act compatibly with human rights did not apply to a council in the making of a by-law under the Local Government Act 1989.

The Court also considered whether the actions of council officers under the local laws, to assist police to remove a tent worn by one of the protestors, breached the Charter. The Court concluded that while the council officer's actions limited the protester's right to freedom of expression, they did not act incompatibly with the right because their conduct was proportionate in the circumstances.

## The Charter in VCAT

VCAT frequently has regard to the Charter in cases in its Human Rights Division but also in its Residential Tenancies, Civil and Administrative Divisions, when it considers the interpretation of legislation compatibly with human rights (section 32) and when it considers claims of a breach of the Charter (under section 39).

In some cases when VCAT is acting in an administrative capacity, including those in the Human Rights Division, it is a public authority bound to properly consider and act compatibly with the Charter (section 38).

VCAT is also a public authority when it undertakes the administrative work in the VCAT registry. VCAT reported that the Human Rights Division registry is particularly mindful of Charter rights because cases often involve persons who are vulnerable or disadvantaged. VCAT said that the registry considers the Charter's rights to equality and a fair hearing and where necessary it takes steps to adopt less formal processes and provide more additional information or supports (such as interpreters) to ensure these rights are complied with before and during hearings.

## Residential tenancy decisions

Although VCAT does not have jurisdiction to consider whether a public authority housing provider's decision breaches the Charter,<sup>166</sup> the Charter was relied on in VCAT to argue for a human rights compatible interpretation of the Residential Tenancies Act 1997.

In *Director of Housing v Cochrane*,<sup>167</sup> VCAT considered whether to grant a possession order to the Director of Housing who had served a notice to vacate under section 243 of the Residential Tenancies Act. Section 243 states a landlord may serve a notice to vacate where the tenant causes malicious damage.

The tenant had lived at the property for over a decade and has a number of children. The Director was aware of property damage at a prior time but had waited to serve the notice until there were no longer children under the age of 18 living with her. The tenant gave evidence that she had relinquished care of her younger children in order to take drug rehabilitation and aim to reunite with her children. VCAT accepted that reunification with her children would be unlikely without the property and that her eviction may result in homelessness. It also accepted there was no current or ongoing malicious damage.

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<sup>166</sup> A person must seek judicial review of the decision in the Supreme Court – see for example *Burgess v Director of Housing* above at page 73.

<sup>167</sup> [2014] VCAT 1180.

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<sup>164</sup> [2014] VCAT 786.

<sup>165</sup> [2014] FCAFC 130.



VCAT found that an interpretation of section 243 that allowed a landlord to hold off issuing a notice to a time when the damage was no longer current would be incompatible with the right to privacy and home when a less harsh interpretation was possible, consistent with the purpose of the Residential Tenancies Act. VCAT said section 243 required the cause of the damage to be current and continuing and it dismissed the application for possession because the damage had not occurred for a significant time.

In some circumstances, VCAT will be a public authority required to consider and act compatibly with human rights when it exercises its discretion to make orders under the Residential Tenancies Act.

In *DJ v Director of Housing*,<sup>168</sup> VCAT considered an application by a tenant under section 232 of the Residential Tenancies Act requiring the Director of Housing to enter into a tenancy agreement in relation to the premises where he had been residing with his son and the former tenant (the son's mother) at the date of her death.

Under section 232, VCAT may make an order if it is satisfied of a number of factors, including that the hardship suffered by the tenant would be greater than the hardship of the Director if the order were made. VCAT considered it was obliged under the Charter to interpret section 232 compatibly with human rights and also to consider and act compatibly with human rights when exercising its discretion. However, because VCAT found that the tenant's hardship would not be greater than that of the Director, it did not reach the stage of exercising its discretion in this case.

## Equal Opportunity Act exemption applications

The Charter is central to VCAT's consideration of applications for exemption from the Equal Opportunity Act. Under section 90 of the Equal Opportunity Act, VCAT must consider whether proposed exemptions can be justified as a reasonable limit on the right to equality in section 8 of the Charter. In exemption proceedings, VCAT is acting as a public authority bound by section 38 of the Charter and considers the impact of proposed exemptions on other relevant Charter rights.

There are four published exemption decisions from 2014.<sup>169</sup> VCAT granted the exemption in each case after finding that the limit on the Charter's right to equality was reasonable and justified.

For example, in *Rosbourne School exemption*,<sup>170</sup> VCAT granted an exemption from the Equal Opportunity Act's prohibition on gender based discrimination in education so the school could structure enrolment lists to target prospective female students and advertise for prospective female students where future waiting lists showed gender imbalance. It found the exemption to achieve greater gender balance served an important purpose and the limit on the Charter's right to equality was reasonable and justified.

## The Charter and bail conditions

In *Woods v DPP*,<sup>171</sup> the Supreme Court considered the requirement that bail conditions be formulated compatibly with the human rights of the individual. The decision identifies which rights may be engaged by decisions to impose bail conditions including: the rights to freedom of movement; liberty; not to be subjected to medical treatment without full, free and informed consent; privacy; peaceful assembly and freedom of association; and to be presumed innocent. The decision highlights that it was the clear intention of the legislature that Victoria's Bail Act is to be applied so that rights are only limited where the limit can be justified in accordance with section 7(2) of the Charter.

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168 *DJ v Director of Housing* [2014] VCAT 406.

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169 *Rosbourne School exemption* [2014] VCAT 1617, *Thales Australia Limited and ADI Munitions Pty Ltd exemption* [2014] VCAT 1441, *Raytheon Australia Ltd* [2014] VCAT 1370, *Whitehorse Community Health Centre Exemption* [2014] VCAT 1040.

170 [2014] VCAT 1617.

171 [2014] VSC 1.

# Human rights considered by courts and tribunals

A number of rights were considered in court and tribunal decisions in 2014.

## Children's rights

In *Re Beth (No 3)*,<sup>172</sup> the Supreme Court reviewed an order it made in 2013 for the ongoing care and protection of a 16-year-old girl with an intellectual disability. The order authorised the Secretary to the Department of Human Services to place Beth (a pseudonym) in a locked residence and use restrictive interventions in her care. The Court considered it could only authorise the orders if they were in the best interests of the child.

An assessment of 'best interests' required the Court to consider whether the substantial invasion on Beth's rights to liberty, privacy, freedom of movement and potentially medical treatment without consent, was necessary, proportionate and the least restrictive in the circumstances of the case. In this case the Court was satisfied the orders would not operate to interfere with Beth's rights beyond what was reasonably necessary for her care and protection because of conditions limiting the orders. This included the requirement for provision of care in accordance with a behaviour support plan and a statutory case plan, the requirement for independent vetting and supervision of the order, provision for a progress report and more.

In *C v Children's Court*,<sup>173</sup> the Supreme Court considered a child's right to be brought to trial as quickly as possible and right to a procedure that takes into account their age and the desirability of promoting rehabilitation. The Court found that a decision of the Children's Court to uplift criminal charges against a young person to be heard by the County Court on the basis of 'exceptional circumstances' did not breach those rights. The Supreme Court observed that the rights must be given effect to in any case involving a child, regardless of whether it is heard in the Children's, County or Supreme Court.

In *Burgess v Director of Housing* (above at page 73), the Supreme Court found that the Director of Housing should have considered the rights of any children that would be affected before deciding to evict a tenant. A failure to consider the impact on the rights of the tenant's child was a breach of the Charter.

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<sup>172</sup> [2014] VSC 121.

<sup>173</sup> [2015] VSC 40.

## Privacy

In *DPP v Kaba* (above at page 71), the Supreme Court said that the right to privacy is broad and covers a person's physical and psychological integrity, individual and social identity, and autonomy and inherent dignity. The police acted in breach of the right to privacy in making repeated demands for a person's name when they had no authority to do so.

## Liberty and freedom of movement

In *DPP v Kaba* (above at page 71), the Supreme Court considered the scope of the rights to liberty and freedom of movement. The Court found that a brief police stop of a vehicle to examine a driver's license and inspect a vehicle does not amount to the detention of the driver or passenger that would limit the right to liberty, however it does interfere with the right to freedom of movement of the driver and the passenger.

## Freedom of expression

The right to freedom of expression in the Charter includes the freedom to seek, receive and impart information and ideas of all kind. The Charter permits limitations on the right where they are lawful restrictions reasonably necessary to respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality or reasonable and justified.

In *Kerrison v Melbourne City Council* (above at page 76), the Full Court of the Federal Court found that an Occupy Melbourne protester who wore a tent as a dress was exercising her right to freedom of expression because it imparted information or ideas. However, the Court found that council officers did not act incompatibly with the right by removing the tent because the Court said the council's conduct was proportionate in the circumstances.

In *Magee v Wallace* (see at page 71), the Supreme Court considered whether a protest against commercial advertising, which involved posting bills to obscure advertisements, was protected by the right to freedom of expression so that the defendant should not be convicted of a bill posting offence in the *Summary Offences Act 1966*. The Court found that the defendant's conviction did not breach the right to freedom of expression because it was a lawful restriction reasonably necessary for the protection of public order, which is permitted under section 15(3) of the Charter.<sup>174</sup>

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<sup>174</sup> The Court also considered the limit on the right was reasonable in accordance with section 7(2) of the Charter, because there was no less restrictive means reasonably available to achieve the purpose of preventing interference with the contractual rights to display advertisements in public places.

## Fair hearing and procedural rights

The Charter provides express protection for the fundamental right to a fair and public hearing before a competent, independent and impartial court or tribunal.

In *Knigh v Wise*,<sup>175</sup> the Supreme Court considered what the right to a fair hearing requires. A prisoner challenged a decision to deny him access to an in-cell computer which he wanted to prepare his court case. Among other things, the right to a fair hearing requires 'equality of arms', that a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage to their opponent. The Court found the right was not breached. The prisoner had access to shared prison computers, legal materials and relevant case documents, and the lack of an in-cell computer did not put him at a substantial disadvantage. The court said a breach of the right requires more than inconvenience.

## 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.<sup>176</sup> The Attorney-General and the Commission have the right to intervene in any court cases in Victoria that raise Charter issues.<sup>177</sup>

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 2014

Section 35 notices	22
Commission interventions	4
Attorney-General interventions	2

**In 2014 the Commission received notification under section 35 of the Charter in 22 cases. The Commission intervened in two of these:**

***Goode v Common Equity Housing*** (Supreme Court) raised the question of how section 39 of the Charter operates (see above at page 73). The Commission intervened to submit that, where a

person has legal proceedings against a public authority alleging they have acted unlawfully other than because of the Charter, section 39 allows them to claim the public authority has acted unlawfully because of the Charter. In particular, the Commission argued that the court or tribunal can determine the Charter unlawfulness claim even in the event the non-Charter unlawfulness is unsuccessful.

***Fertility Control Clinic v Melbourne City Council*** (Supreme Court) raises a question of the human rights compatible interpretation of the duty on local councils in the *Public Health and Wellbeing Act 2008* to remedy nuisances in their districts. The Melbourne City Council raised the human rights of protesters outside a reproductive health clinic, particularly the rights to freedom of expression, freedom of religion, peaceful assembly and freedom of association.

The Public Health and Wellbeing Act applies to nuisances that are dangerous to health or injurious to personal comfort. The Commission's position is that restrictions on protests that amount to a nuisance – because of the manner and form of the protest, together with its content – are not incompatible with human rights. For example, it is compatible with the right to freedom of expression to restrict a protest where it is necessary to respect the right to privacy of patients and staff or for the protection of public health.

The case will be heard in June 2015.

The Commission also intervened in two VCAT cases where notification was not received. The Commission intervened in these cases under section 159 of the Equal Opportunity Act and under section 40 of the Charter.

***RW v State of Victoria (Department of Early Education and Childhood Development)*** (VCAT) involved an allegation of discrimination in education on the basis of disability contrary to the Equal Opportunity Act which raised a question as to whether the Department of Education had acted in breach of the Charter. The Commission's position was that VCAT had jurisdiction to consider the alleged Charter breach. The Commission made submissions on the scope of relevant Charter rights. The Commission's submissions included that a person's circumstances, such as their age and health, must be taken into account in determining whether treatment is cruel, inhuman or degrading, and that restrictions on the right to liberty must be clearly authorised by law.

<sup>175</sup> [2014] VSC 76.

<sup>176</sup> Charter of *Human Rights and Responsibilities Act 2006* (Vic) s 35.

<sup>177</sup> Charter of *Human Rights and Responsibilities Act 2006* (Vic) ss 34 and 40.

The case was heard in 2014 and decided in 2015. VCAT dismissed the discrimination claim and found it did not have jurisdiction to consider the applicant's Charter claims because the alleged Charter breaches did not arise from the same acts or decisions that were the subject of the non-Charter claim.<sup>178</sup>

**Ziarata Zia v Monash Health** (VCAT) involved an allegation of discrimination in the provision of goods and services on the basis of religious belief and sex under the Equal Opportunity Act. It raised a question as to whether Monash Health had breached the Charter by failing to give proper consideration to Mrs Zia's human rights to equality, freedom of religion and belief and cultural rights. In relation to the Charter, the Commission made submissions on the scope of relevant human rights and the obligation on the public authority to act compatibly with them. The case settled before hearing.

The Attorney-General intervened in two cases:

**Castro v Warke** (County Court) raised a question of the interpretation of the offence of wilful trespass in the *Summary Offences Act 1966* compatibly with the right to freedom of expression and association, in the context of a protester charged with the offence during a protest at the Melbourne Convention Centre. The case was withdrawn prior to hearing.

**C v Children's Court** (Supreme Court) (See above page 78). The case was heard in and decided in 2015.<sup>179</sup>

In 2014, the Commission was involved as an intervener in a number of ongoing cases:

**Re Beth (No 3)** (Supreme Court) (see page 78). This was a review of orders made in the *parens patriae* jurisdiction of the Supreme Court in 2013. The Commission intervened in the initial proceeding and remained as an intervener in the review proceeding. The Commission's position was that continued orders authorising Beth's placement in a residential facility would be compatible with Beth's human rights, so long as it was the least restrictive means necessary for her care and protection in the best interests of the child and that there were safeguards to ensure her rights were not unjustifiably limited. Important safeguards included independent oversight, regular review and independent legal representation.

**Bare v Small** (Court of Appeal) concerns a decision by the Office of Police Integrity (now the Independent Broad-based Anti-corruption Commission ('IBAC')) to refer Mr Bare's complaint that he was assaulted and racially abused by Victoria Police back to Victoria Police for internal investigation. Mr Bare challenged the decision in the Supreme Court, which dismissed the challenge.

<sup>178</sup> *RW v State of Victoria* [2015] VCAT 266.

<sup>179</sup> [2015] VSC 40.

This appeal of the Supreme Court decision raises questions about the consequences of a breach of section 38 of the Charter by a public authority, and whether the right against cruel, inhuman and degrading treatment (section 10(b)) includes a procedural right to have allegations of such treatment by Victoria Police investigated by a body independent from Victoria Police. The Commission made submissions on these issues.

The Commission intervened in the original Supreme Court proceeding and remained as an intervener in the appeal. At the time of writing the Court of Appeal's decision is reserved.

**Slattery v Manningham City Council** (VCAT) (see page 73) raised a question of what remedy was appropriate where a local council had breached the Charter. The Commission intervened under section 159 of the Equal Opportunity Act and also made submissions on the issue of remedies where there is a breach of the Charter. The Commission's position was that a declaration of a Charter breach is an important remedy where an individual's rights are found to have been breached and that a declaration should specify the rights breached. The Commission also said it was open to VCAT to make an order that Council undertake human rights training.

In **DPP v Kaba** (Supreme Court) (see page 71), the Commission intervened to make submissions on whether the *Road Safety Act 1959*, interpreted compatibly with the Charter, empowered police to conduct random licence and registration checks, and whether police breached the Charter in questioning a passenger during a random vehicle stop.

The Commission's position was that the Road Safety Act should be interpreted compatibly with the right to freedom of movement so as not to give police an unfettered power to stop vehicles. It said there were means that were less restrictive on rights that could achieve road safety. The Court held that the Road Safety Act did provide such a power.

The Commission said that in this case the police breached the rights to freedom of movement and privacy in the manner they questioned the passenger during the vehicle stop. The Commission said that because evidence against Mr Kaba was obtained in breach of rights, this warranted the exclusion of the evidence in proceedings against Mr Kaba. The Court held that the police breached the rights to freedom of movement and privacy and ordered that the matter be returned to the Magistrates' Court to determine whether the evidence should be excluded on this basis.

# Appendix A: 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)

Victoria Police

## Statutory agencies

Commission for Children and Young People (CCYP)

Commissioner for Aboriginal Children and Young People (CACYP)

Commissioner for Privacy and Data Protection (CPDP)

Court Services Victoria (CSV)

Independent Broad-based Anti-corruption Commission (IBAC)

Mental Health Complaints Commissioner (MHCC)

Office of the Disability Services Commissioner (ODSC)

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

## Local government

City of Melbourne

Yarriambiack Shire Council

## Community organisations

Aboriginal Family Violence Prevention and Legal Service

COTA Victoria

Council to Homeless Persons

Disability Discrimination Legal Service

Disability Justice Advocacy

Domestic Violence Victoria

Ethnic Communities' Council of Victoria

Federation of Community Legal Centres (the Federation)

Flemington & Kensington Community Legal Centre (FKCLC)

Human Rights Law Centre (HRLC)

Justice Connect Homeless Law

Liberty Victoria

Seniors Rights Victoria

Transgender Victoria

VicDeaf

Victorian Aboriginal Child Care Agency (VACCA)

Victorian Aboriginal Legal Service (VALS)

Victorian Council of Social Service (VCOSS)

Victorian Gay & Lesbian Rights Lobby (VGLRL)

Victorian Mental Illness Awareness Council (VMIAC)

Villamanta Disability Rights Legal Service

Youthlaw

## Courts and Tribunals

Supreme Court of Victoria

*Consultation with the following courts and tribunals was coordinated by Court Services Victoria:*

Children's Court of Victoria

Coroners Court of Victoria

County Court of Victoria

Judicial College of Victoria

Magistrates' Court of Victoria

Victorian Civil and Administrative Tribunal (VCAT)





**Victorian Equal Opportunity  
& Human Rights Commission**

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