



Victorian Equal Opportunity
& Human Rights Commission

Submission to Free and Equal: An Australian conversation on human rights

Australian Human Rights Commission
consultation

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1. Executive summary

Human rights and freedoms are inherent to all of us, regardless of our background, culture, gender, age or belief. For many in modern Australia, it's easy to imagine that our human rights and freedoms are well protected. But some Australians have little assurance of this – young people navigating the youth justice system, vulnerable individuals and families relying daily on public housing, disability services or social security, or Aboriginal and Torres Strait Islander communities seeking to uphold their cultural rights. In truth, at some point in our lives, any one of us could find our human rights at risk – whether it be in seeking health care, in accessing education or any other area of public life.

A national Human Rights Act would enshrine into law the rights and freedoms of all Australians. It would be a national statement of the inherent worth of all humans, affirming the democratic values of freedom, respect, equality and dignity – values crucial to wellbeing and our ability to live a fulfilling life.

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the national conversation on human rights and the opportunity to respond to the Australian Human Rights Commission's *Free and Equal* issues paper and *Positive human rights* discussion paper. The Commission supports the enactment of a national Human Rights Act to protect and promote the rights and freedoms of all Australians.

As Victoria's independent human rights body, the Commission can attest to the value that a national Human Rights Act will bring to Australians. The Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter) – annually examined by the Commission – sets out the foundational rights, freedoms and responsibilities of all people in Victoria.

The 'dialogue model' of rights that underpins the Charter and human rights laws in the Australian Capital Territory and Queensland effectively ensures Parliament, the public sector and courts apply a human rights lens to their decisions and operations, while also giving citizens an important foundation for exercising their rights. The effect of the dialogue model is to anchor human rights in the day-to-day interactions between individuals and government. There is tangible evidence that this model has embedded a human rights culture and has had a significant impact on individuals' interactions with government.

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

A national Human Rights Act should reflect the views of the Australian community by protecting the rights we regard as fundamental. These include both civil and political rights (including a right to Aboriginal self-determination) and economic, social and cultural rights, which should be included in a national Human Rights Act. Key protections from other treaties Australia has ratified – including for women, children and people with disabilities – should also be included, and consideration should be given to protection for peoples' right to a healthy environment.

Victorians can attest to the value of the Charter as a framework for resolving competing rights. A national Human Rights Act should include a framework for decision-makers to balance human rights when they are in conflict. This should set

out a proportionality test to govern when a limitation on human rights may be permitted.

We have seen that requiring government decision-makers not to breach human rights standards and to consider human rights in their interactions with individuals is critical. This has been demonstrated through key litigation that has shown the Charter's ability to protect the rights of Australians from all walks of life, but also in the everyday actions of Victorian government officials. A national Human Rights Act should place an obligation on government organisations to act compatibly with human rights and to take human rights into account when making decisions. Private and non-government organisations should be able to opt in to these obligations.

Where a person's human rights have been breached, a Human Rights Act can help address the breach by ensuring that person has access to appropriate avenues to make a complaint, whether through dispute resolution or via the courts. It can also articulate how individuals can seek compensation and remedies.

Bringing a national Human Rights Act to life relies on an independent regulator being empowered to monitor the act's implementation and operation, and to champion its place as a key foundation for Australian culture and lawmaking. This role should be carried out by the Australian Human Rights Commission, which should be equipped with the necessary powers and resources to facilitate effective implementation of national legislation that will protect and promote the human rights of all Australians.

1.1 Recommendations

Recommendation 1. A national Human Rights Act

The Australian Government should enact a national Human Rights Act to protect and promote the human rights of all Australians. This Act should be based on a 'dialogue model' of rights and should place obligations on the three arms of government – the Parliament, the executive and the courts – to protect and promote human rights.

Recommendation 2. Scope of rights

In considering which rights should be protected, the Australian Government should have regard to views of the Australian community. Rights to be protected should include:

- civil and political rights based on those rights contained in the ICCPR, including the right to Aboriginal self-determination
- economic, social and cultural rights based on those rights contained in the ICESCR, including, but not limited to, the right to health, education and housing
- rights contained in other human rights treaties ratified by Australia, including:
 - Convention on the Rights of the Child
 - Convention on the Elimination of All Forms of Discrimination against Women
 - Convention on the Rights of Persons with Disabilities.

Recommendation 3. Balancing and limiting rights

A national Human Rights Act should include a framework for decision-makers to balance human rights when they are in conflict. It should set out a proportionality test to govern when a limit on human rights can be demonstrably justified.

Recommendation 4. Obligations to respect and uphold human rights

- A national Human Rights Act should oblige federal public authorities to act compatibly with human rights and to take human rights into account when making decisions.
- These obligations should extend to non-government entities where they exercise functions of a public nature on behalf of the government.
- Private and non-government organisations should be able to opt in to the obligations of a national Human Rights Act.

Recommendation 5. Remedies for breaches of human rights

A national Human Rights Act should include pathways for individuals to raise breaches of human rights obligations, including through:

- alternative dispute resolution
- a simple and direct right of action to the courts.

Remedies, including compensation, should be applicable for breaches of human rights obligations.

Recommendation 6. A powerful national human rights regulator

The Australian Human Rights Commission (AHRC) should have the functions, powers and resources to effectively support the implementation of a national Human Rights Act, and to protect and promote human rights. In line with the Paris Principles, legislation should provide that the AHRC is autonomous and independent from government and has:

- a broad mandate, based on universal human rights norms and standards
- adequate resources to protect and promote human rights
- a right to intervene in legal cases involving human rights
- adequate powers of investigation.

Recommendation 7. Human rights education

The Australian Government should provide resources and funding for sustained human rights education to duty holders and to the community, to support effective implementation of a national Human Rights Act.

2. About the Commission

2.1 Our role and functions

The Commission is Victoria's independent statutory body with responsibilities under the *Charter of Human Rights and Responsibilities 2006* (the Charter), the *Equal Opportunity Act 2010* and the *Racial and Religious Tolerance Act 2001*. Our role is to protect and promote human rights and to eliminate discrimination, sexual harassment and victimisation, to the greatest extent possible.

We do this through a range of functions.

Resolve complaints	We resolve complaints of discrimination, sexual harassment, racial and religious vilification and victimisation by providing a free, confidential dispute resolution service.
Research	We undertake research to understand and find solutions to systemic causes of discrimination and human rights breaches.
Educate	We provide information to help people understand and assert their rights. We conduct voluntary reviews of programs and practices to help organisations comply with their human rights obligations. And we provide education and consultancy services to drive leading practice in equality, diversity and human rights, including a collaborative approach to developing equal opportunity action plans.
Advocate	We raise awareness across the community about the importance of equality and human rights, encouraging meaningful debate, leading public discussion and challenging discriminatory views/behaviours.
Monitor	We monitor the operation of the Charter to track Victoria's progress in protecting fundamental rights.
Enforce	We intervene in court proceedings to bring an expert independent perspective to cases raising equal opportunity, discrimination and human rights issues. We also conduct investigations to identify and eliminate systemic discrimination.

2.2 Contribution to this consultation

In December 2018 the Australian Human Rights Commission (AHRC) announced that it would conduct a national conversation on human rights in 2019.¹ This conversation seeks to identify the principles and key elements that would make an effective system of human rights protections for 21st century Australia.² To support the national conversation, the AHRC published the following papers:

¹ Australian Human Rights Commission 2019, *Free and equal: An Australian conversation on human rights Issues Paper 2019* (Issues Paper, April 2019) 3.

² Australian Human Rights Commission 2019, *Free and equal: An Australian conversation on human rights* (Terms of Reference, 10 December 2018) https://www.humanrights.gov.au/sites/default/files/ahrc_tor_national_conversation2019.pdf (accessed 24 October 2019).

- Issues Paper: *Free and Equal: An Australian Conversation on Human Rights* (February 2019)
- Discussion Paper: *Priorities for federal discrimination law reform* (August 2019)
- Discussion Paper: *A model for positive human rights in Australia* (August 2019).

As the body responsible for presenting to the Victorian Attorney-General an annual report that examines the operation of the Charter, the Commission seeks to contribute informed comment to the Australian conversation by making recommendations for a national human rights framework.

This submission responds to relevant topics raised in the *Free and Equal* issues paper and the *Positive human rights* discussion paper, including:

- a desirable model for federal human rights protection³
- the human rights to be protected⁴
- mechanisms to balance or limit rights⁵
- bodies that should hold obligations under a national law⁶
- effective mechanisms for dealing with human rights breaches⁷
- the role of a national human rights institution.⁸

The Commission supports the enactment of a national Human Rights Act to protect and promote the rights and freedoms of all Australians.

In this submission, we outline a desirable model for that act. We explain how such a model works in action in Victoria and illustrate the benefits a Human Rights Act can bring. We outline the lessons learned since the Charter's enactment in 2006 and – drawing from this experience – make recommendations for robust and modern national human rights protection.

We discuss the human rights and freedoms that should be protected nationally and outline bodies that should hold obligations to uphold human rights. Finally, we consider the role of a national human rights institution in the protection and promotion of human rights, and the mechanisms required to support effective implementation of a national Human Rights Act in Australia.

³ See Question 2 in Australian Human Rights Commission 2019, *Free and equal: An Australian conversation on human rights Issues Paper 2019* (Issues Paper, April 2019) 20; Australian Human Rights Commission 2019, *Discussion Paper: A model for positive human rights in Australia* (Discussion Paper, August 2019) 6.

⁴ See Question 1 in Australian Human Rights Commission 2019, *Free and equal: An Australian conversation on human rights Issues Paper 2019* (Issues Paper, April 2019) 20.

⁵ See Question 4 in Australian Human Rights Commission 2019, *Free and equal: An Australian conversation on human rights Issues Paper 2019* (Issues Paper, April 2019) 20.

⁶ See Questions 9 and 11 in Australian Human Rights Commission 2019, *Free and equal: An Australian conversation on human rights Issues Paper 2019* (Issues Paper, April 2019) 21; Australian Human Rights Commission 2019, *Discussion Paper: A model for positive human rights in Australia* (Discussion Paper, August 2019) 13.

⁷ See Questions 5 and 7 in Australian Human Rights Commission 2019, *Free and equal: An Australian conversation on human rights Issues Paper 2019* (Issues Paper, April 2019) 20.

⁸ See Question 8 in Australian Human Rights Commission 2019, *Free and equal: An Australian conversation on human rights Issues Paper 2019* (Issues Paper, April 2019) 21.

2.2.1 Additional or alternative protections of human rights

This submission focuses on the enactment of a national Human Rights Act as this would offer strong human rights protection for all Australians.⁹ While there may be other reforms of existing law and policies to support human rights that are positive in themselves,¹⁰ ad-hoc reforms offer a piecemeal approach to national human rights protection. The Commission is of the view that such reforms do not offer a viable alternative to the enactment of a standalone national Human Rights Act.

Unlike ad-hoc reforms, enactment of a national Human Rights Act will serve as a powerful statement about Australia's commitment to human rights. It will set out in one document which rights will be protected, how they will be protected the consequences for breaching them. It will set out mechanism for balancing rights and will provide the infrastructure required to promote a human rights culture. It will provide government rules and a framework within which to operate, and the community a language and principles with which to engage with decision-makers.

⁹ This section refers to the options raised by the AHRC in its *Free and Equal* issues paper and *Positive human rights* discussion paper. The Commission notes that while the strongest legal protection would be through a Constitutional bill of rights, we support the enactment of a national Human Rights Act.

¹⁰ Australian Human Rights Commission 2019, *Discussion Paper: A model for positive human rights in Australia* (Discussion Paper, August 2019) 16-20.

3. A national Human Rights Act for Australia

Human rights matter because people matter. Because the ability to have a life in which you feel respected – where your dignity is maintained, where you can participate freely and equitably in society and the community, in the workplace, in your school – that matters.

– Kristen Hilton, Victorian Equal Opportunity and Human Rights Commissioner

Human rights are rights inherent to all human beings, whatever our nationality or ethnic origin, place of residence, sex, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination.

Australia has a significant record of respecting and supporting international human rights and their adoption in Australia. We are a party to numerous international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and to various optional protocols to these treaties.¹¹ Under these instruments, Australian governments have an obligation to respect, protect and fulfil the human rights of all people in Australia. However, while some of our international human rights commitments have been enshrined in domestic law, many implementation gaps remain.

Despite our international commitments, human rights protections are not always present in domestic law. There are limited protections in place to ensure that the Australian Government considers people's human rights as part of everyday law and policy making and that it takes steps to prevent breaches before they occur. Avenues for review of government decisions are limited and inconsistent. As a result our fundamental rights and freedoms are not fully protected or realised. At times this has led to unfair, unjust or unequal treatment without appropriate recourse or consequences.¹²

A national Human Rights Act would act as a critical foundational document, capturing the relationship between government and its citizens. The enactment of such an act would help embed a fair, respectful and inclusive culture of human rights for the benefit of all Australians. It would improve the development of federal law and policy – for example relating to aged care, Medicare, Centrelink, disability services and education funding – by requiring proactive consideration of human rights during design and implementation. It would also provide a framework to ensure government bodies consider human rights in their everyday business. Significantly, an enforceable act would create viable avenues for people to seek review of decisions or actions that violate a person's human rights.

The implementation of a comprehensive and enforceable national Human Rights Act would complement existing state and territory legislation to create more consistent

¹¹ Australian Government Attorney-General's Department International human rights system <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/International-Human-Rights-System.aspx> at 25 November 2019.

¹² Australian Human Rights Commission 2019, *Discussion Paper: A model for positive human rights in Australia* (Discussion Paper, August 2019) 5.

human rights protection across Australia. This is important as people should have the rights and freedoms protections wherever they are in Australia.

3.1 A dialogue model of rights

The Commission recommends a national Human Rights Act be based on a ‘dialogue model’ of rights. This model places obligations on the three arms of government – the Parliament, the executive (including ministers and public authorities) and the courts – to protect and promote human rights. Existing human rights acts in the ACT, Victoria and Queensland are based on the ‘dialogue model’ of rights.

The dialogue model incorporates three key mechanisms for achieving the aims of the Act:

- It creates obligations on public authorities to act compatibly with human rights and take human rights into account when making decisions
- It ensures that all new laws are scrutinised for compatibility with human rights
- It ensures courts interpret all existing laws compatibly with human rights.

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

Under this model ultimate sovereignty rests with Parliament, which cannot be forced to adopt a particular position on a human rights issue and can pass incompatible legislation.

Following a dialogue model, the Commission considers that a national Human Rights Act should include:

- a statement of the human rights and freedoms to which it applies
- an outline of the obligations of governments and service providers to respect, protect and promote rights
- a process for Parliament to consider rights in lawmaking
- a role for courts to interpret and enforce rights
- processes to seek resolution for human rights breaches and to provide adequate remedies.

In addition, a national Human Rights Act should include an overarching statement of the values and principles that underpin it. Consistent with international human rights instruments, the founding principles of the Act should include recognition of the inherent dignity and worth of all human beings, and the equal and inalienable human rights of us all. The Act should also recognise that human rights come with responsibilities and must be exercised in a way that respects the rights of others. Such an approach may serve as a symbolic, educational and interpretative tool.

Recommendation 1. A national Human Rights Act

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4. The positive effect of the Charter in Victoria

By legislating for human rights, the Victorian Parliament has made a strong statement about the moral dignity of human beings in our State, and helped create tolerance, respect and cultural change to value each person equally.

– Victorian Council of Social Service¹³

Since Victoria's Charter was enacted the Commission has seen tangible evidence of its ability to protect the human rights of all Victorians. It has improved the quality of government services and decisions, reduced discrimination, created fairer laws and policies, and provided avenues for redress and remedies when rights are breached. The Commission's annual report on the operation of the Charter demonstrates this impact every year.¹⁴

Critically, the enactment of human rights legislation in Victoria has:

- **Shaped major legislative reforms to provide stronger and fairer laws**
For example the *Mental Health Act 2014*. Consultation over six years in developing this Act enabled the Victorian Government, service providers and community to consider the significant human rights issues raised by mental health treatment, using the Charter as a framework. The new Act took a significant step forward in protecting the rights of people with psycho-social disabilities.¹⁵
- **Improved decision-making in Victorian public bodies**
It has done this by ensuring that public decision-makers must consider and act compatibly with human rights. This has transformed day-to-day decision making. For example, the Department of Health and Human Services' public housing policy and procedure manuals include information about Charter obligations and guide decision-makers to consider rights in the delivery of housing services.¹⁶
- **Laid the foundations for the development of a culture of human rights within public authorities**
Human rights have become part of the everyday business of government, incorporated into key policies, guidelines and initiatives. For example in 2018 the Port Phillip City Council used the Charter framework to tackle rough sleeping in the city.¹⁷
- **Been an advocacy tool for people whose rights are at risk of being violated**
For example, in 2014 an advocacy group for adults with intellectual disabilities and their families, used the rights in the Charter to advocate against the forced removal of young people with disability into an aged-care facility. For the

¹³ See Victorian Council of Social Service, Submission No 64 to Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (June 2015) 4.

¹⁴ See annual reports from the Victorian Equal Opportunity and Human Rights Commission Reports on the operation of the Charter of Human Rights and Responsibilities.
<<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/charter-reports>>.

¹⁵ See *Mental Health Act 2014* (Vic).

¹⁶ See Victorian Equal Opportunity and Human Rights Commission, *2018 Report on the operation of the Charter of Human Rights and Responsibilities*, (Report, November 2019) 17.

¹⁷ See Victorian Equal Opportunity and Human Rights Commission, *2018 Report on the operation of the Charter of Human Rights and Responsibilities*, (Report, November 2019) 47.

organisation, ‘the fact that the Charter had a whole-of-government scope was significant’.¹⁸

- **Required courts to interpret legislation compatibly with human rights**
For example in 2012 the Court of Appeal considered whether a reporting scheme for convicted criminals arbitrarily interfered with the right to privacy. The court concluded that the scheme did not amount to an arbitrary interference with privacy and was compatible with the Charter.¹⁹
- **Provided tangible outcomes for people whose human right had been limited in the tribunal and courts²⁰**
This includes:
 - keeping families together – in decisions about the rights of public housing tenants who successfully challenged attempts at their evictions.²¹
 - upholding the autonomy of individuals over their own affairs – in an appeal by a person with a mental illness against a decision to appoint an administrator.²²
 - ensuring that police act within the law – in a case where a person who was charged with a criminal offence successfully had evidence excluded on the basis that it was collected in a way that breached his human rights.²³

4.1 A dialogue model in action

In this section we outline the value of the three key elements of the dialogue model, and their operation in Victoria:

- human rights in lawmaking
- human rights obligations of government
- consideration of human rights by courts and tribunals.

4.1.1 Human rights in lawmaking

A system of Parliamentary scrutiny that requires members of Parliament to consider human rights assists in the creation of legislation that is considerate, proportionate and justified to its purpose. This helps make sure laws are consistent with the rights and freedoms that all humans hold.

The Charter underpins all lawmaking in Victoria. It requires a member tabling a Bill in Parliament to set out the Bill’s potential human rights impacts in a statement of compatibility. It also requires a Parliamentary Committee to prepare a report outlining the Bill’s compatibility with human rights. Public submissions may be made to the Committee and are published on its webpage.²⁴

¹⁸ Office of the Public Advocate, Submission No 158 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* (September 2011) 4.

¹⁹ See *WBM v Chief Commissioner of Police* [2012] VSCA 159.

²⁰ See Law Institute of Victoria, Submission No 78 to Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 3.

²¹ See *Director of Housing v Sudi* (2011) 33 VR 559 and *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648.

²² See *P J B v Melbourne Health & Anor* [2011] VSC 327.

²³ See *Director of Public Prosecutions v Kaba* [2014] VSC 52.

²⁴ See Parliament of Victoria Scrutiny of Acts and Regulations Committee
<<https://www.parliament.vic.gov.au/sarc/>>

This process aims to create a transparent framework for the consideration of human rights and policy goals underlying legislation. Significantly, it also aims to ensure that where human rights must be limited, the least restrictive processes are used. The result is that implementation issues are considered and identified at the parliamentary stage – making better laws.

Making better laws: Voluntary Assisted Dying Act 2017

In 2017 Victoria became the first Australian state to legislate voluntary assisted dying by a self-administered lethal dose of medication for Victorian adults with decision-making capacity suffering from a serious incurable condition.

Debate on the Bill demonstrated the significant human rights considerations in this issue. Members in favour of the Bill argued that supporting voluntary assisted dying is a human rights issue – allowing people the choice to die with dignity, under the safest and most rigorous framework possible.²⁵ Other members expressed reservations regarding safeguards surrounding the Bill. It was emphasised that the statement of compatibility did not expressly discuss whether the Bill limited the ‘right not to be arbitrarily deprived of life’ and that the deprivation of life by assisted dying may be ‘arbitrary’ if the person’s consent is the result of outside pressure, irrationality or depression.²⁶ Subsequent amendments strengthened the psychiatric assessment procedures for all patients.²⁷

The Charter provided a human-rights lens through which to consider this important values-based issue. The Act balances competing rights and interests. Its aim is to promote the right to privacy and the right to liberty and security of person by allowing Victorians suffering a terminal illness in very limited circumstances to choose to end their life according to their own preferences.²⁸

The effectiveness of the scrutiny process may be assisted by the implementation of some key processes. For example, the Commission has called for the following amendments to the current Victorian system:

- increased funding and resourcing for Parliamentary Committee members to consider human rights
- enhanced opportunities for community members to make submissions on Bills raising human rights issues
- Parliamentary Committee hearings on Bills raising significant human rights issues
- ensuring that amendments to Bills are subject to human rights scrutiny.²⁹

The Commission recommends these matters are addressed in the drafting of a national Human Rights Act.

While federal Bills are also currently subject to Parliamentary scrutiny,³⁰ reviews of this framework have indicated there are flaws in the structure and operation of this

²⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 3115 (Ros Spence).

²⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 5826 (Richard Dalla Riva).

²⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 6247 (Gavin Jennings); See also *Voluntary Assisted Dying Act 2017 (Vic)* s 18.

²⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 2017, 2945 (Jill Hennessy).

²⁹ See eg Victorian Equal Opportunity and Human Rights Commission, Submission No 90 to Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015).

³⁰ Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3.

model, which limit its effectiveness.³¹ To ensure effectiveness of a national framework, it is recommended that such a regime be incorporated within a national Human Rights Act.³²

4.1.2 Human rights obligations of government

The best human rights outcomes are achieved if people's rights are considered in the everyday business of government and its interactions with the community.

– Michael Brett Young, 2015 Independent Review of the Charter³³

An aspect of the Charter that has had a significant impact on the everyday lives of Victorians is the obligation it places on governments to consider and comply with human rights in all actions and decision-making.

Section 38 of the Charter imposes obligations on public authorities both to act compatibly with human rights, and to give proper consideration to human rights when making a decision. In practice this obligation has assisted government by providing a framework to identify, assess and balance human rights against other rights and interests. This has ultimately improved the quality of government service design, in particular for marginalised, excluded and disadvantaged people in the community. For individuals it has established clear and non-negotiable human rights standards, provided a framework within which to advocate for rights and provided avenues for redress when rights are violated.

Through this mechanism the Charter has, as was intended, contributed to the growth of a human rights culture within the Victorian Government and community.³⁴ We refer to and highlight the Commission's annual report to Parliament on the operation and effectiveness of the Charter, which details this impact annually.³⁵ As part of the reporting process the Commission asks government departments and agencies to report on what they have done to fulfil their Charter obligations and to strengthen a human rights culture.

Strengthening a human rights culture

Each year, as part of its report on the Charter, the Commission asks departments and agencies to provide examples of actions they have taken to strengthen a human rights culture in Victoria. Examples include:

- Senior leaders championing a human rights culture

In 2018 the Department of Justice and Community Safety's Secretary celebrated International Human Rights Day and emphasised to all staff the importance of integrating human rights into the Department's work. The

³¹ George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 470.

³² See George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 470, 507.

³³ Michael Brett Young, '*From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*' (Report, 1 September 2015) 99.

³⁴ Michael Brett Young, '*From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*' (Report, 1 September 2015) 22.

³⁵ See annual reports from the Victorian Equal Opportunity and Human Rights Commission Reports on the operation of the Charter of Human Rights and Responsibilities. <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/charter-reports>>.

Department of Premier and Cabinet Secretary joined the Male Champions of Change initiative, under which male leaders act to advance gender equality.³⁶

- **Modelling a human rights culture**

In 2017 the Registry of Births, Deaths and Marriages engaged the Commission to provide human rights training to all 119 Registry staff. Following this, the extended leadership team raised awareness of human rights by modelling respect and explicitly discussing human rights in their daily interactions and decision-making with citizens, stakeholders and Registry staff.³⁷

- **Providing human rights training**

In 2018 the Department of Education and Training engaged the Commission and the Human Rights Unit of the Department of Justice and Community Safety to provide training to all staff to build knowledge of the Charter. Sessions were tailored to each unit within the Department, covering the fundamentals of the Charter and principles applicable to everyday work.³⁸

- **Employing a human rights framework in the development of new initiatives**

In 2016 the Department of Health and Human Services established a new agency, Family Safety Victoria, to address a number of the key recommendations arising out of the Royal Commission into Family Violence. 'Rights and respect' is one of the eight principles underpinning *Ending Family Violence, Victoria's Plan for Change*.³⁹

- **Taking a whole-of-organisation human rights approach**

The Mitchell Shire Council created its *Social Justice Framework 2017–2021*, a document which affirms the Council's obligations under the Charter and acts on the council's vision to build a diverse, equitable and well-connected community.⁴⁰

- **Using a human rights approach in customer service**

In 2017 the East Gippsland Shire Council, with the assistance of the Commission, developed a best practice human rights approach to customer service across the council. Councillors, executive leaders, managers and team leaders from all business units undertook targeted human rights training. Following this, senior leaders committed to integrating human rights into organisational vision, strategic planning, and policies. For example, the Council developed a complaints management policy and procedure to ensure officers manage complaints fairly and objectively in a manner that upholds human rights.⁴¹

³⁶ Victorian Equal Opportunity and Human Rights Commission, *2018 report on the operation of the Charter of Human Rights and Responsibilities* (Report, November 2019) 23.

³⁷ Victorian Equal Opportunity and Human Rights Commission, *2017 report on the operation of the Charter of Human Rights and Responsibilities* (Report, September 2017) 60.

³⁸ Victorian Equal Opportunity and Human Rights Commission, *2018 report on the operation of the Charter of Human Rights and Responsibilities* (Report, November 2018) 26.

³⁹ Victorian Equal Opportunity and Human Rights Commission, *2016 report on the operation of the Charter of Human Rights and Responsibilities* (Report, November 2016) 26.

⁴⁰ Victorian Equal Opportunity and Human Rights Commission, *2016 report on the operation of the Charter of Human Rights and Responsibilities* (Report, November 2016) 26.

⁴¹ Victorian Equal Opportunity and Human Rights Commission, *2017 report on the operation of the Charter of Human Rights and Responsibilities* (Report, September 2017) 64.

Putting the Charter into action at Barwon Prison

Human rights play a vital role in corrections environments, where staff must carefully balance individual prisoners' right to freedom, respect, equality and dignity with the necessary limitations on freedom that are typical of closed environments. The Charter is a valuable tool for corrections staff – it gives a clear framework for making decisions and understanding the rights of individual prisoners. Mr Anthony Murphy, Operations Manager at Barwon Prison, has worked closely with his team to embed the Charter in everyday decision-making at Barwon.

In a recent example, one prisoner who was well aware of his Charter rights – as many prisoners are – was refusing to give a urine sample. Instead, he was asking for his lunch and stating that it was a breach of his human rights for prison staff to deny his request.

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

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

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

Actively considering the prisoner's human rights and articulated how the prison staff had reached their decision contributed to a positive outcome in this situation, Mr Murphy said. "I've always been about fairness and equality anyway, as a person. But that gave me a real insight into what we are required to do under the Charter. The reality is that we work in an environment where we have to limit a prisoner's human rights from time to time," Mr Murphy said.

4.1.3 The role of courts and tribunals

Courts and tribunals play a crucial role in the human rights protection framework by upholding human rights. Through court processes, individuals have a mechanism to hold government and public authorities to account for conduct that infringes their rights. The impact of court and tribunal decisions can also have positive impacts on the human rights of people beyond those involved in individual matters, through the subsequent interpretation and application of Charter rights.

The Charter requires courts and tribunals to act in the following ways:

- courts and tribunals must interpret Victorian laws, so far as it is possible to do so consistently with the law's purpose, in a way that is compatible with human rights.⁴² Where the Supreme Court is unable to interpret a law compatibly with human rights it can make a declaration of inconsistent interpretation.⁴³

⁴² *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 32.

⁴³ *Charter of Human Rights and Responsibilities Act 2006, (Vic)* s 36.

- courts and tribunals must act compatibly with those rights that affect court proceedings,⁴⁴ including the right to equality before the law, the right to a fair hearing, the rights in criminal proceedings and cultural rights.⁴⁵

In addition, courts and tribunals must act compatibly with human rights in the exercise of their administrative functions,⁴⁶ which include such activities as committal proceedings, the issuing of warrants, listing cases and adopting practices and procedures.⁴⁷

Human rights as part of court and tribunal decision-making

Under a dialogue model of rights such as the Charter, courts and tribunals must interpret all Victorian laws in a way that is compatible with human rights, where it is possible to do so consistently with the law's purpose.⁴⁸ In addition, they must act compatibly with human rights in the exercise of their administrative functions⁴⁹ and, when exercising their judicial functions, in relation to human rights that affect court proceedings.⁵⁰ These include the right to equality before the law, the right to a fair hearing, the rights in criminal proceedings and Aboriginal cultural rights.⁵¹

Cemino v Cannan and Ors⁵²

The Elders know who I am and who my family is. Talking to the Elders is like talking to my family. They can speak to me about my mother and her family, about who I am, and what it means to be Yorta Yorta ... The Elders understand my feelings, that there is a 'shame job' there related to my mum because I treated her poorly and now she's gone. The Elders know what this means for me. I can speak to them about this, in a way I can't speak to the mainstream court.⁵³

– Zayden Cemino

In 2002, the Victorian Government established the Koori Court system to address discrimination faced by Aboriginal people and their over-representation in all aspects of the criminal justice system. The Koori Court division of the Magistrates' Court aims to ensure greater participation by the Aboriginal community in the sentencing of Aboriginal people.

⁴⁴ See especially s 6(2)(b) of the Charter. For interpretation of this provision in relation to courts and tribunals, see *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 (28 February 2017) [32] (Bell J); applying *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 61–4 [241]–[254].

⁴⁵ See (*De Simone v Bevnl Constructions* (2009) 25 VR 237; [2009] VSCA 199 [52]; *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 [247]–[249], [252] (Tate JA); *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221; [2011] VSC 42 [165]–[167]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [250]).

⁴⁶ See *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38(1) 5.

⁴⁷ See Note to *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(j).

⁴⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28.

⁴⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

⁵⁰ This is through the application of *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(2)(b). For interpretation of this provision in relation to courts and tribunals, see *Harkness v Roberts* [2018] VSCA 215 and *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 (28 February 2017) [32] (Bell J), applying *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 61–4 [241]–[254] (Bell J).

⁵¹ See *De Simone v Bevnl Constructions & Developments Pty Ltd* (2009) 25 VR 237, 247 [52]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 63–4 [250], [254] (Bell J); *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221, 258–9 [165]–[167] (Bell J); *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [247]–[249], [252] (Tate JA); *Cemino v Cannan and Ors* [2018] VSC 535.

⁵² *Cemino v Cannan and Ors* [2018] VSC 535.

⁵³ See plaintiff submissions in *Cemino v Cannan and Ors* [2018] VSC 535 [42].

Before Aboriginal people can access the Koori Court, they must first make a request for transfer to a magistrate. In 2017 a magistrate refused the request of a young Aboriginal man – Zayden Cemino – to have his sentence determined in the Koori Court. Mr Cemino raised his Aboriginal cultural rights and his right to equality under the Charter in his appeal to the Supreme Court of Victoria, asking that the decision of the magistrate be overturned.

The Supreme Court ruled in favour of Mr Cemino and confirmed that courts must consider the distinct cultural rights of Aboriginal people under the Charter when making decisions in relation to an Aboriginal person's request to be heard in the Koori Court. The Supreme Court also recognised the important role that Koori Courts play in addressing the systemic disadvantage faced by Aboriginal people in the justice system.⁵⁴

This was the first time that Aboriginal cultural rights under the Charter had been found to be directly applicable to courts and tribunals. Following this decision, magistrates must consider Aboriginal cultural rights when making these types of decisions, even when they are acting in a judicial capacity.

⁵⁴ *Cemino v Cannan and Ors* [2018] VSC 535 [143].

5. Which rights should be protected?

Australia is party to the seven ‘core’ international human rights treaties – including the ICCPR and the ICESCR – and to various optional protocols to these treaties.⁵⁵

While some of our international human rights commitments have been enshrined in domestic law,⁵⁶ many implementation gaps remain. To address these gaps, a national Human Rights Act should be as comprehensive as possible in its protection of rights contained in international human rights treaties ratified by Australia.

In considering which rights should be protected, the Australian Government should have regard to the rights the Australian community regards as important. For example, in 2009 the National Human Rights Consultation Committee reported that during community consultations, people generally did not delineate between economic, cultural and social rights and civil and political rights in considering which rights are unconditional. Community members raised the following rights:

- the right to basic amenities – water, food, clothing and shelter
- the right to essential health care
- the right of equitable access to justice
- the right to freedom of speech
- the right to freedom of religious expression
- the right to freedom from discrimination
- the right to personal safety
- the right to education.⁵⁷

We discuss specific groups of rights below.

5.1 Civil and political rights

Civil and political rights are a class of rights that protect individuals' freedom from infringement. These rights relate to an individuals' freedom to participate in civil and political life without discrimination or repression. They include ensuring peoples' physical and mental integrity, life, safety and privacy; freedom of thought, speech, religion, and movement; and protection from discrimination. The ICCPR requires that nations take steps to give effect to the rights within the Covenant and to ensure that people have an effective remedy for rights violations.⁵⁸

In order to meet its obligations under the ICCPR, the Australian Government should enshrine civil and political rights into domestic law. Civil and political rights form the basis of most human rights regimes, including that of the United Kingdom, New

⁵⁵ Australian Government Attorney-General's Department International human rights system <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/International-Human-Rights-System.aspx> at 25 November 2019.

⁵⁶ For example, protections in the International Convention on the Elimination of All Forms of Racial Discrimination are reflected in the *Racial Discrimination Act 1975* (Cth).

⁵⁷ National Human Rights Consultation Committee, Report of the National Human Rights Consultation Committee (2009) 345.

⁵⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2 (2).

Zealand and Canada. The ACT, Victoria and Queensland have also based their Human Rights Acts largely on the civil and political rights contained in the ICCPR.

Victorian Charter rights and freedoms

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

The Australian Government should incorporate civil and political rights, based on the ICCPR, into a national Human Rights Act.

The right to Aboriginal and Torres Strait Islander self-determination

We seek constitutional reforms to empower our people and take a *rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: *the coming together after a struggle*. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.⁵⁹

– Uluru Statement from the Heart

Self-determination is a key right of Aboriginal and Torres Strait Islander people recognised at international law and in domestic agreements.⁶⁰ This concept is generally understood as a right of peoples to participation in the political process, and can include an entitlement to:

- respect for distinct cultural values and diversity
- recognition of the political identity of Indigenous nations and peoples, their representatives and institutions
- respect for Indigenous peoples' connection with and relationship to land
- ensuring that Indigenous peoples themselves actually have, feel and understand that they have choices about their way of life
- respect for and promotion of Indigenous participation and control
- Indigenous representation and participation in our democratic processes.⁶¹

The United Nations Human Rights Committee has described the right to self-determination as 'the essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.'⁶² It was for this reason that it was placed as the first article of the ICCPR.⁶³

There is a body of evidence linking Indigenous self-determination to highly positive outcomes for Aboriginal people in the areas of policy formulation, resource and economic management, health service delivery and culturally safe program design.⁶⁴

The independent eight-year review of the Charter recommended that a right to self-determination be recognised in Victorian human rights law.⁶⁵ The Commission has long called for a legislated right to self-determination in Victoria and recommends that a right to self-determination also be included in a national Human Rights Act.

The Uluru Statement from the Heart calls for truth-telling about our history.⁶⁶ Reflecting this statement, the process of achieving self-determination should be led

⁵⁹ Referendum Council, *Final Report of the Referendum Council* (Final Report of the Referendum Council, 30 June 2017) i.

⁶⁰ See, eg, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1; *United Nations Declaration on the Rights of Indigenous Peoples*, art 3; Burra Lotjpa Dunguludja, *Aboriginal Justice Agreement Phase 4 Vision*. <https://www.aboriginaljustice.vic.gov.au/the-agreement/the-aboriginal-justice-agreement-phase-4/>; Referendum Council, *Final Report of the Referendum Council* (Final Report of the Referendum Council, 30 June 2017) i.

⁶¹ Human Rights Consultation Committee, Department of Justice, Victoria, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 38.

⁶² Human Rights Committee, *CCPR General Comment 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples*, 21st sess, UN Doc HRI/GEN/1/Rev.1 at 12 (13 March 1994).

⁶³ Consultation Committee, Department of Justice, Victoria, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 39.

⁶⁴ Larissa Behrendt, Miriam Jorgensen and Alison Vivian, 'Self-Determination: Background Concepts' (Scoping paper 1 prepared for the Victorian Department of Health and Human Services, UTS: Jumbunna, Dec 2017) 10, 12-14, 18.

⁶⁵ Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (Report, 1 September 2015) 214.

⁶⁶ Referendum Council, *Final Report of the Referendum Council* (Final Report of the Referendum Council, 30 June 2017) i.

by the communities it will empower and should include a true reckoning with past human rights violations and acknowledgment of the many ways this legacy of violence and pain continues to scar society today.⁶⁷

In addition to specific rights for Australian Indigenous people, a national Human Rights Act should specifically recognise the special importance of all human rights for Indigenous people. The ACT, Victoria and Queensland's human rights acts specifically recognise Australian Indigenous people. For example, the Preamble to the Victorian Charter states:

human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.⁶⁸

The Commission is of the view that a national Human Rights Act should also recognise the special significance that human rights have for Indigenous people.

5.2 Economic, social and cultural rights

Economic, social, and cultural rights include the human right to work, the right to an adequate standard of living, including food, clothing, and housing, the right to physical and mental health, the right to social security, and the right to education. Various reviews have recommended that in Australia priority be given to enshrining these rights because they 'touch the substance of people's lives'⁶⁹ and are 'the rights at greatest risk, especially for vulnerable groups in the community'.⁷⁰ The distinction between the rights contained in the ICCPR and the economic, social and cultural rights contained in the ICESCR is largely artificial⁷¹ – all human rights are 'universal, indivisible, interdependent and interrelated'.⁷² For example, the right to vote and take part in public life will be weakened if people are deprived of the right to an education; and a person's lack of access to safe and secure housing may limit a person's access to essential services and employment.⁷³

The ICESCR requires that steps be taken 'to the maximum of ... available resources, with a view to achieving progressively the full realisation of the rights recognised'.⁷⁴ Thus, full implementation of Australia's international commitments requires not only the protection of civil and political rights, but also the progressive realisation of economic, social and cultural rights. This principle of 'progressive realisation' recognises that fully achieving these rights will take time and will be dependent on

⁶⁷ Michelle Bachelet, Free and Equal: An Australian Conversation on Human Rights (Speech, Australian Human Rights Commission conference, 8 October 2019). <<https://www.humanrights.gov.au/about/news/speeches/un-human-rights-commissioner-speaks-out>>

⁶⁸ *Charter of Human Rights and Responsibilities* (2006) Vic, Preamble.

⁶⁹ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (Twenty-ninth Report of Session 2007-8, 21 July 2008) 56.

⁷⁰ Human Rights Consultation Committee, Department of Justice, Victoria, *National Human Rights Consultation*, (Report, September 2009) 344.

⁷¹ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights*, No.33 (December 2008) 8.

⁷² UN General Assembly, *Vienna Declaration and Programme of Action*, GA Res 48/121 A/CONF.157/23 (12 July 1993) art 5; *Australian Human Rights Commission Act 1986* (Cth) s 10A(1) (a)

⁷³ Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 96.

⁷⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2 (1).

the resources that a government has available. Australia is well placed to give effect to this obligation.

There is strong community support to protect economic and social rights in Victoria and nationally. Consultations undertaken by the Commission have shown that advocacy organisations and community members support the inclusion of economic, social and cultural rights in the Charter on the basis that they are the key rights abuses that their client groups face.⁷⁵

The Human Rights Acts of the ACT and Queensland do not clearly divide civil and political rights from economic, cultural and social rights. Some rights in these acts are drawn from the ICESCR, including:

- education (ACT and Queensland)
- health services (Queensland).

While aspects of some economic, social and cultural rights are also evident in federal law,⁷⁶ protection of these rights is inconsistent. Expressly recognising economic and social rights in a national Human Rights Act would strengthen and clarify these protections. It would fill the gaps and put human rights in one place, making them easier for the community to identify and use.

The Commission reiterates its call for the economic and social rights to health, education and housing to be included in the Charter.⁷⁷ We also recommend that economic and social rights – including, but not limited to, the rights to health, education and housing – be included in a national Human Rights Act at the outset.⁷⁸ These rights should be subject to the same range of obligations, procedures and mechanisms as civil and political rights, but should also be considered through the lens of progressive realisation. We note that in addition to rights derived from the ICCPR and the ICESCR, property rights – present in the human rights acts of the ACT, Victoria and Queensland – are derived from the Universal Declaration of Human Rights.

5.3 Rights recognised under other international treaties

In addition to the rights listed above, the Commission supports inclusion of key aspects of other international treaties ratified by Australia including:

- Convention on the Rights of the Child
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Rights of Persons with Disabilities.⁷⁹

⁷⁵ Colmar Brunton Social Research, *Talking rights: Consulting with Victorians about economic, social and cultural rights and the Charter* (2011) 13.

⁷⁶ For example, in relation to discrimination, health, education and housing.

⁷⁷ See, for example, Victorian Equal Opportunity and Human Rights Commission, Submission No 278 to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 53.

⁷⁸ We note the difficulty in including additional rights once an act has been introduced: in Victoria no new rights have been added, despite the fact that the Charter has undergone two reviews.

⁷⁹ For detailed discussion and recommendations on how aspects of these treaties may be incorporated into domestic human rights law, see the Commission's submission to the Four-year Review of the Charter. See Victorian Equal Opportunity and Human Rights Commission, Submission No 278 to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 44 – 77.

Equality and intersectionality

In addition to facing barriers to rights because of one or other particular attribute (for example, age, sex, disability), people may experience barriers to rights because of the intersection of multiple attributes. This is often described as intersectional discrimination.

Intersectional discrimination is prohibited under international law.⁸⁰ The CEDAW Committee has explained, for instance, that CEDAW requires States Parties to 'legally recognise and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned'.⁸¹ It has also clarified that '[i]ntersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2 [of CEDAW].'⁸² Other human rights treaty bodies, as well as a number of state laws, also recognise intersectional discrimination and require states to identify and address it.⁸³ In drafting a national Human Rights Act, consideration should be given to recognising the additional barriers to rights people may face by virtue of a characteristic or multiple intersecting characteristics. This may be incorporated, for example into the objects or principles of a national Human Rights Act.

5.4 The right to a healthy environment

The Commission is of the view that in drafting any modern human rights legislation, consideration should be given to inclusion of a right to a healthy environment.

The ICESCR recognises a right to 'improvement of all aspects of environmental and industrial hygiene' as part of the right to health contained in Article 12. A right to a healthy environment is also recognised in transnational agreements including the *African Charter on Human and Peoples' Rights*⁸⁴ and the *Protocol of San Salvador to the American Convention on Human Rights*.⁸⁵

Since the United Nations Conference on the Human Environment in 1972, more than 140 countries have incorporated the right to a healthy environment into their national constitutions.⁸⁶ This human right is most often articulated as "every person has the right to a healthy environment" or "every person has the right to a healthy, ecologically balanced environment."⁸⁷

⁸⁰ See, eg, *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature on 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 10, 11(2), 12, 14, 16(1)(e).

⁸¹ *General Recommendation 28*, UN Doc CEDAW/C/GC/28 [18]. See also *General Recommendation 25*, UN Doc A/59/38, annex I [12].

⁸² *General Recommendation 28*, UN Doc CEDAW/C/GC/28 [18]. See also *General Recommendation 25*, UN Doc A/59/38, annex I [12].

⁸³ See, eg, *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 55th sess, Supp No 18, UN Doc A/55/18 (2000) annex VA ('General Recommendation XXV on Gender-Related Dimensions of Racial Discrimination'); *Magna Carta of Women 2008* (the Philippines) s 4.

⁸⁴ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter") CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (27 June 1981) art 24.

⁸⁵ Organization of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* ("Protocol of San Salvador") A-52 (16 November 1999) art 11.

⁸⁶ David R.Boyd, *The Status of Constitutional Protection for the Environment in Other Nations*, (PAPER #4, David Suzuki Foundation, 2013) 12.

⁸⁷ See David R.Boyd, *The Status of Constitutional Protection for the Environment in Other Nations*, (PAPER #4, David Suzuki Foundation, 2013) 12. "For example, art 110(b) of the *Constitution of Norway* (1992) states: 'Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well'."

There have been increasing calls for the protection for the right to a healthy environment in Australia. In 2009 the National Human Rights Consultation Committee reported that almost 250 submissions to the Inquiry raised environmental concerns, and environmental rights were raised at most community roundtables.⁸⁸

The human right to a healthy environment brings together the environmental dimensions of civil, cultural, economic, political, and social rights, and protects the core elements of the natural environment that enable a life of dignity. Diverse ecosystems and clean water, air, and soils are indispensable for human health and security.⁸⁹ The right also protects the civic space for individuals to engage in dialogue on environmental policy.⁹⁰ The right is important for those who suffer most as a result of environmental harm: women, the poor, racial and ethnic minorities, and the young.

The understanding that people have a right to a healthy environment is gaining traction. This is an issue that should be part of the national conversation about what is contained in a national Human Rights Act.

Recommendation 2. Scope of rights

In considering which rights should be protected, the Australian Government should have regard to views of the Australian community. Rights to be protected should include:

- civil and political rights based on those rights contained in the ICCPR, including the right to Aboriginal self-determination
- economic, social and cultural rights based on those rights contained in the ICESCR, including, but not limited to, the right to health, education and housing
- rights contained in other human rights treaties ratified by Australia, including:
 - Convention on the Rights of the Child
 - Convention on the Elimination of All Forms of Discrimination against Women
 - Convention on the Rights of Persons with Disabilities.

<<https://davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations.pdf>>

⁸⁸ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 346.

⁸⁹ The importance of 'environmental hygiene' to a right to health is recognised in the ICESR: see *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12(b).

⁹⁰ Marcos A. Orellana, 'THE CASE FOR A RIGHT TO A HEALTHY ENVIRONMENT', *WORLD POLICY JOURNAL* (Article, 1 March 2018) <<https://worldpolicy.org/2018/03/01/case-right-healthy-environment/>>

6. How should competing rights be balanced or limited?

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

Existing state and territory human rights legislation also provides that human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. One individual's rights may also need to be weighed against another individual's rights.

Likewise, existing state-based Human Rights Acts provide a framework for decision-makers to balance human rights when they are in conflict.⁹¹ For example, section 7(2) of the Charter provides that all rights may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including five key considerations.⁹²

A limit on a human right is 'compatible' with that right where it is a reasonable limit taking into account these factors. Section 7(2) incorporates a proportionality test and provides a clear and effective framework for considering the limits that may be placed on human rights, having regard to competing public interests and policy objectives.

A national Human Rights Act should include a framework for decision-makers to balance human rights when they are in conflict. This should set out a proportionality test to govern when a limitation on human rights is permitted. The test should take into account all the relevant circumstances, including whether there are other less rights-intrusive measures available to achieve the intended purpose of the law or policy.

Recommendation 3. Balancing and limiting rights

A national Human Rights Act should include a framework for decision-makers to balance human rights when they are in conflict. It should set out a proportionality test to govern when a limit on human rights can be demonstrably justified.

⁹¹ *Human Rights Act* (2004 (ACT) s 28; *Charter of Human Rights and Responsibilities* (Vic) s 7(2), *Human Rights Act* 2019 (QLD) s 13.

⁹² See, e.g. *Major Crime (Investigative Powers) Act 2004 [2009]* VSC 381 (7 September 2009) analysis of section 7(2) of the Charter.

7. Who should hold human rights obligations?

A national Human Rights Act should place an obligation on public authorities and other duty holders to act compatibly with human rights and to take human rights into account when making decisions.

In Victoria this obligation in the Charter has had a number of positive effects. It has assisted government by providing a framework to identify, assess and balance human rights against other rights and interests. This has ultimately improved the quality of service design, in particular for marginalised, excluded and disadvantaged people in the community. For individuals it has established clear and non-negotiable human rights standards, and provided a framework within which to advocate for rights and avenues for redress when rights have been violated.

Drawing on the Victorian experience, we set out our recommendations about who should hold human rights obligations under a national Human Rights Act.

7.1 Federal public authorities

In Australian human rights legislation, the obligation to uphold human rights primarily rests on government bodies. Commonly, this is achieved through ‘public authorities’.

The ACT, Victoria and Queensland have adopted adaptive definitions of ‘public authorities.’ The definition of public authority under these acts can be divided into ‘core’ public authorities and ‘functional’ public authorities. Core public authorities are always public authorities, while functional public authorities may or may not be public authorities depending on the function they are performing.

While the Charter provides some guidance on what constitutes a public authority, the eight year review of the Charter highlighted the need to clarify the application of the Charter to functional public authorities,⁹³ and made recommendations to this effect.⁹⁴ The Commission continues to receive feedback that the definition is unclear.⁹⁵ The Commission is of the view that the definitions in the Queensland and ACT acts are preferable model, as they set out in detail matters to consider when deciding whether a function is of a public nature, as well as providing examples of functions of a public nature.⁹⁶

A national Human Rights Act should apply to federal public authorities. This definition should include ‘core’ public authorities including departments and agencies, public officials, police and ministers.

In addition, the definition of ‘public authorities’ should be flexible enough to extend to non-government entities where they exercise functions of a public nature on behalf of the government. This will reflect the reality that modern governments frequently and increasingly outsource important government functions to non-government

⁹³ Michael Brett Young, *‘From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006’* (Report, 1 September 2015) 58.

⁹⁴ See Michael Brett Young, *‘From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006’* (Report, 1 September 2015) 62-65.

⁹⁵ See *Metro West Housing Services Ltd v Sudi [2009]* VCAT 2025 for analysis of section 4(1)(c) of the Charter.

⁹⁶ See *Human Rights Act 2004* (ACT) ss 40, 40A; *Human Rights Act 2019* (Qld) ss 9, 10.

organisations. Importantly, this means that the work of government is subject to human rights frameworks, regardless of which entity provides the service.

7.2 Private and non-government organisations

The acts of private and non-government organisations can affect human rights of their employees and contract workers, their customers, workers in their supply chains, communities around their operations and end users of their products or services. They can have an impact – directly or indirectly – on virtually the entire spectrum of human rights.⁹⁷

Over the past decade the international community has made significant advances in examining the links between private entities and human rights, and international standards and initiatives have been developed to encourage private companies to respect human rights.⁹⁸

A range of Australian laws currently require corporations to comply with human rights standards. Examples include laws that:

- prohibit discrimination and harassment in the workplace and laws requiring employers to provide equal employment opportunities⁹⁹
- require larger companies to report on the steps taken to respond to the risk of modern slavery in its operations and supply chains¹⁰⁰
- protect privacy rights by regulating the collection, use and disclosure of personal information by large companies¹⁰¹
- recognise that Aboriginal and Torres Strait Islander people have rights and interests to land and waters according to their traditional law and customs.¹⁰²

In the ACT and Queensland, human rights laws allow organisations that are not covered by the legislation to choose to be subject to it.¹⁰³ Under these acts, a private company adopting human rights principles as part of its corporate social responsibility charter may request to be subject to the legislation. There is no such provision in the Charter, however the report of the eight year review of the Charter recommended businesses be given the ability to opt in to the obligation,¹⁰⁴ to ‘fit with the increasing focus on human rights beyond the public sector and [to] help build a human rights culture’.¹⁰⁵ The Commission recommends that an opt-in model for private and non-government organisations be considered to strengthen consistency and impact of a national Human Rights Act.

⁹⁷ See Human Rights Reporting and Assurance Frameworks Initiative (RAFI), *UN Guiding Principles Reporting Framework* (The Reporting Framework, 2017) <<https://www.ungreporting.org/>>

⁹⁸ See especially, UNHR Office of the High Commissioner, *Guiding Principles on Business and Human Rights* (Implementing the United Nations “Protect, Respect and Remedy” Framework, 2011) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>

⁹⁹ See, e.g. *Fair Work Act 2009* (Cth).

¹⁰⁰ See, e.g. *Modern Slavery Act 2018* (Cth).

¹⁰¹ See, e.g. *Privacy Act 1988* (Cth).

¹⁰² See, e.g. *Native Title Act 1993* (Cth).

¹⁰³ *Human Rights Act 2004* (ACT) s 40D; *Human Rights Act 2019* (Qld) s 60.

¹⁰⁴ Michael Brett Young, ‘From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006’ (Report, 1 September 2015) 65.

¹⁰⁵ Michael Brett Young, ‘From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006’ (Report, 1 September 2015) 65.

Recommendation 4. Obligations to respect and uphold human rights

- A national Human Rights Act should oblige federal public authorities to act compatibly with human rights and take human rights into account when making decisions.
- These obligations should extend to non-government entities where they exercise functions of a public nature on behalf of the government.
- Private and non-government organisations should be able to opt in to the obligations of a national Human Rights Act.

8. Resolving disputes about rights

It is recognised at international law that effective remedies must be provided for breaches of human rights.¹⁰⁶ To be effective, a remedy must be accessible, affordable and timely.

These principles should guide the development of a framework in a national Human Rights Act that ensures that people can raise concerns about the human rights conduct of duty holders.

In the section below, the Commission draws on key lessons from the Charter framework that are essential to address in the design of a national Human Rights Act.

8.1 The impact of human rights litigation

In Victoria, the Charter provides a mechanism to bring a legal proceeding against a public authority for failing to do either of these things, if brought in conjunction with another proceeding.¹⁰⁷

The Charter is raised in Victoria's higher courts (the Supreme Court, Court of Appeal and County Court) in about 40 cases per year.¹⁰⁸ This has proved a successful mechanism for upholding rights. Litigation using the Charter has seen the following outcomes:

- freedom from medical treatment without full, free informed consent and equality before the law¹⁰⁹
- the right to a fair hearing in the context of unrepresented litigants¹¹⁰ and in situations where the parties have not been notified of, and are not present at, the proceedings¹¹¹
- the right to equality before the law for people with a disability to access, and use of, common property of an owners corporation¹¹²
- the cultural rights of Aboriginal people applying to have their case heard in the Koori Court¹¹³
- the duty to act in the best interests of the children, where young people are being detained within a former adult maximum-security prison environment.¹¹⁴

¹⁰⁶ Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, CCPR/C/21/Rev.1/Add. 13 (26 May 2004).

¹⁰⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39.

¹⁰⁸ Victorian Equal Opportunity and Human Rights Commission, *2017 report on the operation of the Charter of Human Rights and Responsibilities* (Report, September 2017) 31.

¹⁰⁹ *PBU & NJE v Mental Health Tribunal* [2018] VSC 564.

¹¹⁰ *Roberts v Harkness* [2018] VSCA 215 (29 August 2018); *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61.

¹¹¹ *AB & EF v CD* [2017] VSC 350; *AB v CD & EF* [2017] VSCA 338 (21 November 2017); *AB v CD; EF* [2018] HCA 58 (5 November 2018). The proceedings commenced in 2017, however no reporting of the matter was permitted by the courts until 5 February 2019.

¹¹² *Owners Corporation v Black* [2018] VSC 337.

¹¹³ *Cemino v Cannan & Ors* [2018] VSC 535.

¹¹⁴ *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251.

Certain Children v Minister for Families & Children & Ors (No 2)¹¹⁵

You're 16 years old. You're in a unit within a maximum-security adult prison. The guards brought a large German Shepherd dog into the unit. You're scared. When coming in from the yard you are sometimes taken through the adult prison. You don't feel safe. Some days you spend 23 hours a day in solitary confinement. You're handcuffed. The guards use pepper spray on other prisoners. You can't breathe. There's no privacy to shower or use the toilet. The room they call a classroom is small and noisy. You can't concentrate. You're far away from home. And your mother is too afraid to visit.

The Supreme Court of Victoria has highlighted that public authorities must protect young people in their care and provide them with humane treatment – even if they're in prison.

Barwon Prison is designed to be a maximum-security adult prison. It is not designed for the detention of children and young people. Yet, when the capacity of Parkville Youth Justice Precinct was significantly reduced at the end of 2016, it was used for just that. A group of children and young people aged 15 to 18 were transferred to the Grevillea Unit, a new remand and youth justice centre set up within Barwon Prison.

The group raised their rights under the Charter in challenging these actions in the Supreme Court. The court found that the defendants in this case – the Minister for Families and Children, the Secretary of the Department of Health and Human Services, the Minister for Police and the State of Victoria – had failed to properly consider the human rights of this group of children and young people when transferring them to the Grevillea Unit. The judge found that the practices used at Grevillea – as described above – risked impacting the mental health of this group and that the limitation on their rights was not proportionate.

What impact did the Charter have?

- The children and young people were all moved out of the Grevillea Unit.
- It would be very difficult for a future government to justify housing children or young people in an adult prison following this decision.
- Public authorities were put on notice that human rights must be properly considered in all decisions. Human rights and freedoms must be considered in all government decision-making. This obligation still holds in emergencies or urgent situations.

¹¹⁵ Certain Children v Minister for Families and Children & Ors (No 2) [2017] VSC 251.

Burgess v Director of Housing¹¹⁶

When the eviction notice arrives, you're not sure how to react. You're angry, sure, but also terrified. This place is your home. This is where you live, where you've raised your son. How are you meant to find somewhere else to live? Isn't the government meant to look after you?

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

This decision has had a positive ongoing impact on the rights of public housing tenants. The Burgess decision has been helpful in articulating the Director of Housing's obligations to consider human rights in making eviction decisions and has positively affected how the Director engages with tenants.¹¹⁷

8.2 Using ADR to resolve human rights complaints

Alternative dispute resolution should be included in a national Human Rights Act as the first level of redress in any remedies provision. For example, the *Human Rights Act 2019* (Qld) allows for the Commission to accept a human rights complaint and to conduct a conciliation conference in order to promote resolution of the complaint in a way that is informal, quick and efficient. Such a model also exists in the *Anti-Discrimination Act 1991* (Cth) for complaints of discrimination, sexual harassment, victimisation and vilification.

Alternative dispute resolution provides a quick, cheap, accessible, informal and easy to navigate method of redress outside the court system. Parties can negotiate an outcome that is mutually acceptable and which can provide a personal remedy for the complainant, such as compensation or an apology, or systemic change such as changes to customer practices and procedures; changes to internal or staff practices and procedures; modification of facilities and/or premises; the introduction or review of policies; and provision of training.¹¹⁸

Dispute resolution provided under a national Human Rights Act could follow the model set out in the federal Anti-Discrimination Act or the QLD Human Rights Act.

¹¹⁶ *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648.

¹¹⁷ Victorian Equal Opportunity and Human Rights Commission, *2015 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, August 2016) 8.

¹¹⁸ See Victorian Equal Opportunity and Human Rights Commission, Submission No 90 to Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 18-26. See also Victorian Equal Opportunity and Human Rights Commission, Submission No 278 to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 186.

8.3 The importance of a clear right of action through the courts

The examples above illustrate the importance of ensuring that people can challenge the conduct of duty holders through the courts. This is a key accountability feature of a model Human Rights Act. It is important that a person who wishes to make a complaint about a human rights breach is able to have that complaint heard and determined by an appropriate independent body.

Not having clear, accessible and enforceable remedies attached to a Human Rights Act creates a barrier for the development of a human rights culture. In Victoria, the Charter does not allow a person to bring an independent action against a public authority for a breach of the Charter. Instead, a person can only raise the Charter by joining or ‘piggy backing’ a claim to separate proceedings against a public authority. This significantly reduces the ability for individuals to obtain effective relief.

By contrast, human rights legislation in the ACT and Queensland allows a person to bring a claim for a breach of a human right without the need to attach it to another claim. Under this model, a person whose human rights have been breached could either bring a proceeding using the direct cause of action, or rely on their rights in other legal proceedings. A national Human Rights Act should make clear that a person who claims that a decision of a public authority is incompatible with human rights or was made without proper consideration of relevant human rights, can seek review of that decision through the courts. It should not be necessary to claim the conduct is unlawful on another ground, as is the case in Victoria.¹¹⁹

8.4 The importance of effective remedies

A national Human Rights Act should also provide for redress that matches the nature and seriousness of the human rights breach. If a breach of human rights carries tangible consequences, then public authorities are more likely to ensure that they meet their obligations. Good will from public authorities is important, but without a method of enforcement as a last resort, cultural change will be slower.

Recommendation 5. Remedies for breaches of human rights

A national Human Rights Act should include pathways for individuals to raise breaches of human rights obligations, including through:

- alternative dispute resolution
- a simple and direct right of action to the courts.

Remedies, including compensation, should be applicable to breaches of human rights obligations.

¹¹⁹ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 39.

9. What role should a national human rights institution play?

The fulfilment of the goals of a national Human Rights Act relies on actions of all of us – community, government, our lawmakers and our courts. These actions are best supported through a national human rights institution.

In Victoria, the Commission's functions have played a pivotal role in the promotion and protection of human rights, and the development of a human rights culture. Key functions of the Commission under the Charter include:

- intervening in legal proceedings that relate to human rights
- providing the Attorney-General an annual report examining the operation of the Charter
- when requested by the Attorney-General, reviewing and reporting on the effect of statutory provisions and the common law on human rights
- when requested by a public authority, reviewing that authority's programs and practices to determine their compatibility with human rights
- to providing education about human rights and the Charter.

The Charter also confers powers and responsibilities on the Victorian Ombudsman and the Independent Broad-based Anti-corruption Commission. The Victorian Ombudsman may take complaints, and has the power to enquire or investigate, whether an administrative action is incompatible with the Charter.¹²⁰ IBAC is required to consider Charter rights when assessing complaints made about police and protective service officers.¹²¹

The AHRC – Australia's national human rights institution – currently has some functions in relation to the protection and promotion of human rights. These include the power to:

- inquire into and attempt to conciliate individual complaints of unlawful discrimination, equal opportunity in employment and other breaches of human rights
- hold public inquiries and consultations, including to address systemic human rights or discrimination issues of national importance
- undertake research and education to promote human rights
- report to the minister on laws that should be made or action the government should take on human rights or compliance with Australia's international human rights obligations, and
- intervene in legal cases involving human rights issues with the leave of the court.¹²²

The AHRC outlines the limitations with its current functions in its *Discussion Paper: A model for positive human rights reform*:

¹²⁰ *Ombudsman Act 1973* (Vic) s 13(2).

¹²¹ See *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) 15(3)(b)(iii); Independent Broad-based Anti-corruption Commission 'Legislation we work under' <https://www.ibac.vic.gov.au/about-us/legislation-we-work-under> at 21 November 2019.

¹²² Australian Human Rights Commission 2019, *Discussion Paper: A model for positive human rights in Australia* (Discussion Paper, August 2019) 14.

However, the [AHRC's] ability to resolve human rights complaints can be very limited. Unlike complaints alleging unlawful discrimination, if the AHRC cannot conciliate a human rights or ... discrimination complaint, the person cannot then bring court proceedings. Rather, if the Commission finds a breach of human rights it can report to the Attorney-General. Any recommendations made by the Commission are non-binding and are not enforceable by the courts.¹²³

In effect, human rights complainants can be left at the end of a pathway with nowhere to go. While they have been able to make a complaint to the AHRC, the result is a non-binding report which in many cases is ineffective in achieving true justice or reform.¹²⁴

Successful implementation of a national Human Rights Act requires the support of an effective human rights institution. This is recognised in the Paris Principles adopted by the UN General Assembly. The Paris Principles are an international standard for the role, composition, status and functions of national human rights institutions,¹²⁵ and set out six main criteria that national human rights institutions are required to meet:

- a broad mandate, based on universal human rights norms and standards
- autonomy from government
- independence
- pluralism
- adequate resources
- adequate powers of investigation.¹²⁶

The AHRC must be equipped with the necessary powers, functions and resources to protect and promote rights in line with the Paris Principles.¹²⁷ These powers should include the power to intervene in legal cases involving human rights (without necessarily seeking the leave of the court to do so, as is currently the case). This function is important, as it will allow the AHRC to act as an independent and expert advocate in relation to the interpretation and application of the national Human Rights Act and to contribute to the development of jurisprudence on the protection of human rights.¹²⁸ The impact of the Commission's intervention function on the operation of the Charter, and on the inclusion of human rights in judicial decision-making, is outlined above at '4.1.3 The role of courts and tribunals'.

¹²³ Australian Human Rights Commission 2019, *Discussion Paper: A model for positive human rights in Australia* (Discussion Paper, August 2019) 10.

¹²⁴ Australian Human Rights Commission 2019, *Discussion Paper: A model for positive human rights in Australia* (Discussion Paper, August 2019) 14; with reference to the Australian Human Rights Commission Act 1986 (Cth).

¹²⁵ UNHR Office of the High Commissioner, *Principles relating to the Status of National Institutions (The Paris Principles)*, GA Res 48/134, PTS-4(Rev.1) (9 October 1991, adopted 20 December 1993).
<<https://www.ohchr.org/EN/ProfessionalInterest/Pages>StatusOfNationalInstitutions.aspx>>

¹²⁶ UNHR Office of the High Commissioner, *Principles relating to the Status of National Institutions (The Paris Principles)*, GA Res 48/134, PTS-4(Rev.1) (9 October 1991, adopted 20 December 1993) 31.
<<https://www.ohchr.org/EN/ProfessionalInterest/Pages>StatusOfNationalInstitutions.aspx>>

¹²⁷ UNHR Office of the High Commissioner, *Principles relating to the Status of National Institutions (The Paris Principles)*, GA Res 48/134, PTS-4(Rev.1) (9 October 1991, adopted 20 December 1993).
<<https://www.ohchr.org/EN/ProfessionalInterest/Pages>StatusOfNationalInstitutions.aspx>>

¹²⁸ See discussion relating to the intervention function in the Charter by the Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (December 2005), 107–108.

Recommendation 6. A powerful national human rights regulator

The Australian Human Rights Commission (AHRC) should have the functions, powers and resources to effectively support the implementation of a national Human Rights Act, and to protect and promote human rights. In line with the Paris Principles, legislation should provide that the AHRC is autonomous and independent from government and has:

- a broad mandate, based on universal human rights norms and standards
- adequate resources to protect and promote human rights
- a right to intervene in legal cases involving human rights
- adequate powers of investigation.

9.1 Education is key to building a culture of human rights

The Victorian experience of the Charter illustrates that investment in education is critical to the development of a human rights culture. Meaningful cultural change is the result of sustained commitment and efforts over time.¹²⁹

For the Charter to make a difference to people's lives, it must be backed by an effective package of education for the community, the legal profession, the courts, parliamentarians and government. This will help to build a human rights culture – a culture that creates an understanding of and respect for our basic rights and responsibilities across the entire Victorian community. Such a culture could contribute to a greater understanding of the protection of human rights where it matters most: at the individual level where people interact with each other, with government and in their communities.

Victorian Department of Justice¹³⁰

In the Victorian context, initial funding was provided for education, which was integral to the implementation of the Charter in the early years of the Charter's life. Following this, there was a reduction in funding, and the 2015 independent review of the Charter re-emphasised the importance of investment in education to build a human rights culture.¹³¹ The Government responded by prioritising human rights training and education for public sector employees, and provided significant resources to the Commission and the Department of Justice and Regulation to deliver training across the Victorian public sector.

Early results indicate this training has been successful in raising awareness of the application of the Charter across the Victorian public sector. In 2018, the annual survey of the Victorian public sector, the People Matter Survey, 76 per cent of respondents agreed or strongly agreed to the statement 'I understand how the

¹²⁹ See Victorian Equal Opportunity and Human Rights Commission, 2017 Report on the operation of the Charter of Human Rights and Responsibilities (Report, June 2018) 51; See Michael Brett Young, '*From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*' (Report, 1 September 2015) 20.

¹³⁰ Department of Justice, Victoria, 2006-07 Victorian Budget Fact Sheet: Victoria Leads the Way on Human Rights (2006) in George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' [2006] MelbULawRw 27; (2006) 30(3) Melbourne University Law Review 880.

¹³¹ Michael Brett Young, '*From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*' (Report, 1 September 2015) 20.

Charter applies to my work.¹³² This was a significant 15 per cent increase from the previous year and is an encouraging result.

Human rights education helps departments, agencies and local governments ensure that proper consideration is built into their project planning and that their service delivery is compatible with their obligations under the Charter.

Prioritisation and funding should be given to sustained human rights education to support the effective implementation of a national Human Rights Act.

Recommendation 7. Human rights education

The Australian Government should provide resources and funding for sustained human rights education to duty holders and to the community, to support the effective implementation of a national Human Rights Act.

¹³² Victorian Public Sector Commission, *People Matter Survey* (Survey, 2018).



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