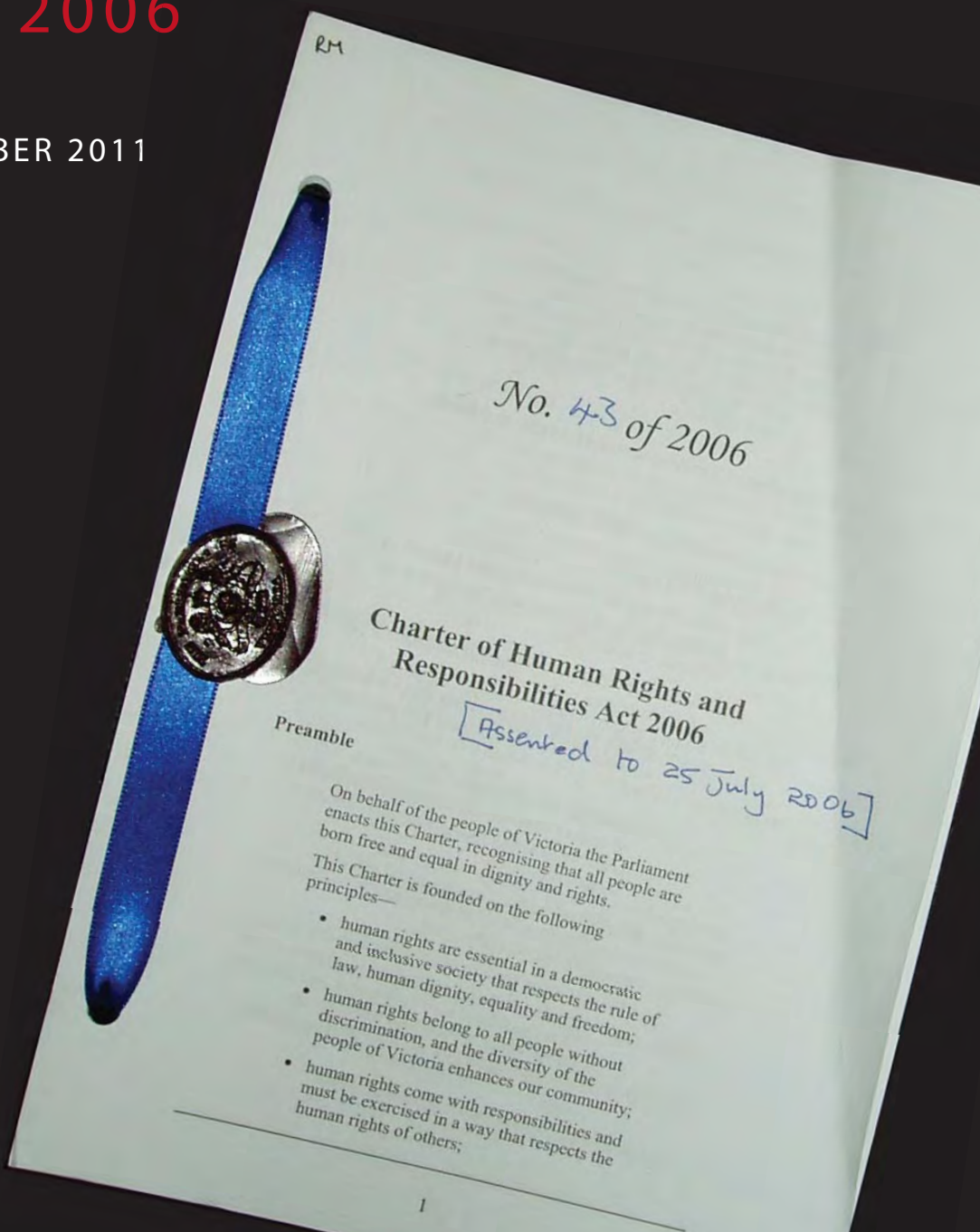
PARLIAMENT OF VICTORIA

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

REVIEW OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

SEPTEMBER 2011



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Referral to the Committee

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE OF PARLIAMENT

REVIEW OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

To inquire into and report by 1 October 2011 on the first four years of operation of the Charter of Human Rights and Responsibilities Act 2006 (the Charter Act), including:

1. the matters referred to in section 44(2) of the Charter Act
2. the effects of the Charter Act on
   - (a) the development and drafting of statutory provisions
   - (b) the consideration of statutory provisions by Parliament
   - (c) the provision of services, and the performance of other functions, by public authorities
   - (d) litigation and the roles and functioning of courts and tribunals
   - (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights
3. the overall benefits and costs of the Charter Act; and
4. options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria.

In carrying out its inquiry, the Committee is asked to take note of, and make use of as it sees fit, the evidence and findings of, and government responses to, previous inquiries and reports concerning rights and responsibilities in Australia.

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

57th Parliament

Review of the Charter of Human Rights and Responsibilities Act 2006

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Scrutiny of Acts and Regulations Committee

Review of the Charter of Human Rights and Responsibilities Act 2006

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Functions of the Committee

The statutory functions of the Scrutiny of Acts and Regulations Committee as set out in section 17 of the *Parliamentary Committees Act 2003* are —

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly–

  (i) trespasses unduly upon rights or freedoms;

  (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;

  (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;

  (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;

  (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;

  (vi) inappropriately delegates legislative power;

  (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;

  (viii) is incompatible with the human rights set out in the *Charter* of Human Rights and Responsibilities;

(b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –

  (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;

  (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;

  (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but where an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

(c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –

  (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or

  (ii) within 10 sitting days after the Act receives Royal Assent —

  whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs; (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;

(e) the functions conferred on the Committee by the *Environment Protection Act 1970*;

(f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;

(fa) the functions conferred on the Committee by the *Charter* of Human Rights and Responsibilities;

(g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

Terms of Reference

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE OF PARLIAMENT

REVIEW OF THE
CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

To inquire into and report by 1 October 2011 on the first four years of operation of the **Charter of Human Rights and Responsibilities Act 2006** (the Charter Act), including:

1. the matters referred to in section 44(2) of the Charter Act
2. the effects of the Charter Act on
   (a) the development and drafting of statutory provisions
   (b) the consideration of statutory provisions by Parliament
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   (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights
3. the overall benefits and costs of the Charter Act; and
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In carrying out its inquiry, the Committee is asked to take note of, and make use of as it sees fit, the evidence and findings of, and government responses to, previous inquiries and reports concerning rights and responsibilities in Australia.

Victoria Government Gazette,
No. S 128, Tuesday 19 April 2011

Glossary of terms and abbreviations

In this paper the following abbreviations are used:

'ACT'	Australian Capital Territory
'CAT'	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
'CEDAW'	Convention on the Elimination of All Forms of Discrimination against Women
'CERD'	Convention on the Elimination of All Forms of Racial Discrimination
'Charter'	*Charter of Human Rights and Responsibilities Act 2006*
'CLC'	Community Legal Centre
'CRC'	Convention on the Rights of the Child
'CRPD'	Convention on the Rights of Persons with Disabilities
'CSOs'	Community Sector Organisations
'Declaration of inconsistent interpretation'	Declaration by the Supreme Court pursuant to Charter, s. 36 that a provision in an Act cannot be interpreted consistently with a Charter right
'DEECD'	Department of Education and Early Childhood Development
'DHS'	Department of Human Services
'DPP'	Director of Public Prosecutions
'EARC'	Electoral and Administrative Review Commission (Qld)
'ESC rights'	Economic, Social and Cultural rights
'Human rights certificate'	Certificate required to be provided by a Minister concerning a statutory rule pursuant to section 12A of the *Subordinate Legislation Act 1994*
'HRCC'	Victorian Human Rights Consultation Committee
'ICCPR'	International Covenant on Civil and Political Rights 1966
'ICESCR'	International Covenant on Economic, Social and Cultural Rights
'LIV'	Law Institute of Victoria
'MAV'	Municipal Association of Victoria
'NZ'	New Zealand
'OECD'	Organisation for Economic Co-operation and Development
'Override Declaration'	Declaration by Parliament pursuant to Charter, s. 31 that a provision of an Act has effect despite being incompatible with a Charter right
'PILCH'	Public Interest Law Clearing House

'public authority'	A public official, body or entity within the meaning of Charter, s. 4
'SARC'	Scrutiny of Acts and Regulations Committee of the Parliament of Victoria
'SRO'	State Revenue Office of Victoria
'Statement of Compatibility'	Statement required to be prepared by a member introducing a Bill in the Parliament pursuant to Charter, s. 28
'UK'	United Kingdom
'UNDRIP'	United Nations Declaration on the Rights of Indigenous Peoples
'VACCA'	Victorian Aboriginal Child Care Agency
'VACHO'	Victorian Aboriginal Controlled Health Organisation
'VACSAL'	Victorian Aboriginal Community Services Association Limited
'VAEAI'	Victorian Aboriginal Education Association Limited
'VALS'	Victorian Aboriginal Legal Service
'VCAT'	Victorian Civil and Administrative Tribunal
'VCOSS'	Victorian Council of Social Services
'VEOHRC'	Victorian Equal Opportunity and Human Rights Commission
'VLA'	Victoria Legal Aid
'VLGA'	Victorian Local Governance Association
'WA'	Western Australia

Chair's Foreword

I am pleased to present the Scrutiny of Acts and Regulations Committee's (SARC) review of the *Charter of Human Rights and Responsibilities Act 2006* (the 'Charter').

The four year review and inquiry is pursuant to section 44 of the Charter. That provision requires the Attorney-General to cause a review to be made of the first 4 years of the Charter's operation for tabling in Parliament before 1 October 2011. SARC was requested to undertake the review and inquiry by the Governor-in-Council Order dated 19th April 2011. In addition, three other terms of reference were provided to SARC which form part of this report.

The meaning of human rights in a Victorian context and the most appropriate way to protect and enhance those rights are matters of significant public interest and debate.

SARC and other joint Parliamentary Committees have a history of dealing with challenging and complex issues in a diligent and bipartisan manner.

It is hoped that this report continues that tradition by adequately responding to the terms of reference and provides the community with detailed and constructive recommendations to improve the regime for protecting human rights in Victoria.

In the report, SARC notes that the Charter is an ordinary statute capable of repeal or amendment. In addition, the Charter has built within it mandatory four year and eight year reviews, which of their very nature, contemplate change. The Charter has been in operation for over four years which presents an opportunity for a deeper and more evidence-based analysis of the question of how best to protect human rights in Victoria than was possible under the initial consultation that led to the Charter.

In responding to the below terms of reference there was much common ground. There is agreement regarding the problems with the current Charter and only a difference on the most appropriate solution.

Terms of reference:

1. **Section 44 (2) of the Charter requires the consideration of the expansion of the Charter rights and how, with their Charter obligations and tested and enforced. (Chapter 3)**

   SARC finds that the case for adding new categories of rights, reviews and proceedings to the existing Charter has not been made.

2. **The impact of the Charter on the development of legislation, Parliament, public authorities, courts and tribunals and remedies. (Chapter 4)**

   Various recommendations are made to address the problems identified pursuant to this term of reference, such as; the redrafting of the provisions on reasonable limits and obligations of public authorities in plain, localised language, reconsideration and revision of the interpretation provision to preserve traditional interpretation methods and the primacy of the purpose of statutory provisions,

replacement of the complex definition of public authorities with a clear statutory list of each body and function, transfer of the Supreme Court's role in making declarations of inconsistent interpretation to an independent non-judicial body reporting to a Parliamentary Committee, and express identification of specific remedies (if any) to be made available for breaches of the provisions for obligations of public authorities.

3. The overall costs and benefits of the Charter. (Chapter 5)

The difficulty in identifying costs and benefits, as noted in numerous submissions, was demonstrated by the Government submission which detailed costs of $13,488,750. This figure captured part of the total direct costs to date and did not include indirect costs. As a consequence, SARC was unable to make any specific conclusions about the costs and benefits of the Charter.

4. Options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria. (Chapter 6)

Having made recommendations pursuant to the above terms of reference, SARC presents for consideration two options for reform and improvement of the human rights regime in Victoria.

Option 1, preferred by the minority, retains the current Charter framework with the significant reforms and simplification recommended in chapters 3, 4 and 5.

Option 2, preferred by the majority, retains the provisions for scrutiny of new law while removing the obligations of public authorities and returning the courts and tribunals to their traditional role. These changes create flexibility and enable the consideration of additional rights and new forms of dispute resolution with the prospect of justiciability removed.

Two major court decisions on the Charter were brought down in the final days of the inquiry and are referred to below.

In the first decision, *Director of Housing v Sudi*, the Court of Appeal overruled an earlier ruling of the Victorian Civil and Administrative Tribunal (VCAT) by ruling that VCAT has no jurisdiction to determine whether or not a public landlord's conduct complied with the Charter. Instead, a tenant who seeks a remedy for a landlord's alleged failure to comply with the Charter will have to bring a judicial review proceeding in the Supreme Court. Such concerns about jurisdiction are one of the reasons why SARC recommends against adding an independent remedy to the Charter (Recommendation 8) and instead recommends that Parliament should expressly specify all remedies for breaches of the Charter by public authorities (Recommendation 32.)

In the second decision, *Momcilovic v The Queen*, the High Court overturned the first and (to date) only declaration of inconsistent interpretation made under Victoria's Charter. While a narrow majority of the Court held that the provisions for declarations are valid, the majority was divided on when such declarations can be made. Two judges held that courts may engage in a reasonable limits analysis when making a declaration, while the opposite view was part of the other two judges' reasons for upholding the validity of the relevant provisions. Those two judges also held that such declarations should rarely be made in criminal matters. Doubts about the constitutional validity and appropriateness of the current Charter's provisions for declarations were reasons why SARC recommend transferring the Supreme Court's role in making declarations to a non-judicial body reporting to a Parliamentary Committee (Recommendation 31.)

A clear majority of the High Court held that the Charter's interpretation rule is limited to traditional methods of interpretation, rejecting the significance of overseas approaches. Accordingly, the result in the case – the overturning of Ms Momcilovic's conviction because the trial judge directed the jury that the burden of proof on one issue was on the defendant – followed from both the Charter and the common law principle of legality. However, the majority split evenly on the question of whether or not the Charter's

interpretation rule is qualified by the Charter's test for reasonable limits. The deciding vote (holding that it was) was cast by a judge who relied on that holding to declare the entire Charter is unconstitutional. SARC's concerns about both the necessity and intelligibility of the Charter's interpretation rule are why it recommended its reconsideration and redrafting in local language (Recommendation 24.)

Finally, two judges ruled that Victoria's Director of Public Prosecutions is a public authority under the Charter, disagreeing with the DPP's argument and Mr Rapke's submission to this inquiry (see [441].) However, the remaining judges did not address this issue. The uncertainty about the application of the definition of public authority to prosecutors is one of the reasons why SARC recommended that Charter's definition be replaced with a schedule specifying all entities and functions that are subject to the obligation to give proper consideration to human rights (Recommendation 22.)

Both of the options for reform recommended for consideration by SARC aim to overcome the difficulties identified in these and other judgments on the Charter. Option 1 incorporates the above recommendations and other changes aimed at increasing the usability of the current Charter model. Option 2, by removing the existing role of the Courts, would remove the divisions containing the above provisions of the Charter altogether.

The review and inquiry presented SARC with challenging issues and an exacting timetable in which to complete its review and recommendations. I thank the Deputy Chair and all Members of the Committee for their significant individual contributions throughout this process.

The Committee is indebted to its team of professional legal advisers and human rights counsel. I thank the Committee's Senior Legal Adviser, Mr Andrew Homer, for his advice and co-ordination of the overall review project. The Committee thanks our Legal Adviser (Regulations), Ms Helen Mason for her significant role during the public hearings. Further, the Committee was fortunate to obtain external specialist human rights advice from Associate Professor Jeremy Gans (Law School, University of Melbourne and SARC Human Rights Counsel); Dr Charles Parkinson (Barrister-at-Law); and Dr Nicole Schlesinger (Human Rights and Equal Opportunity Consultant).

The Committee is further indebted to our dedicated administrative team, Simon Dinsbergs, Sonya Caruana, Maria Marasco and Victoria Kalapac. Their professional assistance enabled the Committee to effectively handle over 320 major submissions and a further 3600 smaller submissions or comments.

Finally, I thank all persons and organisations who made written contributions to the Committee or who appeared before the Committee to give further evidence at the public hearings. Their contributions have allowed us to consider all points of view and have informed our deliberations and the recommendations we now make.

Edward O'Donohue MLC
Chairperson

September 2011

Table of Contents

6: Options for Reform or Improvement

Appendices

Recommendations

The recommendations of the Report are set out below.

Recommendation 1

page 34

If the Charter is retained in its current form, SARC recommends that consideration be given to whether the rights contained in the ICCPR omitted by the Human Rights Consultation Committee should be re-examined for inclusion in the Charter.

Recommendation 2

page 52

Additional rights

If the Charter is retained in its current form, SARC recommends that, except pursuant to the terms of Recommendation 1, no further rights be added to the Charter.

Recommendation 3

page 58

Right to self-determination

If the Charter is retained in its current form, SARC acknowledges that there was no agreement on the definition of the right to self-determination and subsequently does not recommend that the right to self-determination be added to the human rights in the Charter, but recommends that the Victorian government, in consultation with Victorian Indigenous communities, continue to develop specific programs that foster improved outcomes for Victoria's Indigenous peoples.

Recommendation 4

page 64

Mandatory auditing

SARC recommends that no change be made to Charter s. 41(c)'s current provision that VEOHRC have a function of reviewing the programs and policies of public authorities to determine their compatibility with human rights 'when requested by a public authority'.

Recommendation 5

page 69

Internal complaints

If the Charter is retained, then SARC recommends that public authorities that do not have internal complaints procedures relating to human rights be supported through the development and distribution of templates for incorporating such procedures into existing complaints processes.

Recommendation 6

page 69

Complaints to the Ombudsman

If the Charter is retained, then SARC recommends that public authorities who are subject to the Ombudsman's jurisdiction be encouraged to inform people who bring internal complaints that the

Ombudsman may be able to investigate any unresolved complaints, including complaints concerning Charter rights.

Recommendation 7

page 71

Dispute resolution

SARC recommends that, if Division 4 of Part 3 of the Charter is retained, then VEOHRC should not be given a dispute resolution function in relation to human rights.

Recommendation 8

page 73

Legal proceedings

SARC recommends that Charter s. 39 not be amended to provide for an independent legal remedy or damages for breaches of Charter s. 38.

Recommendation 9

page 82

Publication of draft statements of compatibility

If Charter s. 28(1) is retained, then SARC recommends that consideration be given to publishing a draft statement of compatibility, as appropriate, when drafts of Bills are exposed for public comment.

Recommendation 10

page 83

Publication of draft human rights certificates

If ss. 12A and 12D of the Subordinate Legislation Act 1994 are retained, then SARC recommends that ss. 11 and 12I of that Act be amended to require that copies of the proposed human rights certificate be made available for public comment in respect of subordinate legislation for which a regulatory impact statement has been prepared.

Recommendation 11

page 89

When statements of compatibility are required

If Charter s. 28 is retained, then SARC recommends that it be amended to provide that statements of compatibility must be prepared and tabled only for provisions of Bills that limit a human right. For provisions of Bills that do not limit a human right, consideration should be given to providing, where appropriate, a brief account of why particular provisions do not limit a human right in the relevant section of the explanatory memorandum for the relevant Bill. Statements of compatibility may continue to provide information about provisions that promote particular Charter rights, at the discretion of the member of Parliament introducing the Bill.

Recommendation 12

page 90

Whether rights are limited

If Part 2 is retained, then SARC recommends that consideration be given to altering the guidelines and practices for drafting of statements of compatibility and, where necessary, particular human rights in Part 2 to avoid occasions when routine, minor provisions are regarded as limiting a human right.

Recommendation 13

page 91

Whether rights are reasonably limited

If Charter s. 7(2) is retained, then SARC recommends that the provision be redrafted to state the test for limiting rights in plain language that is accessible to Victorians without reference to comparative jurisprudence, and to remove or reduce the list of factors that must be considered when applying this test.

Recommendation 14

page 92

Scrutiny of Acts and Regulations Committee

If Charter s. 30 is retained, then SARC recommends that Charter s. 29 be amended to clarify that a failure to comply with Charter s. 30 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or any other statutory provision.

Recommendation 15

page 93

Statements of compatibility for proposed amendments

If Charter s. 28 is retained, then SARC recommends that it be amended to extend its requirements for Bills so that they also apply to proposed House amendments to a Bill that broaden the Bill's purpose clause.

Recommendation 16

page 94

Revised statements of compatibility

If Charter s. 28 is retained, then SARC recommends that it be amended to require that, if amendments are accepted by both Houses, the member who introduced the Bill shall cause the preparation of a revised statement of compatibility and cause that statement to be laid before both Houses of Parliament in advance of the time specified in s. 17(1)(c) of the Parliamentary Committees Act 2003.

Recommendation 17

page 95

SARC reports on amended Bills

If s. 17(1)(c) of the Parliamentary Committees Act 2003 is retained, then SARC recommends that it be amended to clarify that the Scrutiny of Act and Regulations Committee may consider any provisions of an Act that were not considered by SARC when the Act was a Bill.

Recommendation 18

page 95

Compatibility information about national uniform legislation schemes

If Charter s. 28 is retained, then SARC recommends that consideration be given to providing for a system for causing the preparation and laying before the Parliament of statements of compatibility for amendments to national uniform legislation schemes, and human rights certificates for regulations made under those schemes.

Recommendation 19

page 96

Scrutiny of national uniform legislation schemes

If Charter s. 30 is retained, then SARC recommends that consideration be given to providing for a system for referring amendments to non-Victorian laws that a Victorian law gives force and effect to in Victoria, and regulations under those laws, to SARC for scrutiny.

Recommendation 20

page 97

Exemptions from scrutiny of new legislation

If Charter s. 28 and s. 12A of the Subordinate Legislation Act 1994 are retained, then SARC recommends that consideration be given:

(a) to amending Charter s. 48 to provide that it does not affect the provisions for scrutiny of new legislation in Division 1 of Part 3 of the Charter

(b) to examining, in consultation with Victoria's courts and tribunals, whether the exemption from the requirement for human rights certificates in s.12A(3)(a) of the Subordinate Legislation Act 1994 is necessary.

Recommendation 21

page 99

Override declarations

If the Charter is retained, then SARC recommends that Charter s. 31 be repealed. To avoid doubt, the amending statute or explanatory memorandum should expressly state that Charter s. 31 has been repealed in order to confirm the Parliament's continuing authority to enact any statute, including statutes that are incompatible with human rights.

Recommendation 22

page 108

What is a public authority?

If Charter s. 4 is retained, then SARC recommends that Charter s. 4(1)(a)–(g) and (2)–(5) be replaced by a schedule to the Charter containing an exhaustive list of:

(a) specific entities that must comply with Charter s. 38, and

(b) specific functions that must be carried out in compliance with Charter s. 38.

Recommendation 23

page 110

Conduct of public authorities

If Charter s. 38 is retained, then SARC recommends that it be redrafted to state the obligations of public authorities in plain language that is accessible to both lay employees of public authorities and lay users of public services without recourse to overseas precedents. For example, Charter s. 38(1)-(2) could be replaced with a single requirement that a public authority must, in making a decision, give proper consideration to any relevant human right.

Recommendation 24

page 116

Interpretation of legislation

If the Charter is retained, then SARC recommends that consideration be given to whether Charter s. 32 is necessary, in light of common law principles of statutory interpretation. If Charter s. 32 is retained, then sub-s. (1) should be redrafted in a manner that both clarifies that it is limited to traditional approaches to interpretation and makes its meaning accessible to local users, without undue recourse to overseas judgments. For example, sub-s. (1) could be drafted (similarly to s. 35(a) of the Interpretation of Legislation Act 1984) to provide that, in the interpretation of the provision of an Act or a subordinate instrument, a construction that would not limit a human right shall be preferred to a construction that would limit a human right.

Recommendation 25

page 117

Relationship between the Interpretation of Legislation Act 1984 and the Charter

If Charter s. 32 is retained, then SARC recommends that the operation of sub-s. (1) be expressly made subject to s. 35(a) of the Interpretation of Legislation Act 1984.

Recommendation 26

page 117

Relevance of opinions about compatibility

If Division 1 of Part 3 is retained, then SARC recommends that Charter s. 28(4) be amended so that it also applies to human rights certificates, explanatory memoranda and SARC reports. In addition, drafters of

these documents should be encouraged to clearly distinguish between opinions as to the intended or likely effect of new laws and opinions about the compatibility of those laws with human rights.

Recommendation 27

page 118

Use of international law and the judgments of domestic, foreign and international courts

If Charter s. 32 is retained, then SARC recommends that sub-s. (2) be repealed. To avoid doubt, the amending statute or explanatory memorandum should expressly state that the repeal of Charter s. 32(2) is not intended to affect existing common or statutory law on the relevance of non-Victorian judgments or laws to the interpretation of Victorian statutory provisions.

Recommendation 28

page 119

Are courts public authorities?

If Charter s. 38 is retained, then SARC recommends Charter s. 4(1)(j) be amended by removing the words 'except when it is acting in an administrative capacity'.

Recommendation 29

page 120

Are tribunals public authorities?

If Charter s. 38 is retained, then SARC recommends that:

(a) Charter s. 4(1)(j) be amended by removing the words 'or tribunal', and

(b) Charter s. 4 be amended, consistently with Recommendation 22, to provide for a schedule containing an exhaustive list of specific tribunals or specific functions of tribunals that are subject to Charter s. 38.

Recommendation 30

page 120

Application of the Charter to courts and tribunals

If Charter s. 6(2)(b) is retained, then SARC recommends that the words 'Part 2 and' be deleted.

Recommendation 31

page 125

Inconsistent interpretation

If Charter s. 36 is retained, then SARC recommends that consideration should be given to amending it to give an independent non-judicial body (such as VEOHRC) the functions of identifying statutory provisions that the Supreme Court has interpreted in a way that limits a human right and forwarding those provisions to a parliamentary committee (such as SARC) for reporting to the Parliament, as well as to the Minister responsible for the statutory provision.

Recommendation 32

page 127

Reliefs and remedies

If Charter s. 38 is retained, then SARC recommends that:

(a) Charter s. 39 be repealed and replaced by a provision that states that, except where a statute expressly provides otherwise, nothing in Charter s. 38 creates in any person any legal right, gives rise to any civil cause of action or affects the rights or liabilities of a public authority, and

(b) if any existing relief or remedy in Victorian law is to be made available for a breach of Charter s. 38, it should be provided for by an express amendment to the statute that provides for that relief or remedy.

Recommendation 33

page 128

Jurisdiction of the Ombudsman

If s. 13(1A) of the Ombudsman Act 1973 is retained, then SARC recommends that it be amended so as to specify the range of bodies that can be subject to an enquiry or investigation with respect to human rights.

Recommendation 34

page 131

Development of a framework for assessing benefits and costs

SARC recommends that the government develop a framework for assessing the benefits and costs of the regime for protecting and upholding human rights in Victoria.

Recommendation 35

page 173

Options for reform or improvement of the regime for protecting and upholding the human rights and responsibilities of Victorians

SARC recommends that consideration be given to the following two options:

1. That all of Part 3 of the Charter (application of human rights in Victoria) be retained, subject to the modifications recommended in this Report.
2. That only Division 1 of Part 3 of the Charter (scrutiny of new laws) be retained, with the modifications recommended in this Report, and that Divisions 3 (interpretation of laws) and Divisions 4 (obligations of public authorities) be repealed.

A minority of SARC prefers the first option to the second, while a majority of SARC prefers the second option to the first.

1

The Charter of Human Rights and Responsibilities Act 2006 Review

Introduction

Review and inquiry terms of reference

[1] The review and inquiry into the *Charter of Human Rights and Responsibilities Act 2006* (the 'Charter') was referred to the Scrutiny of Acts and Regulations Committee (SARC) by a Governor in Council Order (the 'Order') dated 19 April 2011 (No. S128).

[2] The review is mandated by Charter s. 44(1) which requires the Attorney-General to cause a review of the Charter to be undertaken and tabled in each House of Parliament on or before 1 October 2011. Essentially, this report concerns the review of the first four years of operation of the Charter and, in addition, an inquiry and consideration of further matters included in the Order.

[3] Notices and information about the review and inquiry asked persons and organisations wishing to make written submissions to the Committee to frame their contributions against the terms of reference.

Issues for consideration

[4] To assist the call for submissions, SARC translated the terms of reference into a series of questions as follows:

1. *Whether the Charter should include additional human rights under the Charter, including but not limited to, rights under the:*
   - *(a) International Covenant on Economic, Social and Cultural Rights;*
   - *(b) Convention on the Rights of the Child; and*
   - *(c) Convention on the Elimination of All Forms of Discrimination against Women?*
2. *Whether the right to self-determination should be included in the Charter?*
3. *Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?*
4. *Whether the Charter should include further provisions with respect to legal proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by the Charter?*
5. *What have been the effects of the Charter Act on:*
   - *(a) the development and drafting of statutory provisions;*

(b) the consideration of statutory provisions by Parliament;

(c) the provision of services, and the performance of other functions, by public authorities;

(d) litigation and the roles and functioning of courts and tribunals; and

(e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?

6. What have been the overall benefits and costs of the Charter?

7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

1.1 The Scrutiny of Acts and Regulations Committee

The role of SARC

[5] A Joint House Committee, SARC examines all Bills and subordinate legislation (regulations) presented to the Parliament. In respect of its oversight of legislation role, SARC does not make any comments on the policy aspects of legislation. Rather, SARC's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of non-partisan legislative scrutiny. These traditions have been developed since the first Australian scrutiny of Bills committee of the Australian Senate commenced the scrutiny of federal legislation in 1982. They are traditions followed by all Australian scrutiny of legislation committees. Non-policy scrutiny within its statutory terms of reference allows the Committee to alert the Parliament about the use of certain legislative practices and allows the Parliament to consider whether these practices are necessary, appropriate or desirable in all the circumstances. It also gives the two Houses the opportunity to deal with particular measures in an informed way.

[6] The Charter requires that the Committee consider any Bill introduced into the Parliament and report to the Parliament whether provisions in a Bill are incompatible with human rights. This function has been described as follows:

> *There is fairly general agreement that scrutinising legislation is one of the most important activities undertaken by the two Houses of Parliament. … Overall, the object of scrutinising legislation is to keep in check the tendency of governments to extend their powers, or the liabilities of citizens, too greatly, or for unacceptable purposes, at the expense of individual freedom. The primary role of scrutiny committees is to examine particular aspects of measures brought before Parliament, and to enable the two Houses to deal with them in a well-informed and systematic way.*
>
> *Professor David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Public Law 328, 336.*

Brief history of SARC

[7] In the Australian context the establishment of a scrutiny of Bills committee was first recommended by the Senate Standing Committee on Constitutional and Legal Affairs in a report tabled in the Australian Parliament in November 1978.[1] Acting on those recommendations, the Senate established a Standing Committee on the Scrutiny of Bills in 1982. That committee has been re-established under the Senate's Standing Orders in each new Parliament continuously since it first commenced operation.

[8] The first proposal to establish a Victorian Parliamentary Committee with a scrutiny of Bills function was made in 1984 by the now defunct Legal and Constitutional Committee.[2] In subsequent reports tabled

1 Parliamentary Paper No. 329/1978, *Report on Scrutiny of Bills*, November 1978.

2 *Report on the Subordinate Legislation (Deregulation) Bill*, Recommendation 3, September 1984.

in 1987 and 1990, that committee again recommended the desirability of including a scrutiny of Bills function within its terms of reference.[3]

[9] In May 1992,[4] the Hon. Mark Birrell MLC (Liberal), the then Leader of the Opposition in the Legislative Council, introduced a private members Bill to establish a scrutiny of Bills committee based on the terms of reference of the Senate Standing Committee for the Scrutiny of Bills. That Bill did not finish its passage in the Legislative Council before the conclusion of the 1992 autumn sitting of Parliament and lapsed as a result of the dissolution of Parliament and the ensuing general election of 9 October 1992.

[10] Following the 1992 election the Premier, the Hon. Jeff Kennett, introduced the Parliamentary Committees (Amendment) Bill 1992 on 28 October 1992,[5] which inserted a new s. 4D in the *Parliamentary Committees Act 1968* establishing SARC as an all-party, Joint House Investigatory Committee.

[11] The *Parliamentary Committees Act 2003* (the 'Act') repealed the 1968 Act and came into force on 10 December 2003. The successor Act re-established SARC with identical terms of reference to those found in the repealed Act.

The SARC of the 57th Parliament

[12] SARC is established under s. 5(k) of the *Parliamentary Committees Act 2003* and is composed of seven members of Parliament, two from the Legislative Council and five from the Legislative Assembly, four government members and three opposition members.

[13] The principal functions of SARC are set out in the Committee terms of reference and principally involve the oversight of legislation, both proposed Acts (Bills) and regulations, introduced or tabled in the Parliament.

For the purposes of this review and inquiry, the relevant Committee statutory terms of reference are provided in s. 17 of the *Parliamentary Committees Act 2003*. Section 17 states that SARC's functions are:

> *(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –*
>
> *(i) trespasses unduly upon rights or freedoms;*
>
> *(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;*
>
> *(fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;*
>
> *(g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.*

[14] Further, Charter s. 30 provides that:

> *The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is compatible with human rights.*
>
> **Note:** *The Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights: see s. 21 of the Subordinate Legislation Act 1994.*

3 *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, Recommendation 4, April 1987; and *Report upon the Constitution Act 1975*, Recommendation 9, March 1990.

4 *Parliamentary Debates, Legislative Council*, 20 May 1992, p. 841.

5 *Parliamentary Debates, Legislative Assembly*, 28 October 1992, p. 61.

1.2 Conduct of the Review

Call for Submissions

[15] To publicise the commencement of the review and inquiry and its specific terms of reference, the Committee placed advertisements in The Age and the Herald Sun on Saturday, 7 May 2011. Simultaneously, the Committee secretariat commenced an extensive direct email advertising campaign to stakeholders and peak organisations. The direct mail campaign included Word and PDF document attachments of the terms of reference and the guidelines for making a written submission. In turn the secretariat's contacts were invited to assist the Committee by publicising these documents in their own internal communications/newsletters to their own members or constituent organisations.

[16] The advertising sought written submissions against the questions which reflected the terms of reference contained in the Order in Council.

[17] Interested persons and organisations were asked to make their submissions to the Committee by 10 June 2011. In order to allow individuals and organisations adequate time to prepare their written submissions, that deadline was subsequently extended to 1 July 2011.

[18] The Committee received 329 substantive submissions and approximately 3600 short submissions or comments and pro forma (petition style) letters that mainly concerned abortion law reform, supported the Charter or called for its repeal.

[19] Other than a small number of confidential submissions, the Committee has posted the substantive submissions on its website in PDF form.

Guidelines for making submissions

[20] SARC released 'Guidelines' for submissions (the 'Guidelines') on 10 May 2011. These were posted on the Committee website on that day and forwarded to key organisations and peak bodies in the direct mail campaign mentioned above.

[21] The Guidelines set out the terms of reference and provided useful material concerning the rights set out in the Charter; gave links to websites dealing with other rights that could be included in an expanded Charter; provided a brief overview of the operation and effect of the Charter; summarised that part of the review concerned with reforming or improving the Charter; and gave useful links to relevant previous inquiries, reports and consultation processes concerning rights and responsibilities in Australia.

[22] The Guidelines for submissions as posted on the Committee website are provided in Appendix A.

[23] The list of persons and organisations making written submissions to the Committee is provided in Appendix B.

Previous reports

[24] Throughout the course of the inquiry, the Committee noted the terms of reference also provided that 'in carrying out its Inquiry, the Committee is asked to take note of, and make use of as it sees fit, the evidence and findings of and government responses to, previous inquiries and reports concerning rights and responsibilities in Australia'.

SARC's legal advisers and counsel

[25] Throughout the inquiry process the Committee was supported by a team of highly skilled legal advisers. The Committee's Charter review team comprised:

- Mr Andrew Homer, Executive Officer and Senior Legal Adviser
- Ms Helen Mason, Legal Adviser (Regulations)
- Associate Professor Jeremy Gans, Legal Counsel (Human Rights) – Law School, University of Melbourne)
- Dr Charles Parkinson, Barrister-at-Law
- Dr Nicole Schlesinger, equal opportunity and human rights consultant.

Public hearings

[26] From the outset the Committee announced it would hold a series of public hearings to take further evidence from persons and organisations on key aspects of the review and inquiry. Following a review of the written submissions, the Committee issued invitations to provide evidence at the public hearing to submitters that the Committee determined could further assist the Committee in formulating its report and recommendations.

[27] Public hearings were held at Parliament House from 18 to 22 July 2011.

[28] The list of witnesses who gave evidence at the Committee's public hearings is provided in Appendix C.

[29] Following the public hearings a number of witnesses provided supplementary information or documents that had been referred to in evidence or responses to questions on notice from the Committee. A list of this additional material is provided in Appendix D.

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC)

[30] Under the Charter,[6] VEOHRC has a number of important statutory responsibilities. These include providing education about the Charter and human rights, assisting the Attorney-General in the review of the Charter and advising the Attorney-General on anything relevant to the operation of the Charter.

[31] SARC thanks VEOHRC for the considerable assistance it has given to the Committee throughout the inquiry process and for the important statutory role performed by the Commission since the Charter came into operation.

6 Charter ss. 40-43.

2

Charter of Human Rights and Responsibilities Act 2006

2.1 Background

Pre-Charter legal regime in Victoria for the protection of rights and freedoms

[32] The pre-Charter legal regime in Australian jurisdictions for protecting and upholding rights and freedoms is outlined in Chapter 6 of the report. Broadly those protections are based in common law, provided by specific State and Commonwealth statutes or exist as a consequence of the express and implied provisions of the Federal Constitution.

Attorney-General's Justice Statement

[33] In May 2004, the Attorney-General, the Hon. Rob Hulls MP, released a statement[7] outlining a number of future justice portfolio initiatives. One of those initiatives was the establishment of discussion and consultation within the Victorian community on how human rights and obligations can best be promoted and protected in Victoria, including the examination of options for better protecting those rights, such as a charter of human rights and responsibilities.

The Human Rights Consultation Committee

[34] In April 2005, Attorney-General Hulls announced the appointment of a four-person Human Rights Consultation Committee (the 'HRCC') comprising Ms Rhonda Galbally AO, Mr Andrew Gaze, the Hon. Professor Haddon Storey QC, and Professor George Williams as the Chair.[8] The HRCC was assisted with legal counsel by the Victorian Solicitor-General, Ms Pamela Tate SC.

The Consultation process

[35] The HRCC held a series of community meetings in country and regional Victoria and in Melbourne.[9] The meetings asked participants to consider 10 questions. These questions and background information were set out in a discussion paper prepared by the HRCC entitled *Have Your Say about Human Rights in Victoria*. Similar information was also provided by the HRCC and posted on a website. The HRCC also prepared shorter information booklets and pamphlets for Indigenous people and people speaking other languages. Special materials were also prepared for young people to be used in schools.

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7 Attorney-General's Justice Statement, *New Directions for the Victorian Justice System*, May 2004.

8 For those wishing to access more detailed information concerning the process leading to the enactment of the Victorian Charter of Human Rights and Responsibilities, the following article will be of assistance: G Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope (2006) 30 *Melbourne University Law Review* 880.

9 Joint submission from the former members of the Victorian Human Rights Consultation Committee.

[36] The HRCC consultation process resulted in a final report being delivered to the Attorney-General on 30 November 2005.[10] The report made 35 recommendations to government and included a Draft Charter of Human Rights and Responsibilities prepared by the *HRCC* with the assistance of the Office of Chief Parliamentary Counsel.

[37] This draft Bill, with some minor modifications, was later introduced in the Parliament as the Victorian Charter of Human Rights and Responsibilities.

[38] On 2 May 2006, Attorney-General Hulls introduced a Bill in the Legislative Assembly entitled the Charter of Human Rights and Responsibilities Bill. The Second Reading Speech was delivered on 4 May 2006 and the *Charter of Human Rights and Responsibilities Act* (the 'Charter') received Royal Assent on 25 July 2006. SARC reported on the Charter in *Alert Digest No. 5 of 2006*.[11]

2.2 The Charter of Human Rights and Responsibilities Act 2006

[39] This section of the report provides a brief and plain English summary/overview of the structure and content of the Charter. The full text of the Charter is provided in Appendix E.

Preamble

[40] The preamble declares that on behalf of the people of Victoria, the Parliament enacts the Charter recognising that all people are born free and equal in dignity and rights. The preamble then goes on to list a number of key principles on which the Charter is founded, including that human rights belong to all people without discrimination and the special significance of human rights for the Aboriginal people of Victoria.

Part 1 – Preliminary

[41] This Part provides for the necessary preliminary matters, including the Charter's purpose, commencement and the significant definitions used throughout the Charter.[12] The Charter defines 'discrimination' in relation to a person as meaning 'discrimination' within the meaning of the *Equal Opportunity Act 2010* on the basis of an attribute set out in that Act. The definition for 'person' makes it clear that the Charter concerns rights of natural persons not corporations.[13]

[42] This Part also provides a complex definition for what constitutes a 'public authority' for the purposes of the Charter. The definition is important in the context of the Charter compliance provisions in Division 4 of Part 3 (ss. 38 and 39).[14]

[43] This Part also declares that a right of freedom not included in the Charter that is recognised under any other law (whether International or domestic) is not abrogated or limited because it is not included in the Charter or is only partly included.[15]

[44] Section 6 sets out the scope of application of the Charter in respect of the persons, the Parliament, the courts and tribunals and public authorities.[16]

10 *Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee*, November 2005.
11 Tabled on 30 May 2006.
12 Charter ss. 1-3.
13 Charter s. 3 and 6.
14 Charter s. 4.
15 Charter s. 5.
16 Charter s. 6.

Part 2 – Human rights

[45] Part 2 of the Charter provides a list of human rights protected under the Charter. The majority of these rights were codified in the *International Covenant on Civil and Political Rights 1966* (*ICCPR*, or the 'Covenant') which Australia ratified in 1980. The full text of the *ICCPR* is provided in Appendix F.

[46] A number of the provisions in Charter ss. 8-27 also provide that specific limitations may apply to a right. That is, the Charter recognises there are competing rights such as the right to privacy and reputation vis à vis the right to freedom of speech.

[47] The Bill's explanatory memorandum relevantly provided:

> *Although the rights appear in a different order to that of the Covenant, they are generally expressed in the same terms as the Covenant. Some adjustments to language have been made to both improve the drafting and to clarify the application of the particular human right in the context of the State of Victoria.*
>
> *In some instances a right or part of a right contained in the Covenant has been omitted from the Charter. Omissions have occurred for various reasons. The right to self-determination contained in article 1 of the Covenant is not incorporated in the Charter because the right to self-determination is a collective right of peoples. Moreover, there is a lack of consensus both within Australia and internationally on what the right to self-determination comprises. Other rights are omitted because they are matters within the Commonwealth's jurisdiction and are consequently inappropriate in State legislation. For example, the prohibition on expulsion of non-nationals contained in article 13 of the Covenant is omitted for this reason. Article 23(2) to (4) of the Covenant concerning marriage is also omitted, as is article 24(3) which concerns a child's right to a nationality. Other omissions are mentioned in the clause notes below.*

[48] The rights enumerated in the Charter (ss. 8-27) are preceded by a general limitation section headed 'Human rights – what they are and when they may be limited'.[17] The general limitation provision in section 7(2) provides that a human right may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including five key considerations or criteria

These are:

> *(a) the nature of the right; and*
>
> *(b) the importance of the purpose of the limitation; and*
>
> *(c) the nature and extent of the limitation; and*
>
> *(d) the relationship between the limitation and its purpose; and*
>
> *(e) any less restrictive means reasonable available to achieve the purpose that the limitation seeks to achieve.*

The Bill's explanatory memorandum relevantly provided:

> *This sub-clause reflects Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests. The operation of this clause envisages a balancing exercise between Parliament's desire to protect and promote human rights and the need to limit human rights in some circumstances.*
>
> *The sub-clause lists a range of relevant factors to be taken into account when assessing whether a human right may be limited. These factors include the nature of the right, the importance of the*

17 Charter s. 7.

purpose of the limitations, the nature and extent of the limitation, the relationship between the limitation and its purpose and whether there are less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The general limitation clause, including the list of relevant factors, is modelled on section 5 of the New Zealand Bill of Rights Act 1990 and, more particularly, on section 36 of the Bill of Rights contained in the Constitution of the Republic of South Africa 1996.

Laws which are necessary to protect security, public order or public safety which limit human rights are examples of laws which may be demonstrably justified in a free and democratic society.

[49] With respect to limiting human rights the Committee notes the (the *ICCPR* relevantly provides:

Article 4.1 – In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.

Article 4.2 – No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Note: *The provisions where no derogation is permissible are: Article 6 – The right to life; Article 7 – Cruel, inhumane or degrading treatment or punishment; Article 8 – Slavery and servitude; Article 11 – Imprisonment merely for breach of contractual obligation; Article 15 – Not to be held guilty of criminal offence on account of an act or omission which did not constitute a criminal offence under international or criminal law at the time when it was committed; Article 16– right to be recognised and protected as a person before the law; Article 18 – Freedom of thought, conscience and religion.*

The Charter and comparison with the International Covenant on Civil and Political Rights

[50] There is a useful comparison provided in the Victorian government submission concerning each right set out in the Charter and its derivation or adaptation from the relevant Article found in the *ICCPR*. The government's submission is available on the SARC website.

The Charter rights

[51] Sections 8–27 of Part 2 of the Charter set out the Charter rights. For ease of reference, the rights are listed by their headings and section number. The 'Article' reference below each provision is a reference to the relevant Article in the *ICCPR*.

8. Recognition and equality before the law

(1) Every person has the right to recognition as a person before the law.

Article 16

(2) Every person has the right to enjoy his or her human rights without discrimination.

Note: *Discrimination in relation to a person, means discrimination (within the meaning of the Equal Opportunity Act 2010) on the basis of an attribute set out in section 6 of that Act.*[18]

Article 26

18 'Discrimination' is defined in Charter s. 3(1). Section 6 of the *Equal Opportunity Act 2010* lists a number of attributes in respect of which discrimination is prohibited, including age; disability; political belief or activity; race; religious belief or activity; sex; and sexual orientation.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

Article 26

(4) Measures taken for the purpose of assisting persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.[19]

9. Right to life

Every person has the right to life and must not be arbitrarily deprived of life.

> ***Note 1:*** *The right is to be read together with Charter s. 48 which declares that nothing in the Charter affects any law applicable to abortion or child destruction.*
>
> ***Note 2:*** *The right to life has been interpreted in some international judgments as encompassing a procedural obligation to undertake effective coronial investigations where required.*

Article 6(1)

10. Protection from torture and cruel, inhuman or degrading treatment

A person must not be –

(a) subjected to torture; or

(b) treated or punished in a cruel, inhuman or degrading way; or

> **Note:** *In accordance with Charter s. 32(2), courts and tribunals may consider Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 when examining whether conduct amounts to torture.*

Article 7

(c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

> **Note:** *This section expands on Article 7 of the Covenant as it also includes a prohibition on medical or scientific treatment without consent. In addition, it has been modified to provide that consent must be full, free and informed. This modification is intended to reflect the requirements for consent outlined in s. 5(1) of the Medical Treatment Act 1988.*
>
> *It is intended that the rights in this section may be subject under law to reasonable limitations. For example, under Victorian law there are some well-recognised situations where full, free and informed consent to medical treatment is not required. These include an emergency or where a person is incapable of giving consent and consent is provided by a substitute decision-maker. Some procedures are also permitted without consent in accordance with Divisions 4 and 6 of the Guardianship and Administration Act 1986. These procedures will not breach the Charter since they may be considered as reasonable limitations under law that can be demonstrably justified in a free and democratic society.*

Article 7

11. Freedom from forced work

(1) A person must not be held in slavery or servitude.

Article 8(1) and (2)

19 This subsection is modelled on section 19(2) of the New Zealand *Bill of Rights Act 1990.* The purpose of the measures taken must be to assist or advance a person or group of persons who are disadvantaged because of discrimination.

(2) A person must not be made to perform forced or compulsory labour.

Article 8(3)(a)

(3) For the purposes of subsection (2) 'forced or compulsory labour' does not include –

(a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or

(b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or

(c) work or service that forms part of normal civil obligations.

(4) In this section 'court order' includes an order made by a court of another jurisdiction.

Note: *The Charter qualifies the right to freedom from forced or compulsory labour by providing three exceptions to these prohibitions. The first exception in paragraph (a) is for work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or has been ordered to perform work in the community. The second exception in paragraph (b) is for work or service required because of an emergency threatening the Victorian community or part of the Victorian community. The third exception in paragraph (c) is for work or service that forms part of normal civil obligations. An example of normal civil obligations is jury service pursuant to the Juries Act 2000.*

Article 8(3)(a)

12. Freedom of movement

Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

Note: *Exceptions include restrictions on the freedom of movement of persons lawfully detained, such as prisoners and persons who are subject to a lawful order restricting their movement or where they may live such as orders made by the Adult Parole Board.*

Article 12

13. Privacy and reputation

A person has the right –

(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have his or her reputation unlawfully attacked.

Article 17

14. Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief, including –

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Article 18

15. Freedom of expression

(1) Every person has the right to hold an opinion without interference.

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether –

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary –

(a) to respect the rights and reputation of other persons; or

(b) for the protection of national security, public order, public health or public morality.

Article 19

16. Peaceful assembly and freedom of association

(1) Every person has the right of peaceful assembly.

(2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

Articles 21 and 22

17. Protection of families and children

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

Article 23(1)

(2) Every child has the right, without discrimination,[20] to such protection as is in the best interests of the child and which is needed by reason of being a child.

Article 24(1)

18. Taking part in public life

(1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

(2) Every eligible person has the right, and is to have the opportunity, without discrimination –

(a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and

(b) to have access, on general terms of equality, to the Victorian public service and public office.

Article 25

20 Discrimination is defined in Charter s. 3(1).

19. Cultural rights

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

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community –

(a) to enjoy their identity and culture; and

(b) to maintain and use their language; and

(c) to maintain their kinship ties; and

(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Note: *The provision is based on s. 4 of the Multicultural Victoria Act 2004 which enshrines in law a number of important principles of multiculturalism; Charter 19(2)(d) is modelled on Article 25 of the United Nations Draft Declaration on Indigenous Rights.*

Article 27

20. Property rights

A person must not be deprived of property other than in accordance with the law.

Note: *This right does not provide a right to compensation. The section reflects the legislative powers of States in respect of compensation confirmed in the decision of the High Court in Durham Holdings v New South Wales [2001] 75 ALJR 501. That is, specific State legislation may override a right to compensation.*

21. Right to liberty and security of person

(1) Every person has the right to liberty and security.

(2) A person must not be subjected to arbitrary arrest or detention.

(3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

(4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.

(5) A person who is arrested or detained on a criminal charge –

(a) must be promptly brought before a court; and

(b) has the right to be brought to trial without unreasonable delay; and

(c) must be released if paragraph (a) or (b) is not complied with.

(6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear –

(a) for trial; and

(b) at any other stage of the judicial proceeding; and

(c) if appropriate, for execution of judgment.

(7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must –

(a) make a decision without delay; and

(b) order the release of the person if it finds that the detention is unlawful.

(8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

Articles 9 and 11

22. Humane treatment when deprived of liberty

(1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

(2) An accused person who has been detained or a person detained without charge must be segregated from persons convicted of offences, except where reasonably necessary.

(3) An accused person who has been detained or a person detained without charge has the right to be treated in a way that is appropriate for a person who has not been convicted.

Article 10

23. Children in the criminal process

(1) An accused child who has been detained or a child detained without charge has the right to be segregated from accused and convicted adults.

(2) An accused child must be brought to trial as quickly as possible.[21]

(3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

Article 10(2)(b)

24. Fair hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

Note: *For example, s. 19 of the Supreme Court Act 1986 sets out the circumstances in which the Supreme Court may close all or part of a proceeding to the public. See also s. 80AA of the County Court Act 1958 and s. 126 of the Magistrates' Court Act 1989.*

(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

Article 14(1)

21 This is intend to operate as a more onerous obligation than the requirements in Charter s. 25(1)(b) and s. 25(2)(c) which provide for 'trial without unreasonable delay'.

25. Rights in criminal proceedings

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –

(a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and

(b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and

(c) to be tried without unreasonable delay; and

(d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the *Legal Aid Act 1978*; and

(e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the *Legal Aid Act 1978*; and

(f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*; and

(g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and

(h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and

(i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and

(j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and

(k) not to be compelled to testify against himself or herself or to confess guilt.

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

(4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

Note: *Charter s. 25(2)(g) qualifies the rights of an accused person in relation to the attendance and examination of witnesses by including the words 'unless otherwise provided for by law'. This qualification is intended to make it clear that current rules in relation to the cross-examination of certain witnesses, such as children and victims of sexual assault, continue to apply.*

Article 14(2)-(5)

26. Right not to be tried more than once

A person must not to be tried or punished more than once for an offence for which that person has already been finally convicted or acquitted in accordance with law.

Article 14(7)

27. Retrospective criminal laws

(1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

(2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

(4) Nothing in this section affects the trial and punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

Article 15

Part 3 – Application of human rights in Victoria

Division 1 – Scrutiny of new legislation

[52] The Charter invests a number of duties and functions in the Parliament, the Scrutiny of Acts and Regulations Committee and members of Parliament introducing Bills in a House of Parliament.

Member's duty to table a statement of compatibility with a Bill

[53] A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility (the 'statement requirement') to be prepared in respect of that Bill and cause it to be laid before the House of Parliament into which the Bill is introduced before delivering his or her second reading speech on that Bill. The use of the word 'member' clearly indicates that the tabling requirement also applies to private members Bills.[22]

Failure to provide a statement of compatibility does not invalidate the law

[54] The requirement to provide and table a statement of compatibility is qualified to the extent that a failure to comply with this procedural requirement does not affect the validity, operation or enforcement of the Act or any other statutory provision.[23]

SARC must report on Charter incompatibility

[55] SARC must consider any Bill introduced into the Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights. The term 'human rights' is defined in Charter s. 3 as the civil and political rights found in Part 2 of the Charter.

[56] A footnote to the section draws attention to the Committee's corresponding function to report on statutory rules which are considered incompatible with human rights. This additional reporting function has a statutory basis in the *Subordinate Legislation Act 1994*. Under that Act, the responsible Minister must prepare a human rights certificate in respect of a proposed statutory rule unless it is an exempt statutory rule such as court rules.[24]

Division 2 – Override by Parliament

[57] The Charter makes it clear that the Parliament may make an override declaration[25] allowing the Parliament to enact legislation which is incompatible with one or more of the Charter rights. An override declaration also may extend to subordinate instruments made under the Charter. A member introducing a

22 Charter s. 28.
23 Charter s. 29.
24 Charter s. 30.
25 Charter s. 31

Bill containing an override provision must make a statement in the House in which the Bill is introduced explaining the 'exceptional circumstances' justifying the inclusion of the override declaration.

An override declaration statement by a member must be made:

- during the second reading speech for the Bill that contains the override
- after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill, or
- with the leave of the House of Parliament at any time before the third reading of the Bill.

[58] The section makes it plain that an override should only be made in exceptional circumstances. However, the section provides no guidance by means of a definition or otherwise as to what circumstances may be considered to be 'exceptional'.

[59] With respect to what circumstances may be considered 'exceptional circumstances', it is instructive to consider the provisions of Article 4 of the *ICCPR* while keeping in mind the proviso concerning immutable human rights noted earlier:

> *Article 4.1 – In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.*

[60] Were an exceptional circumstance to arise and an override was passed by the Parliament then, to the extent of the override declaration, the Charter does not apply to that law. There are at least two consequences that flow from the override and they are that the provision is not subject to judicial review by way of a declaration of incompatible interpretation by the Supreme Court; and a public authority is not bound by any obligation to act in a way that is compatible with a human right and not bound to consider relevant human rights in making a relevant decision. Essentially, the override cloaks the provision with a Charter immunity or by-pass.

[61] One limiting aspect of such an override declaration is that the relevant law sunsets five years after commencement or at an earlier time if this is specified by the law. However, Parliament may renew the override at any time.

[62] The override declaration is not a 'manner and form'[26] constitutional provision and no absolute or special majority is necessary for its effect to take effect; a simple majority is sufficient. As with the procedural requirements concerning statements of compatibility, the section provides that a failure to make an override statement does not affect the validity, operation or enforcement of that Act or of any other statutory provisions.[27]

Division 3 – Interpretation of Laws

[63] The Charter provides that as far as is possible to do so consistently with their purpose, all statutory provisions should be interpreted in a way that is compatible with the Charter. In doing so, international law

26 Parliament may enact that certain provisions require special majorities for the provision to pass into law. An example is an amendment to or limitation of the jurisdiction of the Supreme Court which requires an absolute majority of members of the court approving the provision and other procedural thresholds for such measures to be validly passed. See s. 85 of the *Constitution Act 1975*.

27 Charter s. 31.

and the judgments of domestic, foreign and international courts and tribunals relevant to human rights may be considered in interpreting statutory provisions.

[64] However, the provision however makes it plain that the interpretative provision does not effect the validity of a statutory provision incompatible with a human right. Further this does not apply to incompatible subordinate legislation where the enabling Act does not itself permit incompatibility.[28]

The following extract is from the explanatory memorandum to the 2006 Charter Bill:

> *Sub-clause (3) confirms that an Act or provision of an Act, or a subordinated instrument or provision of a subordinate instrument, will remain valid even if they are incompatible with a human right. The same result will apply to a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right if the Act under which it was made permitted it to be so made. The corollary of this is that if a subordinate instrument is incompatible with human rights and the Act under which it was made did not enable the incompatibility with human rights, the relevant provision of the subordinate instrument will not be valid as it would not have been empowered to be incompatible with the human right.*

Referral to the Supreme Court and the Attorney-General's right to intervene

[65] The Charter provides a mechanism for the referral to the Supreme Court of an issue concerning the interpretation of the Charter that may arise in legal proceedings. Such a referral may be made on application by a party or on the court's own motion. If the court is the Trial Division of the Supreme Court or the County Court, the referral must be to the Court of Appeal.[29]

[66] If a referral is made the Attorney-General may intervene in and may be joined as a party to such proceedings and be taken to be a party to an appeal from an order made in such proceedings.[30]

Notice of Charter issue arising in proceedings to be given to the Attorney-General and the Commission

[67] Other than where they may already be parties to the proceedings, the Charter requires that notice be given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) by a party, in a proceeding where a question of law involving the application of the Charter arises or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter or a question is referred to the Supreme Court under Charter s. 33.[31]

The Supreme Court may make a declaration of inconsistent interpretation (a 'declaration')

[68] Where a question of law or of statutory interpretation arises in a proceeding or a referral made under s. 33 is involved and where no override declaration has been made by the Parliament, the Supreme Court (or the Court of Appeal as the case may be) is invested with a power to make a declaration of inconsistent interpretation under the Charter. Where the court considers making such a declaration, it must give notice to the Attorney-General and VEOHRC.

[69] Where a declaration of inconsistent interpretation is made by the court, the Attorney-General must provide a copy as soon as reasonably practicable to the Minister responsible for administering the relevant statutory provision in respect of which the declaration is made.

28 Charter s. 32.
29 Charter s. 33.
30 Charter s. 33.
31 Charter s. 35.

[70] As with the Charter provisions concerning a failure to observe procedural requirements in Charter ss. 28 and 31 (providing a statement of compatibility and a statement accompanying an override declaration), such a court declaration does not affect the validity, operation or enforcement of the law.[32]

[71] Where the Supreme Court makes a declaration of inconsistent interpretation, the Minister administering the law in respect of which the declaration is made must within six months of receiving the declaration prepare a written response to the declaration and provide a copy of that response to be laid before each House of Parliament and published in the Government Gazette.[33]

Division 4 – Obligations on public authorities

Conduct of public authorities

[72] With respect to a 'public authority'[34] undertaking public functions, the Charter provides that it is unlawful to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to relevant human rights. This obligation does not apply if as a result of a Victorian or Commonwealth law the public authority could not have reasonably have acted differently or made a different decision.[35]

Legal proceedings

[73] Where a public authority breaches the duty to act in conformity with the Charter and a proviso or exception does not apply, the failure may be evidence in legal proceedings of an administrative error. Relief or remedy on the ground that the action or decision was unlawful because of the Charter only arises where a person has an existing avenue for relief or remedy 'otherwise than because of the Charter'.[36]

[74] The Charter provides no award of damages for a breach of the Charter but also provides that the Charter does not affect any right that a person has for an award of damages under any other existing entitlement.[37]

Part 4 – Victorian Equal Opportunity and Human Rights Commission (VEOHRC)

VEOHRC may intervene in legal proceedings

[75] VEOHRC may intervene in, and may be joined as a party to, any legal proceedings (including an appeal) where a question of law arises that relates to the application or the interpretation of the Charter.[38]

[76] On commencement, the Charter renamed the Victorian Equal Opportunity Commission as the Victorian Equal Opportunity and Human Rights Commission and invested in it new functions broadly characterised as educative, reporting, reviewing and monitoring the Charter's operation.[39]

[77] The Attorney-General must present reports of VEOHRC to the Parliament.[40]

32 Charter s. 36.
33 Charter s. 37.
34 Charter s. 4.
35 Charter s. 38.
36 Charter s. 39(1).
37 Charter s. 39.
38 Charter s. 40.
39 Charter s. 41.
40 Charter s. 43.

Part 5 – General

Review of the Charter after four and eight years of operation

[78] The Attorney-General must review the Charter after four years and after eight years of its operation. There are a number of specific review matters prescribed with respect to the four-year review, including whether additional rights found in other international conventions should be included within the Charter. The statutory review matters in Charter s. 44(1) and a number of other additional terms of reference all form part of this review. These reviews must be tabled in each House of Parliament respectively on or before 1 October 2011 and on or before 1 October 2015.[41]

Regulations

[79] The Governor in Council may make regulations required or permitted by the Charter that are necessary to give effect to the Charter.[42]

Consequential, savings and transitional provisions

[80] The remaining sections of the Charter deal with consequential amendments, savings and transitional provisions.[43] The items in the Schedule list the consequential amendments made by the Charter to eight other Acts.

[81] Of particular importance to the Committee were the amendments made to the *Parliamentary Committees Act 2003* and the *Subordinate Legislation Act 1994*. The amendments to these Acts provided the Committee with scrutiny and oversight functions and responsibilities respectively concerning primary and subordinate legislation.

[82] Of particular note is the savings provision in s. 48 which provides that nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2. This savings provision should be read in conjunction with s. in Part 2 (right to life).[44]

41 Charter ss. 44-45.

42 Charter s. 46.

43 Charter ss. 47-49. Section 47 concerning consequential amendments became a spent provision on the commencement of the amendments made to the other Acts provided for in the Schedule of the Charter. As a spent provision s. 47 and the Schedule were repealed by s. 3 (Schedule 1, item 8) of the *Statute Law Revision Act 2011* (Schedule 1, item 8).

44 Charter s. 48.

3
Additional Rights and Remedies

Introduction

[83] Charter s. 44(2) requires a review of the Charter that must include consideration of the following issues:

- whether additional human rights should be included as human rights under this Charter, including but not limited to, rights under:
  - (a) the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*)
  - (b) the *Convention on the Rights of the Child* (*CRC*)
  - (c) the *Convention on the Elimination of All Forms of Discrimination against Women* (*CEDAW*)
- whether the right to self-determination should be included in this Charter
- whether regular auditing of public authorities to assess compliance with human rights should be made mandatory
- whether further provision should be made in this Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of this Charter.

As Charter s. 44(2) contemplates, SARC addresses each term of reference on the basis that the Charter is retained in its present form. Hence, this chapter proceeds on the basis that the Charter continues to operate as described in Chapter 2.

[84] In Chapter 6, SARC recommends consideration of two reform options for the Charter. In that chapter SARC addresses the applicability of the recommendations contained in this chapter to the two reform options.

[85] This chapter addresses each term of reference separately. It sets out the submissions received about each question and SARC's recommendations for amendment if the Charter is retained in its present form.

3.1 Whether additional human rights should be included in this Charter

Introduction

[86] The Charter sets out the rights that it protects in ss. 8–27. Those rights are principally fundamental civil and political liberties recognised in international law. They are based upon the rights stated in the *International Convention on Civil and Political Rights (ICCPR)*.

[87] The *ICCPR* is an international convention on civil and political rights that was adopted by the General Assembly of the United Nations in 1966. Australia ratified the *ICCPR* on 13 August 1980.

[88] The reasons that the Charter includes civil and political rights drawn from the *ICCPR* to the exclusion of other rights may be identified from the following.

[89] The Victorian government established the Human Rights Consultation Committee to undertake a community consultation and report to the government on human rights issues in Victoria. The Victorian government's Statement of Intent to the Human Rights Consultation Committee relevantly stated:

> *The Committee is asked to focus on the rights in the ICCP in considering a statutory human rights model as a starting point in its deliberations. The Government's primary purpose in this initiative is to adequately recognise, protect and promote those rights that have a strong measure of acceptance in the community.*
>
> *In addition, the Committee should consider whether the scope of operation of any of the ICCP Rights which are adopted should be altered or limited to remove any ambiguity and to add certainty.*
>
> *Legislating for the protection of the ICESC rights, such as the right to adequate food, clothing and housing, is complicated by the fact that such rights can raise difficult issues of resource allocation and that many deal with responsibilities that are shared between the State and Commonwealth Governments. The Government also believes that Parliament rather than the courts should continue to be the forum where issues of social and fiscal policy are scrutinised and debated.*
>
> *The issues associated with specific international covenants, such as the Covenant on Elimination of Discrimination Against Women, are extensive. Recognising that many of these rights are already protected in domestic equal opportunity legislation, the Committee is not asked to examine the rights contained in those covenants.*

[90] The Human Rights Consultation Committee stated in its report:[45]

> *Many Victorians said that the Charter should also contain rights relating to matters such as food, education, housing and health, as found in the International Covenant on Economic, Social and Cultural Rights 1966, as well as more specific rights for Indigenous people, women and other groups. While we agree that these rights are important, we have not recommended that they be included in the Charter at this stage. Based on what we have been told by the community, we think that the focus should be on the democratic rights that apply equally to everyone.*

The Human Rights Consultation Committee took the view that the *ICCPR* was the appropriate starting point for determining which democratic rights should be included in the Charter.

[91] There were two broad categories of rights stated in the *ICCPR* that the Human Rights Consultation Committee excluded from the Charter, being:[46]

- where there was a lack of consensus within Australia and internationally on what a right comprises
- where rights covered matters of Commonwealth jurisdiction and were consequently inappropriate in state legislation.

In addition, the Human Rights Consultation Committee took the view that some of the rights in the *ICCPR* were no longer relevant, and that some of the language in the *ICCPR* was no longer appropriate, and it modified that language to fit the Victorian context.[47]

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45 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. iii.

46 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 42. See also Charter of Human Rights and Responsibilities Bill, Explanatory Memorandum, p. 8.

47 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 32.

[92] In consequence, the Charter contains a modified list of rights stated in the *ICCPR*.

[93] SARC received submissions that a wide range of new rights be incorporated into the Charter. Those submissions are addressed within the following structure:

- discussion of submissions on adding rights in the *ICCPR* omitted from the Charter
- SARC's recommendations on adding rights in the *ICCPR* omitted from the Charter
- discussion of submissions on adding rights in the *ICESCR*
- discussion of submissions on adding other rights
- SARC's recommendations on adding rights in the *ICESCR* and other rights.

Although the right to self-determination is in both the *ICCPR* and the *ICESCR*, this right is the subject of a separate term of reference and will be addressed under that term of reference.

Discussion of submissions on adding rights in the ICCPR omitted from the Charter

[94] SARC received submissions that the Charter should incorporate all rights contained in the *ICCPR*[48] or at least that the rights in the *ICCPR* omitted from the Charter should be reconsidered,[49] and that the expression of all rights should be consistent with international law.[50] Some submissions were to the effect that the Human Rights Consultation Committee had drawn the wrong line as to which rights were to be included and which rights were to be excluded, notably that only rights which fall within purely Commonwealth jurisdiction should be excluded.[51] Other submissions focused upon incorporating into the Charter specific rights in the *ICCPR*.

[95] As stated above, the Human Rights Consultation Committee's approach to selecting rights in the *ICCPR* for inclusion in the Charter was to proceed on the basis that:

- only rights where there is a consensus about their meaning and certainty about their effect should be incorporated
- rights about matters over which the Commonwealth predominantly exercises jurisdiction should not be dealt with in the Charter
- rights that were no longer relevant should not be included
- the wording of the rights in the *ICCPR*, which was drafted in the post-WWII era, should be modified where required to fit the Victorian context.

[96] SARC observes that the approach adopted by the Human Rights Consultation Committee for the inclusion of *ICCPR* rights in the Charter necessarily involved some subjective judgments by that Committee.

[97] Equivalent committees or bodies in other Australian jurisdictions have taken different approaches. The National Human Rights Consultation Committee recommended that an Australian Human Rights Act based upon a dialogue model should protect the rights in the *ICCPR*.[52] The Commonwealth government is not pursuing an Australian Human Rights Act. The ACT Bill of Rights Consultation Committee recommended that an ACT Human Rights Act should include all *ICCPR* rights that were within the legislative power of the ACT Parliament to protect, with some modification to fit the ACT laws.[53] The ACT government broadly adopted this course in the ACT Human Rights Act. The Tasmanian Law Reform Institute recommended that

48 E.g. Submission 127 (Top End Women's Legal Service Inc), p. 3; Submission 247 (Law Institute of Victoria), p. 10.
49 E.g. Submission 274 (Jamie Gardiner), p. 3; Submission 285 (Castan Centre for Human Rights Law), p. 3.
50 E.g. Submission 247 (Law Institute of Victoria), p. 10.
51 E.g. Submission 278 (VEOHRC), p. 33.
52 National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, pp. 366-70.
53 ACT Bill of Rights Consultation Committee, *Towards an ACT Human Rights Act*, May 2003, 5.13–5.15.

a Tasmanian Charter should be modelled on the *ICCPR* rights, subject to certain modifications, but that the rights whose protection constitutionally falls outside the jurisdiction of the state government should not be included, being:[54]

- the right to social security
- the right to marry
- the right of foreign nationals not to be expelled from Australia without due process
- the right to leave and re-enter Australia.

The Tasmanian government is undertaking a community consultation on a Tasmanian Charter.

[98] And the Consultation Committee for a Proposed WA Human Rights Act considered that a WA Human Rights Act should include some, but not all *ICCPR* rights. It stated:[55]

> *The Committee does not consider that a WA Human Rights Act must necessarily include all of the rights in the ICCPR. There are a number of reasons why rights in the ICCPR may be inappropriate for inclusion in state human rights legislation. For example, the protection of some of the rights in the ICCPR has been extensively regulated by the Commonwealth Parliament and state legislation for these rights would be likely to be ineffective. Rights in this category include the right to marry and the right of non-nationals unlawfully within Australia not to be expelled except in accordance with law. Other rights in the ICCPR are not particularly relevant to modern human rights legislation (for example, the right to legal protection from propaganda for war), while others involve concepts which have caused difficulties internationally in their interpretation (for example, the right of all peoples to utilise natural wealth and resources). (footnotes omitted)*

[99] In addition to the foregoing, SARC notes that Australia reserved the operation of a number of rights in the *ICCPR* at the time Australia ratified the *ICCPR*. When a State ratifies an international treaty, it may make a reservation in relation to any specific term to modify or exclude its operation in that State. Australia has since withdrawn some reservations, but they remain in relation to three Articles.[56]

[100] SARC addresses in turn specific submissions for inclusion of rights contained in the *ICCPR* that were omitted from the Charter.

Article 14(6) of the ICCPR – the right to compensation for wrongful conviction

[101] Article 14(6) of the *ICCPR* provides that:

> *When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*

Charter ss. 24, 25 and 26 are modelled on arts. 14(1)-(5) and (7). But the Charter expressly excludes a right to compensation for wrongful conviction.

[102] SARC received submissions seeking amendment of the Charter to include a right to compensation for wrongful conviction. [57]

54 Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, pp. 124-5.

55 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, November 2007, pp. 88-9.

56 Australia has reservations to arts. 10, 14 and 20 of the *ICCPR*. See Appendix F for the terms of these reservations.

57 Submission 291 (Australian Federation of University Women (Victoria)), p. 7; Submission 285 (Castan Centre for Human Rights Law), p. 5.

[103] In Victoria, persons who have been wrongfully convicted and imprisoned have no right at common law or under statute to be compensated for wrongful conviction and imprisonment. In limited circumstances, a wrongful conviction may found a claim in tort for false imprisonment, malicious prosecution or misfeasance. The Victorian government, however, often provides compensation for wrongful conviction on an ex gratia basis.

[104] In Australia, the traditional approach to compensating persons who have been wrongly convicted and imprisoned is for the government to make an ex gratia payment. This was reflected in the fact that Australia made the following reservation when it ratified the *ICCPR*:[58]

> *Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision.*

[105] There is not a standard approach to the incorporation of art. 14(6) of the *ICCPR* in the human rights legislation of comparable jurisdictions. The ACT *Human Rights Act 2004* includes an express right modelled on art. 14(6) of the *ICCPR* providing for a right to compensation for wrongful conviction.[59] The United Kingdom *Human Rights Act 1998* does not expressly incorporate art. 14(6) of the *ICCPR*, but s. 133 of the *Criminal Justice Act 1988* (UK) does incorporate such a right to compensation into the domestic law of England, Wales and Northern Ireland. Further, the New Zealand *Bill of Rights Act 1990* does not expressly incorporate art. 14(6) of the *ICCPR*,[60] and as in Victoria, the New Zealand government makes payments for wrongful conviction and imprisonment on a discretionary basis by ex gratia payments.[61]

[106] The Human Rights Consultation Committee in its report made the general recommendation that an award of damages not be available only for a breach of a right.[62] And consistently with this approach, it expressly noted that art. 14(6) of the *ICCPR* was excluded from the Charter because that article may amount to a right to damages.[63]

[107] The explanatory memorandum to the Charter of Human Rights and Responsibilities Bill expressly stated that the Charter does not confer any entitlement to an award of damages from nothing more than a breach of a right protected under Part 2 of the Charter.[64] It is silent in relation to the omission of art. 14(6) of the *ICCPR*.

[108] SARC notes that it received no evidence in relation to whether the current method of compensating persons who have been wrongfully convicted has resulted in injustice.

Article 18 of the ICCPR – the right to freedom of thought, conscience and religion

[109] Article 18 of the *ICCPR* states:

> *1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

58 *International Covenant on Civil and Political Rights* [1980] ATS 23.
59 *Human Rights Act 1994* (ACT), s. 23.
60 See *The Attorney-General of New Zealand v Chapman* [2009] NZCA 552; *The Attorney-General of New Zealand v Chapman* [2010] NZSC 31.
61 *Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases*, POL Min (01) 34/5, 12 December 2001.
62 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 28.
63 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 44.
64 Charter of Human Rights and Responsibilities Bill, Explanatory Memorandum, p. 28.

> *2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
>
> *3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
>
> *4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

[110] Charter s. 14 is modelled on art. 18 of the *ICCPR* and provides:

> *(1) Every person has the right to freedom of thought, conscience, religion and belief, including-*
>
> *(a) the freedom to have or to adopt a religion or belief of his or her choice; and*
>
> *(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.*
>
> *(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.*

[111] Charter s. 14 does not include the right in art. 18(4) of the *ICCPR*.

[112] SARC received submissions supporting the inclusion in the Charter of the right in art. 18(4) of the *ICCPR*.[65] Submissions pressing for the inclusion in the Charter of the right in art. 18(4) of the *ICCPR* focused upon ensuring consistency with the *ICCPR* and the particular importance of enshrining this right. Some submissions noted the relevance of the right in art. 18(4) of the *ICCPR* in the context of the *Equal Opportunity Act 2010* (Vic), which will have the effect of limiting exemptions from the prohibition of discrimination for teachers in religious schools.[66]

[113] In this regard, SARC notes that the *Equal Opportunity Act 2010* (Vic) was the subject of parliamentary consideration as to the proper balance between competing rights.

[114] The Human Rights Consultation Committee stated in relation to the omission of the right in art. 18(4) of the *ICCPR* from the Charter that:[67]

> *The Committee has omitted this provision as it is concerned that it may have the unintended consequence of leading to an enforceable right to education when the Committee has decided that economic, social and cultural rights should not be included in the Charter at this first stage.*

The explanatory memorandum to the Charter of Human Rights and Responsibilities Bill was silent on the omission of the right in art. 18(4) of the *ICCPR*.

[115] In response to the Human Rights Consultation Committee's comment that the right in art. 18(4) of the *ICCPR* might have the unintended consequence of leading to an enforceable right to education, VEOHRC submitted that international law supports the view that this right does not create funding obligations and that regardless the Parliament could clarify the position.[68]

[116] SARC observers that art. 18(4) of the *ICCPR* is reflected in Art. 2 to Part II to Schedule 1 of the United Kingdom *Human Rights Act 1998*, which provides:

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65 E.g., Submission 278 (VEOHRC), p. 79.
66 E.g., Submission 287 (Joseph Santamaria QC), pp. 17-19.
67 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 44.
68 Submission 278 (VEOHRC), p. 79.

> *No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*

[117] SARC also received submissions in relation to the differences between art. 18 of the *ICCPR* and Charter s. 14. The Uniting Church in Australia,[69] amongst other religious organisations,[70] submitted that the right to freedom of religion in the Charter should be directly aligned with art. 18 of the *ICCPR*. Doctors in Conscience submitted that the freedom of conscience, in line with art. 18 of the *ICCPR*, should be regarded as fundamental and non-derogable, and that its limitations would be better served by adopting the wording of art. 18(3) of the *ICCPR*.[71]

[118] SARC observes that the central difference between arts. 18(1) to (3) of the *ICCPR* and Charter s. 14 is that art. 18(3) of the *ICCPR* provides that freedom to manifest one's religion or beliefs may only be limited where necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, whereas Charter s. 14 may be limited "only to such reasonable limits as can be demonstrably justified in a free and democratic society" pursuant to the terms of Charter s. 7.

[119] The Human Rights Consultation Committee adopted the general approach of excluding right specific limitation provisions such as that used in art 18(3) of the *ICCPR* in favour of a general limitation provision contained in Charter s. 7.[72] The sole exception to this approach is for the right to freedom of expression in Charter s. 15.

[120] It was submitted that Charter s. 14 might produce unwelcome outcomes when compared to arts 18(1) to (3) of the *ICCPR*. For example, the Interfaith Ad Hoc Committee submitted that in the recent case of *Cobaw*[73] the right to religious freedom had been "trumped or overtaken" by the right to freedom from discrimination.[74] As this matter is currently the subject of appeal, SARC makes no comment in relation to it.

[121] SARC also received submissions that Charter s. 48 abrogated the rights in Charter s. 14 (which is based upon art. 18 of the *ICCPR*) of registered health practitioners and registered nurses.[75]

[122] Specifically, these submissions were directed towards the effects of s. 8 of the *Abortion Law Reform Act 2008* (Vic), which provides:

> *(1) If a woman requests a registered health practitioner to advise on a proposed abortion, or to perform, direct, authorise or supervise an abortion for that woman, and the practitioner has a conscientious objection to abortion, the practitioner must-*
>
> *(a) inform the woman that the practitioner has a conscientious objection to abortion; and*
>
> *(b) refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.*
>
> *(2) Subsection (1) does not apply to a practitioner who is under a duty set out in subsection (3) or (4).*

69 Submission 256 (Synod of Victorian and Tasmania Uniting Church in Australia), pp. 6-7.
70 E.g., Submission 297 (Catholic Social Services Victoria), p. 18.
71 Submission 226 (Doctors in Conscience), p. 2.
72 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, pp. 46-48.
73 *Cobaw Community Health Services Limited v Christian Youth Camps Limited* [2010] VCAT 1613.
74 SARC, Transcript of Public Hearings, 22 July 2011, Mr R. Ward (Ad Hoc Interfaith Committee), p. 5.
75 SARC, Transcript of Public Hearings, 21 July 2011, Dr C. French (Doctors in Conscience), p. 3.

> *(3) Despite any conscientious objection to abortion, a registered medical practitioner is under a duty to perform an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman.*
>
> *(4) Despite any conscientious objection to abortion, a registered nurse is under a duty to assist a registered medical practitioner in performing an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman.*

[123] Many submissions stated that s. 8 of the *Abortion Law Reform Act 200*8 (Vic) overrode the conscientious objection rights of registered health practitioners and registered nurses with respect to the practice of abortion.[76] Specifically, it was submitted that s. 8 of the *Abortion Law Reform Act 200*8 (Vic) is inconsistent with Charter s. 14, which provides for freedom of thought, conscience, religion and belief. Dr Wilks and Jo Grainger submitted that there are reasons other than religious belief that require medical staff to retain their right to conscientious objection; examples include a doctor deeming an abortion too dangerous for the patient or the psychological effect on the patient.[77]

[124] Doctors in Conscience submitted that s. 8 of the *Abortion Law Reform Act 2008* (Vic) had the effect of rendering void Charter ss. 11(2) (freedom from forced or compulsory labour) and 15(1) (the right to hold an opinion), and infringing the privacy provisions of Charter s. 13, as those rights relate to registered health practitioners and registered nurses.[78]

[125] SARC also received evidence from some doctors that s. 8 of the *Abortion Law Reform Act 2008* (Vic) has caused them and other doctors to stop practising medicine in areas which would require them to refer a pregnant patient to a medical practitioner who does not have a conscientious objection to abortion.[79] Dr Mark Hobart informed SARC that he was a law abiding citizen, but that he was unable to abide by the law in s. 8 of the *Abortion Law Reform Act 2008* (Vic) owing to his beliefs and his conscience, and was unable to protect himself from its effects.[80] Prof John Murtagh gave evidence that s 8 of the *Abortion Law Reform Act 200*8 (Vic) had impacted the choices of medical students to pursue practice in certain fields.[81]

[126] Doctors in Conscience also submitted that Charter s. 48 denies medical practitioners and registered nurses their rights and causes them difficulty, and that it should be repealed.[82] Prof John Martin likewise submitted that Charter s. 48 should be repealed because it imposes upon practitioners an obligation either directly or indirectly to contribute to abortions, despite a moral objection.[83]

[127] Charter s. 48 provides:

> *Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.*

[128] The Human Rights Consultation Committee considered that the Charter should not impose an outcome in relation to the abortion debate, and that it should be left to political debate and individual judgment. The Human Rights Consultation Committee stated:[84]

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76 E.g., Submission 33 (Dr Ivan Stratov), p. 1; Submission 155 (Dr Mary Walsh), pp. 1-2; Submission 180 (Dr Rod Stephenson), pp. 1-2; Submission 226 (Doctors in Conscience), p. 2; Submission 309 (Dr Bernadette Wilks), pp. 1-2; SARC, Transcript of Public Hearings, 21 July 2011, Jo Grainger, pp. 4-5.

77 Submission 309 (Dr Bernadette Wilks), pp. 1-2; SARC, Transcript of Public Hearings, 21 July 2011, Jo Grainger, pp. 4-5.

78 SARC, Transcript of Public Hearing, 21 July 2011, Dr C. French (Doctors in Conscience), p. 3.

79 SARC, Transcript of Public Hearings, 21 July 2011, Prof John Murtagh (Doctors in Conscience), p. 4; Submission 180 (Dr Rod Stephenson), pp. 2-3.

80 Submission 68 (Dr Mark Hobart), p. 1.

81 SARC, Transcript of Public Hearing, 21 July 2011, Prof John Murtagh (Doctors in Conscience), p. 4.

82 SARC, Transcript of Public Hearings, 21 July 2011, Dr Rod Stephenson (Doctors in Conscience), p. 4; Prof John Murtagh (Doctors in Conscience), p. 4.

83 Submission 15 (Prof John Martin).

83 Human Rights Consultation Committee, Rights, Responsibilities and Respect, November 2005, p. 33.

> *The question of whether the right to life extends to the unborn child is a controversial one. The submissions do not reveal any clear common ground but rather that it remains a matter of often heated debate. The Committee notes these views and believes that, in the absence of consensus, the issue should not be resolved through the Charter.*

[129] SARC notes that repeal of Charter s. 48 alone would not remedy the foregoing issues raised in submissions by medical professionals.

[130] SARC recognises that the submissions it has received in relation to s. 8 of the *Abortion Law Reform Act 2008* (Vic) address complex and important issues where the community holds a diversity of strongly held views. It also notes that reform of s. 8 of the *Abortion Law Reform Act 2008* (Vic) falls outside the terms of reference of this Inquiry. In addition, SARC observes that s. 8 of the *Abortion Law Reform Act 2008* (Vic) reflects the current position as adopted by the Parliament in 2008 following extensive community consultation and Parliamentary debate.

[131] Separately to the foregoing, SARC received submissions that Charter s. 48 should be repealed. In particular, it was submitted that Charter s. 48 may have once been a de facto transitional provision that should now be repealed following the enactment of the *Abortion Law Reform Act 2008* (Vic).[85]

Article 20 of the ICCPR – war propaganda and racial and religious hatred

[132] Article 20 of the *ICCPR* provides:

> *1. Any propaganda for war shall be prohibited by law.*
>
> *2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

There is no similar provision in the Charter.

[133] SARC received submissions supporting the inclusion in the Charter of the rights in art. 20 of the *ICCPR*.[86]

[134] The Human Rights Consultation Committee stated:[87]

> *The Committee considers that [art 20(1)] was primarily included in the ICCPR as a response to the experience of World War II and is less relevant to a modern Victorian Charter. ICCPR article 20(2) … has also been omitted because it does not express a human right per se, but is rather a direction to government. In addition, the Victorian Racial and Religious Tolerance Act 2001 deals with such matters.*

[135] When ratifying the *ICCPR*, Australia made the following reservation to art. 20:[88]

> *Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters.*

[136] In relation to art. 20(1) of the *ICCPR*, SARC observes that the Australian Constitution confers power on the Commonwealth Parliament to make laws for the defence of the Commonwealth.[89]

85 Submission 287 (Joseph Santamaria QC), p. 20.
86 Submission 291 (Australian Federation of University Women (Victoria)), p. 4; Submission 285 (Castan Centre for Human Rights Law), p. 5.
87 Report of the Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 33.
88 *International Covenant on Civil and Political Rights* [1980] ATS 23.
89 Australian Constitution, s. 51(vi).

[137] In relation to art. 20(2), SARC observes that the *Racial and Religious Tolerance Act 2001* (Vic) deals with such matters and in particular seeks to cover conduct which incites severe ridicule of a person on the grounds of race (s. 7) or religion (s. 8). As it currently stands, the law in Victoria seeks to go further than art. 20(2) of the *ICCPR*.

Article 23 of the ICCPR – the right to found a family

[138] Article 23 of the *ICCPR* provides:

> *1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
>
> *2. The right of men and women of marriageable age to marry and to found a family shall be recognized.*
>
> *3. No marriage shall be entered into without the free and full consent of the intending spouses.*
>
> *4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

[139] Article 23(1) of the *ICCPR* has been incorporated into the Charter in a modified form in s. 17(1), which provides:

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

[140] SARC received a submission that art. 23(2)–(4) of the *ICCPR* should be incorporated into the Charter,[90] and numerous submissions that the right to found a family in art. 23(2) of the *ICCPR* should be incorporated.[91]

[141] The Human Rights Consultation Committee considered the right to found a family to be an essential civil and political right that people would expect to see in a human rights instrument. But the Human Rights Consultation Committee did not recommend including the right so as not to pre-empt the results of a Victorian Law Reform Commission reference on assisted reproduction and adoption.[92] The Victorian Law Reform Commission's reference was to inquire into and report on changes to the *Infertility Treatment Act 1995* (Vic) and the *Adoption Act 1984* (Vic) to expand eligibility criteria in respect of all or any forms of assisted reproduction and adoption.

[142] The explanatory memorandum to the Charter of Human Rights and Responsibilities Bill stated in relation to cl. 17 of the Bill (which is the same as Charter s. 17):[93]

> *Sub-clause (1) provides that families are the fundamental group unit of society and are entitled to be protected by society and the State. This provision is modelled on article 23(1) of the Covenant. This sub-clause recognises a right to protection. It is not Parliament's intention to create a right to found a family in this Charter.*

It also stated that the provisions of art. 23(2)-(4) of the *ICCPR* were omitted from the Charter because marriage is a matter within the Commonwealth's jurisdiction.[94]

90 Submission 285 (Castan Centre for Human Rights Law), p. 7.
91 E.g. Submission 278 (VEOHRC), p. 78; Submission 264 (Australian Lawyers for Human Rights), p. 6; Submission 291 (Australian Federation of University Women (Victoria)), p. 7.
92 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 42.
93 Charter of Human Rights and Responsibilities Bill, Explanatory Memorandum, p. 14.
94 Charter of Human Rights and Responsibilities Bill, Explanatory Memorandum, p. 8.

[143] The right to found a family is recognised in Art. 12 of the United Kingdom *Human Rights Act 1998*, which states: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.' It is not recognised in the ACT *Human Rights Act 2004* or the New Zealand *Bill of Rights Act 1990*.

[144] The Victorian Law Reform Commission released Assisted Reproductive Technology and Adoption: Final Report on 7 June 2007 and the Victorian government responded to the recommendations contained in the report.

[145] SARC observes that the Australian Constitution confers power on the Commonwealth Parliament to make laws for marriage,[95] and divorce and matrimonial causes,[96] and that the Commonwealth Parliament has enacted the *Marriage Act 1961* (Cth) and the *Family Law Act 1975* (Cth). But the right to found a family is also relevant to issues covered by state legislation. For example, in the recent case of *Castles v Secretary of the Department of Justice*,[97] Ms Castles sought to rely upon the right to found a family to obtain access to reproductive assistance technology while in prison. The court held that Ms Castles could not rely upon this right because it had been excluded from the Charter.[98]

Article 24(2) of the ICCPR – the right to birth registration

[146] Article 24(2) of the *ICCPR* provides that '[e]very child shall be registered immediately after birth and shall have a name'.

[147] The Charter does not contain this right. The Human Rights Consultation Committee explained its omission in its report, stating:[99]

> *While these* rights *were more relevant in the post-World War II context in which the ICCPR was drafted, they are less relevant for inclusion in a modern Victorian Charter.*

[148] SARC received submissions calling for the incorporation of the right in art. 24(2) of the *ICCPR* because the right was said to be relevant for Victorians, and in particular Indigenous Victorians.[100]

[149] VEOHRC gave evidence that in 2008, there were 1841 unregistered births in Victoria.[101] SARC received submissions stating that a large number of those unregistered births were from the Victorian Indigenous population.[102]

[150] SARC received evidence that failure to be registered at birth or failure to obtain a birth certificate could result in significant disadvantage because not having a birth certificate gives rise to difficulties in obtaining a driver's licence, registering to vote, opening a bank account, obtaining a tax file number, and enrolling at school. And in circumstances where persons were already disadvantaged, these difficulties were an exacerbation.

[151] The submission by the Castan Centre for Human Rights Law recommends that the right in art. 24(2) of the *ICCPR* be augmented to include an obligation on the state that every child born in Victoria be provided with a birth certificate immediately after his or her birth is registered.[103]

95 Australian Constitution, s. 51(xxi).
96 Australian Constitution, s. 51(xxii).
97 [2010] VSC 310.
98 At [72].
99 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 34.
100 E.g. Submission 278 (VEOHRC), p. 78; Submission 247 (Law Institute of Victoria), p. 10; Submission 274 (Jamie Gardiner), p. 3; Submission 285 (Castan Centre for Human Rights Law), p. 6.
101 Submission 278 (VEOHRC), p. 78, citing P Gerber, 'Making Indigenous Australians Disappear: Problems Arising from Our Birth Registration System' (2009) 34 Alternative Law Journal 159.
102 E.g. Submission 278 (VEOHRC), p. 78; Submission 247 (Law Institute of Victoria), p. 10; Submission 274 (Jamie Gardiner), p. 3; Submission 285 (Castan Centre for Human Rights Law), p. 6.

[152] SARC observes that Part 3 of the *Births, Deaths and Marriages Registration Act 1996* (Vic) regulates the registration of births in Victoria. Part 3 imposes an obligation upon responsible persons to register the birth of a child and that the child must be given a name. But the Act does not provide that a birth certificate must be issued to the child when its birth is registered.

Other rights in the ICCPR omitted from the Charter

[153] SARC also received submissions calling for the inclusion of all *ICCPR* rights in the Charter.

[154] SARC observes that the Charter omits or qualifies a number of rights in the *ICCPR*. These omissions and qualifications are set out in the submissions of the Victorian government[104] and VEOHRC.[105] The Human Rights Consultation Committee identified reasons for their omission or qualification.[106]

SARC's recommendations on adding rights in the ICCPR omitted from the Charter

[155] SARC's terms of reference are to consider whether additional human rights should be added to the Charter. The submissions received supporting the addition of rights in the *ICCPR* omitted from the Charter have been discussed above.

[156] SARC observes that the approach adopted by the Human Rights Consultation Committee resulted in some subjective judgments being made about the inclusion of rights contained in the *ICCPR*, such as decisions that certain rights were no longer relevant, and that certain rights should not be included because doing so might influence the outcome of then current law reform projects.

[157] SARC recommends that if the Charter is retained in its current form, consideration should be given as to whether the rights contained in the *ICCPR* omitted by the Human Rights Consultation Committee should be re-examined for inclusion in the Charter. This consideration should note the submissions received in this review and the comments made in the preceding part of this chapter. The right to self-determination contained in art. 1 of the *ICCPR* is considered in a separate term of reference in this chapter.

[158] This recommendation also applies to both options for reform or improvement recommended by SARC for consideration at the conclusion of this Report.[107]

Recommendation 1

If the Charter is retained in its current form, SARC recommends that consideration be given to whether the rights contained in the ICCPR omitted by the Human Rights Consultation Committee should be re-examined for inclusion in the Charter.

Discussion of submissions on adding rights in the ICESCR

What is the ICESCR?

[159] SARC's terms of reference include reporting on whether rights under the *ICESCR* should be included in the Charter.

[160] The *ICESCR* was adopted by the General Assembly of the United Nations in 1966, and ratified by Australia on 10 December 1975.

103 Submission 285 (Castan Centre for Human Rights Law), p. 6.
104 Submission 324 (Victorian Government), pp. 79-88.
105 Submission 278 (VEOHRC), Appendix E.
106 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, pp. 42-6.
107 See Chapter 6, [687] and Recommendation 35.

[161] The *ICESCR* includes protection for the following rights:

- the right of all peoples to self-determination (art. 1)
- the right to work (art. 6)
- the right to just and favourable conditions of work (art. 7)
- the right to form and join trade unions (art. 8)
- the right to social security (art. 9)
- protection and assistance to the family (art. 10)
- the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing (art. 11)
- the right to the enjoyment of the highest attainable standard of physical and mental health (art. 12)
- the right to education (art. 13)
- the right to cultural life (art. 15).

It may be noted that the *ICESCR* contains rights that overlap with some rights in the *ICCPR*. For example, art. 1(1) of both conventions concerns the right of all peoples to self-determination, and art. 13(3) of the *ICESCR* and art. 18(4) of the *ICCPR* concern the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions. As noted earlier, the right to self-determination is the subject of a separate term of reference.

[162] It is frequently stated that the difference between civil and political rights on the one hand and economic, social and cultural (ESC) rights on the other is that civil and political rights restrain the State from acting, whereas ESC rights require positive State action through the allocation of resources. This division is not absolute, for some civil and political rights also require positive State action, such as the right to a fair trial imposing funding obligations on the State for a legal system that meets minimum standards. But certainly, ESC rights concerning health, education and housing, to name a few, require positive State action and substantial resources from the public purse.

[163] Another difference between the *ICCPR* and the *ICESCR* relates to the obligations each imposes upon States. By art. 2(1) of the *ICCPR*, a State 'undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant'. That is, the *ICCPR* imposes immediate obligations. By contrast, by art. 2(1) of the *ICESCR*, a State 'undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realisation of rights recognised in the present Covenant by all appropriate means'. That is, the *ICESCR* obligations require progressive steps to be taken for the fulfilment of the enumerated rights.

[164] SARC observes that if the *ICESCR* rights were to be included in the Charter, the rights could be modified as required to impose either immediate obligations or progressive obligations upon Victoria.

The approach to the rights in the ICESCR in the United Kingdom and Australian jurisdictions other than Victoria

[165] SARC observes that other comparable jurisdictions have considered whether to give statutory force to ESC rights as found in the *ICESCR*. To date, no comparable jurisdiction with a dialogue model has done so.

United Kingdom

[166] In 1998, the United Kingdom Parliament enacted the *Human Right Act 1998* (UK). The Act does not include economic and social rights, with the exception of the right to education, which was taken from the European Convention on Human Rights.

[167] In 2008, the United Kingdom Parliament's Joint Committee on Human Rights recommended that economic and social rights be included in a United Kingdom Bill of Rights. The Joint Committee on Human Rights stated in its report:[108]

> *In our view the main objections to the inclusion of social and economic rights in a Bill of Rights are not, in the end, objections of principle, but matters which are capable of being addressed by careful drafting … We consider that rights to health, education and housing are part of this country's defining commitments, and including them in a UK Bill of Rights is therefore appropriate, if it can be achieved in a way which overcomes the traditional objections to such inclusion.*

[168] The Joint Committee on Human Rights recommended initially including the following ESC rights:[109]

- the right to health
- the right to education
- the right to housing
- the right to an adequate standard of living
- the right to social security.

[169] The United Kingdom government's response to the Joint Committee on Human Rights' report expressed concern about any increased judicial intervention in areas involving resource allocation in the socio-economic sphere, and stated that such issues should remain a matter for democratically accountable institutions of government.[110]

[170] In March 2009, the United Kingdom government released a Green Paper as part of its consultations on a United Kingdom Bill of Rights that stated 'a general model of directly legally enforceable rights … may not be the best mechanism for ensuring fair provision for society as a whole in relation to social and economic rights'.[111] In addition, the Green Paper stated:[112]

> *One of the key questions in relation to the constitutional expression of rights is the extent to which the courts should make decisions which have a direct effect on resource allocation. Different jurisdictions have arrived at different answers depending on their constitutions and their history and social and economic conditions. For the United Kingdom, it is the Government's clear view that Parliamentary sovereignty must remain as the cornerstone of the UK constitution. Ministers are democratically accountable to Parliament for the prioritisation of social needs, and for the way in which resources are targeted towards meeting them. The process of adjudication of individual claims cannot take account of broader public policy arguments in a way which ensures such accountability. Nor do the judiciary have any democratic mandate to take such decisions. The Government is satisfied that there is no case for extending the UK courts' jurisdiction over such areas.*

108 Joint Committee on Human Rights, *Twenty-Ninth Report*, 2009, [191].
109 Joint Committee on Human Rights, *Twenty-Ninth Report*, 2009, [197].
110 Joint Committee on Human Rights, *A Bill of Rights for the UK? Government Response to the Committee's Twenty-Ninth Report of Session 2007–2008*, House of Lords Paper 15, House of Commons Paper No. 145, Sessions 2008–09, pp. 19-20.
111 Ministry of Justice, *Rights and Responsibilities: Developing Our Constitutional Framework*, March 2009 (Cm 7577), p. 57.
112 Ministry of Justice, *Rights and Responsibilities: Developing Our Constitutional Framework*, March 2009 (Cm 7577), p. 57.

Commonwealth of Australia

[171] In 2009, the National Human Rights Consultation Committee recommended that the Commonwealth adopt human rights legislation based upon a dialogue model, although suggesting that many of its proposals could be implemented independently. The National Human Rights Consultation Committee recommended that economic and social rights should not be justiciable under such a model. It considered that it was not prudent to impose upon Australian federal courts jurisdiction to make decisions about the sufficiency of government resource allocation to achieving particular social and economic rights.[113]

[172] The Commonwealth government has not adopted the National Human Rights Consultation Committee's recommendation for a dialogue model, and instead is considering a parliamentary scrutiny model based on the rights found in the seven core UN conventions that Australia has ratified (which includes the *ICESCR*).[114]

ACT

[173] In 2003, the ACT Bill of Rights Consultation Committee recommended that an ACT Human Rights Act be enacted and that it should include the following ESC rights:[115]

- the right to adequate food, clothing and housing
- the right to health
- the right to education
- the right to work and just conditions
- the right to take part in cultural life.

[174] The ACT government adopted the recommendation to enact an ACT Human Rights Act, but decided not to adopt the recommendation that it include economic and social rights modelled on the *ICESCR*. The ACT government's reasons included that a successful claim by one person for breach of economic, social and cultural rights might involve limited government resources being drawn away from others, and that questions about whether such rights have been breached will involve judgments about whether or not resources have been appropriately allocated.[116]

[175] In 2009, the ACT government committed to consider including ESC rights in the *Human Rights Act 2004* (ACT). The ACT government partnered with ANU on an independent research project on the effect of including ESC rights in the *Human Rights Act 2004* (ACT). The resulting report recommended including the following ESC rights in the *Human Rights Act 2004* (ACT):[117]

- the right to housing
- the right to health, including food, water, social security and a healthy environment
- the right to education
- the right to work, including the right to enjoy just and favourable work conditions and the right to form and join work related organisations
- the right to take part in cultural life.

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113 National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, p. 365.

114 See Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Human Rights (Parliamentary Scrutiny) Bill 2010 and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010*, January 2011.

115 ACT Bill of Rights Consultation Committee, *Towards an ACT Human Rights Act*, May 2003, 5.32, 5.46.

116 'Government Response to the Report of the ACT Bill of Rights Consultative Committee: *Towards an ACT Human Rights Act*', Tabling Speech, 23 October 2003.

117 ACT Economic, Social and Cultural Rights Research Project, *Report*, September 2010, p. 17.

[176] The ACT government is currently undertaking a community consultation about the possible inclusion of ESC rights in the ACT *Human Rights Act 2004*.

Tasmania

[177] In October 2007, the Tasmanian Law Reform Institute reported on whether Tasmania should adopt a legislative human rights scheme. It recommended that Tasmania adopt a dialogue model Tasmanian Charter that includes civil and political rights alongside ESC rights. It relevantly stated:[118]

> *The arguments for limiting rights protection to civil and political rights are not compelling. They speak of timidity rather than rationality. Suggestions that courts are ill-equipped to engage with economic, social and cultural rights show little knowledge of the courts' current decision making responsibilities. Fears that the inclusion of economic, social and cultural rights in a Tasmanian Charter would deprive the governments of their control of fiscal policy and resource allocation are unfounded. Under the dialogue model recommended here for the Tasmanian Charter, this cannot occur. The Tasmanian Law Reform Institute recognises that human rights are indivisible and that the separation of rights into civil and political rights on the one hand and economic, social and cultural rights on the other is artificial.*

[178] On 20 October 2010, the Tasmanian government released a Consultation Paper to undertake a dialogue with the Tasmanian community. The Tasmanian government has not yet responded.

Western Australia

[179] In 2007, the Consultation Committee for a Proposed WA Human Rights Act recommended that Western Australia adopt a Human Rights Act. In addition to civil and political rights, the Consultation Committee for a Proposed WA Human Rights Act recommended including the following ESC rights:[119]

- the right to housing
- the right to health
- the right to an education
- the right to take part in cultural life.

The Western Australian government has not adopted the Consultation Committee's recommendations to enact human rights legislation.

Submissions about adding rights from the ICESCR

[180] SARC received many submissions supporting the inclusion in the Charter of all or some of the rights contained in the *ICESCR*.[120]

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118 Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, p. 122.

119 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, November 2007, p. 82.

120 E.g. Submission 16 (Community Child Care), p. 1; Submission 38 (Action for Aboriginal Rights, Bendigo), p. 2; Submission 43 (United Macedonian Diaspora), p. 1; Submission 55 (Kendall Lister), p. 1; Submission 76 (Jane Douglas), p. 1; Submission 85 (YWCA Victoria), p. 5; Submission 87 (Domestic Violence Resource Centre Victoria), p. 4; Submission 99 (Vision Australia), pp. 4-6; Submission 110 (Peninsula Community Legal Centre Inc), p. 2; Submission 127 (Top End Women's Legal Service Inc), p. 2; Submission 130 (Australian Association of Social Workers), pp. 15-17; Submission 147 (Amnesty International), p. 5; Submission 152 (Women's Legal Service Victoria), p. 3; Submission 154 (Centre for Multicultural Youth), p. 2; Submission 114 (Dr Julie Debeljak), p. 1; Submission 131 (Eastern Community Legal Centre), p. 7; Submission 146 (Leadership Plus), p. 3; Submission 118 (Western Region Health Centre and Women's Health West), p. 9; Submission 160 (Victorian Alcohol & Drug Association), p. 3; Submission 161 (Whitehorse City Council), p. 1; Submission 166 (Council on the Ageing Victoria), p. 4; Submission 172 (Catie Shavin), p. 1; Submission 177 (Loddon Mallee Homelessness Network), p. 2; Submission 182 (Athena Nguyen), pp. 1-2; Submission 202 (Brimbank City Council), p. 4; Submission 211 (Public Interest Advocacy Centre), p. 3; Submission 205 (Federation of Community Legal Centres), p. 8; Submission 204 (Victorian Local Government Association),

[181] Many submissions identified specific ESC rights as being of particular importance, sometimes in conjunction with general support for including all the *ICESCR* rights in the Charter. Those specific rights that received particular support were:

- the right to health (art. 12 of the *ICESCR*)[121]
- the right to education (art. 13 of the *ICESCR*)[122]
- the right to living, including the right to food, clothing and housing (art. 11(1) of *ICESCR*).[123]

[182] Indeed, while VEOHRC supported the inclusion of all rights in the *ICESCR* in the Charter, it submitted that at a minimum the rights to housing, health and education (subject to an appropriate limitation that these rights are to be progressively realised) should be included.[124]

[183] SARC makes the following observations in relation to these rights.

[184] The right to health is contained in art. 12 of the *ICESCR* and provides:

> *1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
>
> *2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*
>
> *(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*
>
> *(b) The improvement of all aspects of environmental and industrial hygiene;*
>
> *(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
>
> *(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*

[185] SARC observes that the *Health Services Act 1988* (Vic) provides as one of its objectives that 'an adequate range of essential health services is available to all persons resident in Victoria irrespective of where they live or whatever their social or economic status'.[125] SARC also observes that health services are provided through a complex mix of state and Commonwealth funding.

[186] The right to education is contained in art. 13 of the *ICESCR* and provides:

> *1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively*

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p. 7; Submission 247 (Law Institute of Victoria), p. 7; Submission 264 (Australian Lawyers for Human Rights), p. 4; Submission 270 (Victorian Gay and Lesbian Rights Lobby), p. 2; Submission 271 (Environment Defenders Office), p. 5; Submission 291 (Australian Federation of University Women (Victoria)), p. 2; Submission 296 (Mental Health Legal Centre Inc), p. 5.

121 Submission 90 (Youth Disability Advocacy Services), p. 1; Submission 93 (Women's International League for Peace and Freedom), p. 1; Submission 128 (Health Services Commissioner), p. 1; Submission 118 (Western Region Health Centre and Women's Health West), p. 7; Submission 271 (Environment Defenders Office), p. 5; Submission 298 (Native Title Services Victoria), p. 3.

122 Submission 90 (Youth Disability Advocacy Services), p. 1; Submission 96 (Arnold Bloch Leibler), p. 2; Submission 131 (Eastern Community Legal Centre), p. 7; Submission 291 (Australian Federation of University Women (Victoria)), p. 4.

123 Submission 90 (Youth Disability Advocacy Services), p. 1; Submission 96 (Arnold Bloch Leibler), p. 2; Submission 93 (Women's International League for Peace and Freedom), p. 5; Submission 131 (Eastern Community Legal Centre), p. 7; Submission 271 (Environment Defenders Office), p. 5.

124 Submission 278 (VEOHRC), p. 44.

125 At s. 9(b),

in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. *The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*

   (a) *Primary education shall be compulsory and available free to all;*

   (b) *Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*

   (c) *Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*

   (d) *Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;*

   (e) *The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.*

3. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.*

4. *No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.*

[187] SARC observes that the *Education and Training Reform Act 2006* (Vic) provides for compulsory education of students to 17 years of age (s. 2.1.1) and free education to and including year 12 or its equivalent for students under the age of 20 attending a government school (s. 2.2.4(1)).

[188] SARC also notes that higher education is the subject of federal funding, and that questions of accessibility are being addressed through policies other than the progressive introduction of free tertiary education.

[189] The right to an adequate standard of living is contained in art. 11 of the *ICESCR* and relevantly provides:

1. *The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

SARC observes that a number of Victorian Acts protect housing rights, including the *Residential Tenancies Act 1997* (Vic). SARC also observes that social security and welfare benefits are predominantly federal matters.

[190] SARC notes in relation to the scope of the rights to health, education and living (but also more broadly in relation to other rights), that the wording and scope of some rights would require modification for inclusion in the Charter.

[191] Before setting out the submissions both in favour of and against including ESC rights in the Charter, SARC makes the following observations about the nature of the evidence before it. SARC is undertaking a predictive exercise as to the effect of adding ESC rights to the Charter. The evidence of the actual operation of the Charter is of limited utility because economic and social rights raise different issues than civil and political rights. And the evidence from comparable jurisdictions about the impact that adding ESC rights might have for Victoria is minimal and of little use. In particular, SARC considers that the experience of South Africa, which is one of the few comparable jurisdictions to protect ESC rights, says little about the prospective experience of Victoria because many of the issues South Africa faces in providing access to health care, education and housing to large segments of its population simply do not arise in Victoria. As Carlo Carli, a former chairman of SARC, recognised in evidence, care must be taken with the South African experience.[126] Further, the South African Constitutional Court has departed from international law in significant respects.[127] It follows that many of the contentions put to SARC both for and against adding economic and social rights are not empirically based.

Arguments supporting the incorporation of ESC rights in the Charter

[192] The submissions in favour of incorporating ESC rights in the Charter include the following arguments.

[193] **First**, it was submitted that economic and social rights are the rights that matter most to Victorians, and the Charter should reflect the rights that Victorians consider most important.[128]

[194] SARC observes that the submissions it received are consistent with the view that health, education and living conditions are among the most important issues for many Victorians.

[195] **Second**, the rights in the *ICCPR* and the rights in the *ICESCR* are interdependent and indivisible.

[196] It was submitted that the enjoyment of civil and political rights often depends upon the State protecting ESC rights. By way of example, the Synod of Victoria and Tasmania Uniting Church in Australia gave evidence that it would be near impossible for a homeless person with educational disadvantages experiencing drug addiction to exercise their right to vote if there were not some level of access to support services like emergency relief, housing support and access to information.[129]

[197] And the Top End Women's Legal Service Inc submitted:[130]

> *Civil and political rights by their nature tend to protect the ability of individuals to participate in the public realm, which does not adequately protect women, and other vulnerable members of the community, who are in need of housing, access to healthcare facilities, welfare benefits or education before they can meaningfully participate in society.*

[198] Youthlaw submitted that in its experience, young people do not talk about human rights using an arbitrary division of rights as 'civil and political' or 'economic, social and cultural', but instead they talk about human rights as a collective set of rights, many of which are interdependent and mutually

126 SARC, Transcript of Public Hearings, 21 July 2011, Carlo Carli, p. 6.
127 E.g. the Constitutional Court rejected 'minimum core obligation' analysis developed in international law in favour of a reasonableness test in *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).
128 Submission 276 (Australian Centre of Human Rights Education), p. 23; National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, p. 344.
129 Submission 256 (Synod of Victoria and Tasmania Uniting Church in Australia), p. 25.
130 Submission 127 (Top End Women's Legal Service Inc), p. 2.

reinforcing.[131] Similarly, the HRLC submitted that for those who are marginalised and vulnerable, or who feel a sense of unfairness at being treated without equality or human dignity, the distinction between *ICCPR* rights and ESC rights has very little meaning or relevance.[132]

[199] Several submissions also noted that the absence of ESC rights from the Charter might create a ranking of rights, whereby civil and political rights were considered more important than ESC rights. For example, Community Child Care submitted that rights are equal and indivisible so it is important to enshrine both broader and more specifically defined rights to ensure a class system within rights is avoided.[133]

[200] **Third**, the rights in the Charter are already being used to protect ESC rights.

[201] The Law Institute of Victoria submitted that rights in the Charter have been used to advocate social and economic rights, such as the right to humane treatment when deprived of liberty, has been relied upon to protect health,[134] and that ESC rights should be protected to avoid this piecemeal approach.[135]

[202] **Fourth**, it would ensure Victoria plays a role in fulfilling Australia's international human rights obligations.[136]

[203] However, it was not suggested in submissions that Victoria would be in breach of its international human rights obligations by not enacting the rights in the *ICESCR* in domestic law. Many of the rights in the *ICESCR* (and other international conventions which Australia has ratified) are already protected in Victorian law: for example, privacy, the right to education, health services, eliminating violence against women, work rights and accommodation.

[204] **Fifth**, it would align the Charter with the most innovative human rights acts in other parts of the world and by including internationally accepted rights ensure engagement with international developments and world best practice in the protection of human rights.[137]

[205] SARC observes that while it is possible to identify a trend in global constitutions recognising ESC rights,[138] South Africa is the notable exception in what some might consider a jurisdiction comparable to Victoria.

[206] **Sixth**, adding ESC rights to the Charter would foster a rights culture in Victoria.

[207] The Australian Federation of University Women (Victoria) submitted that including ESC rights:[139]

> *in the Charter can assist with their practical realisation by, amongst other things, encouraging an awareness by the community and by public authorities of the full extent of human rights recognised under international law (recognising that Australia does not exist in a vacuum), and by fostering a culture, routine or habit of recognition and respect for human rights in contemporary society.*

The Federation of Community Legal Centres submitted that the realisation and enjoyment of all human rights starts with the fostering of community, government and public service cultures that are familiar with

131 Submission 156 (Youthlaw), p. 4.
132 Submission 263 (Human Rights Law Centre), p. 64.
133 Submission 16 (Community Child Care), p. 2.
134 *Castles v Secretary of Department of Justice* [2010] VSC 310.
135 Submission 247 (Law Institute of Victoria), p. 12.
136 E.g. Submission 247 (Law Institute of Victoria), p. 11.
137 Submission 245 (International Commission of Jurists), p. 7.
138 D S Law and M Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) *California Law Review* (forthcoming).
139 Submission 291 (Australian Federation of University Women (Victoria)), p. 4.

and respectful of rights, and that a clearly articulated domestic law is the most effective catalyst for working towards these goals.[140]

[208] **Seventh**, broader recognition of rights will lead to better policy development and decision-making by the Victorian government and public authorities.

[209] Western Region Health Centre and Women's Health West submitted that including social and economic rights, such as the right to adequate housing, health care and education, would improve decision-making practices and procedures in relation to those rights.[141] In particular, they submitted that including a right to health in the Charter would provide more clearly articulated guidance on how health services and government can fulfil their existing obligations, and would assist to ensure legislation, policies and service models are more accessible, consumer-directed, and cognisant of the structural and social determinants impacting on health status and outcomes.

[210] The Victorian Council of Social Service (VCOSS) submitted that incorporating ESC rights would provide a framework to address poverty and disadvantage in Victoria.[142]

[211] SARC received evidence that this was occurring through other means. The City of Yarra submitted:[143]

> *Consideration of the full realm of rights will strengthen the Charter and assist in decision making and setting effective and efficient policy. Moreover it will enhance existing mechanisms for protection of ESC rights, such as the Victorian Equal Opportunity Act. Several policies and agreements to which Council is a party, such as the Multicultural Strategy, the UNESCO Coalition for Cities Against Discrimination, and the Aboriginal Partnership Plan, commit Council to the protection of ESC rights of Yarra residents.*

[212] Many organisations expressly stated that although expanding the Charter would not solve their problems, it would provide a tool to encourage change. For example, Vision Australia submitted:[144]

> *The problems facing people who are blind or who have low vision will not be remedied solely by the Charter, but along with other measures and avenues at both State and Federal levels, the tools with which to create change and the opportunities for change to occur, will be enhanced by the adoption of ESC rights into the Charter.*

The HRLC submitted that the inclusion of economic and social rights will ensure that these rights are appropriately considered and taken into account at the front end of law and policy making.[145]

[213] **Eighth**, including ESC rights in the Charter would increase resources being allocated to those enshrined rights. For example, the YWCA Victoria submitted that adding the right to housing in the Charter would address the provision of accommodation to an individual.[146] And Whitehorse City Council submitted that including ESC rights in the Charter would require governments to demonstrate progressive attainment and require government action and spending.[147]

[214] In addition, SARC observes that some of the foregoing arguments in favour of adding ESC rights to the Charter apply to the inclusion in the Charter of rights in the *CRC*, the *CEDAW* and the other international conventions to which Australia is a party.

140 Submission 205 (Federation of Community Legal Centres), p. 8.
141 Submission 118 (Western Region Health Centre and Women's Health West), p. 15.
142 Submission 262 (VCOSS), p. 12.
143 Submission 52 (City of Yarra), p. 3.
144 Submission 99 (Vision Australia), p. 5.
145 Submission 263 (Human Rights Law Centre), p. 65.
146 Submission 85 (YWCA Victoria), p. 5.
147 Submission 161 (Whitehorse City Council), p. 1.

Arguments against incorporating ESC rights in the Charter

[215] SARC also received submissions opposing the incorporation of any ESC rights in the Charter. SARC notes, however, that submissions calling for the repeal of the Charter generally did not address the terms of reference about adding new rights to the Charter.

[216] SARC observes that the central theme of opposition to adding economic and social rights to the Charter was that the Parliament and not the courts should be making decisions about social and economic policy.

[217] **First**, SARC received submissions that the content of the rights in the *ICESCR*, as well as the expression of rights in other international human rights instruments, is contested.[148]

[218] For example, Michael Pearce SC submitted:[149]

> *While there is undoubtedly a broad consensus in support of the rights contained in Part 2 of the Charter, I do not think the consensus extends to the rights in the International Covenant on Economic, Social and Cultural Rights. Whether, or the extent to which, society is expected to provide for such rights is a highly contested political issue in Australia. Since these matters sit outside the broad social consensus on human rights, I do not think they should be included in Part 2 of the Charter.*

To similar effect, FamilyVoice Australia submitted that there are fundamental complexities and deeply held disagreements on the best approach to economic policy to facilitate a continuous improvement in living conditions. FamilyVoice Australia also submitted that robust debate on these matters is properly a matter for democratically elected parliaments.[150]

[219] **Second**, it was said that the rights in the *ICESCR* are vague and uncertain.[151] It would therefore not be clear what consequence would flow from giving them statutory force. And it would give rise to difficulties for the courts in giving them sensible meaning.

[220] **Third**, there was concern expressed that giving the courts a role in commenting upon the appropriateness of resource allocation by government would produce no positive results, and possible negative results.

[221] FamilyVoice Australia submitted:[152]

> *Of course every additional dollar a government spends on health or education comes either from reducing spending on other responsibilities – such as providing an efficient police service and justice system – or from increased taxation. Budget decisions are properly subject to intense public scrutiny through estimates committees and other parliamentary and public debate. There is nothing to be gained – and significant risks – in giving the courts a role in such debates through enshrining economic and social rights in the Charter.*

The potential negative results would flow from any politicisation of the judiciary. It was generally agreed that the politicisation of the judiciary was detrimental. Some submitted to SARC that Bills of Rights have a

148 Submission 287 (Joseph Santamaria QC), p. 14; Submission 63 (Michael Pearce SC), p. 2.
149 Submission 63 (Michael Pearce SC), p. 2.
150 Submission 19 (FamilyVoice Australia), p. 2.
151 Submission 19 (FamilyVoice Australia), p. 2; Submission 63 (Michael Pearce SC), p. 2.
152 Submission 19 (FamilyVoice), p. 3.

tendency to politicise and undermine the reputation of the judiciary.[153] Some submitted that the Charter has not shown that tendency.[154]

[222] SARC also refers to the reasons that the National Human Rights Consultation Committee concluded that economic and social rights should not be included as justiciable rights in any national Human Rights Act:[155]

> *For most Australians the main concern is the realisation of primary economic and social rights such as the rights to education, housing and the highest attainable standard of health. The Committee acknowledges that it would be very difficult, if not impossible, to make such rights matters for determination in the courts.*
>
> *In our robust democracy these are the very rights that feature most often in political debate, especially at election time. They are the rights that are scrutinised by specialist parliamentary committees on health and ageing, education and training, family community, housing and youth. They are the rights that demand large resource allocations by government. No matter what the level of public deliberation in allocating scarce resources for securing these rights, there will always be some people who miss out.*
>
> *… The Committee considers that it is not prudent to impose this role on Australian federal courts. Many judges and retired judges have expressed strong reservations about the courts' capacity to determine the limits on economic and social rights, saying it is not appropriate for judges to opine on whether the government has dedicated enough resources to achieving particular economic and social rights.*
>
> *At the Mintabie roundtable the Committee was struck by the dilemma confronting any government trying to deliver services to small, remote communities. There, the decision had been made to close the health clinic, whereas the primary school was to be maintained. If it came to a choice between the maintenance of the clinic or the primary school, there would be no suitable criteria a judge could apply to make such a determination. If the residents had petitioned the court to maintain the clinic, the judge might not even be apprised of the fact that the school was being maintained.*
>
> *The Committee endorses the observations of Professor Tom Campbell and Dr Nicholas Barry:*
>
> > *Courts have a bias towards negative rights, which protect the individual from interference by the state. Because ensuring the protection of socioeconomic rights requires positive action by the state, it involves decisions about the allocation of state resources which courts do not have the expertise or information to make.*

[223] **Fourth**, SARC notes the evidence given by the former Chair of SARC Carlo Carli, in which he stated:[156]

> *The other thing I wanted to say on whether you expand the rights is that in my view the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights are not divisible, but I think in a practical sense civil and political rights are much easier to codify and control than, for example, the right to housing and the right to economics.*

153 Submission 287 (Joseph Santamaria QC), p. 21; SARC, Transcript of Public Hearings, 22 July 2011, R. Ward (Ad Hoc Interfaith Committee), p. 5.

154 SARC, Transcript of Public Hearings, 22 July 2011, Julian Burnside QC (Liberty Victoria), p. 8.

155 National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, pp. 365-6.

156 SARC, Transcript of Hearings, 21 July 2011, Carlo Carli, p. 6.

Other rights

The seven core international human rights treaties ratified by Australia

[224] SARC observes that Australia has obligations under seven core international human rights treaties. In addition to the *ICCPR* and *ICESCR*, these are:

- *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*, which Australia ratified on 30 September 1975
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, which Australia ratified on 28 July 1983
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, which Australia ratified on 8 August 1989
- *Convention on the Rights of the Child (CRC)*, which Australia ratified on 17 December 1990
- *Convention on the Rights of Persons with Disabilities (CRPD)*, which Australia ratified on 17 July 2008.

[225] SARC received submissions that the Charter should include all rights under the international covenants and conventions to which Australia is a party.[157] Many submissions referred specifically to the seven core human rights instruments that Australia has ratified.[158] SARC observes that the Commonwealth Parliament will be scrutinising legislation against these seven core human rights instruments if the proposed Human Rights (Parliamentary Scrutiny) Bill 2010 is enacted.

[226] Both the Law Institute of Victoria and the Law Society of New South Wales submitted that Victoria should incorporate the same rights in the Charter as are in the *Human Rights (Parliamentary Scrutiny) Bill 2010* to promote consistency between the Victorian and Commonwealth laws.[159]

[227] SARC received few submissions supporting the inclusion of the rights in the Charter from the *CERD*[160] or the *CAT*.[161] In relation to the *CERD*, SARC refers to Charter s. 8; it provides for recognition and equality before the law, and the *Racial Discrimination Act 1975* (Cth) and the *Equal Opportunity Act 2010* (Vic), which concern the subject matter of the *CERD*. In relation to the *CAT*, SARC refers to Charter s. 10, which provides protection from torture and cruel, inhuman or degrading treatment.

[228] SARC received many submissions about the *CEDAW* and the *CRC*, which were specifically referred to in SARC's terms of reference, and a significant number about the *CRPD*. SARC observes that the *CRPD* was ratified by Australia on 17 July 2008, after SARC's terms of reference in Charter s. 44(2) were enacted.

CEDAW

[229] SARC received many submissions in support of including all or some of the rights in the *CEDAW* in the Charter.[162]

157 Submission 182 (Athena Nguyen), p. 2; Submission 211 (Public Interest Advocacy Centre), p. 2; Submission 244 (Martin Foley MP), p. 3.

158 Submission 124 (John Rutherford), pp. 1-2; Submission 256 (Synod of Victorian and Tasmania Uniting Church in Australia), p. 4; Submission 147 (Amnesty International), p. 6; Submission 203 (Law Society of New South Wales), p. 6; Submission 247 (Law institute of Victoria), p. 10.

159 Submission 247 (Law Institute of Victoria), p. 10; Submission 203 (Law Society of New South Wales), p. 3.

160 Submission 16 (Community Child Care), p. 1; Submission 105 (Victorian Aboriginal Child Care Agency), pp. 10-11.

161 Submission 16 (Community Child Care), p. 1; Submission 147 (Amnesty International), p. 5.

162 E.g. Submission 16 (Community Child Care), p. 1; Submission 38 (Action for Aboriginal Rights, Bendigo), p. 2; Submission 55 (Kendall Lister), p. 1; Submission 76 (Jane Douglas), p. 1; Submission 85 (YWCA Victoria), p. 5; Submission 105 (Victorian Aboriginal Child Care Agency), pp. 10-11; Submission 111 (City of Darebin), p. 5; Submission 126 (MacKillop Family Services), p. 1; Submission 127 (Top End Women's Legal Service Inc), p. 2; Submission 147 (Amnesty International), p. 5; Submission 152 (Women's Legal Service Victoria), p. 3; Submission 161 (Whitehorse City Council), p. 2; Submission 166 (Council on the

[230] The Charter does not contain gender specific rights, instead providing in s. 8 that every person has the right to enjoy his or her human rights without discrimination. SARC observes that the substantive provisions of the *CEDAW* are already reflected in the *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity Act 2010* (Vic).

[231] In support, Domestic Violence Resource Centre Victoria submitted that recognition of domestic violence as a violation of human rights in the Charter would strengthen the message in Victoria that violence against women and family is not acceptable, and would support provisions in the *Family Violence Protection Act 2008* (Vic) enacted to protect victims and provide a statuary response to situations of domestic violence.[163]

[232] More broadly, the YWCA Victoria submitted that a gender analysis should be used when reviewing the Charter, identifying the differences in men's and women's lives, including those that lead to social and economic inequality.[164]

[233] VEOHRC submitted that the rights of women should be recognised in the objects of the Charter to inform the interpretation of all Charter rights.[165]

[234] In opposition, FamilyVoice Australia submitted that as the Charter purports to protect and promote the human rights of all Victoria, it would be inappropriate to use it as a vehicle to promote the interests of only one sex – women.[166]

[235] To similar effect, Michael Pearce SC submitted both in relation to the *CEDAW* and the *CRC*:[167]

> *I am not persuaded that the rights contained in the Convention on the Rights of the Child and in the Convention on the Elimination of all Forms of Discrimination against Women require expression in the Charter beyond its current provisions. Those two conventions essentially contain restatements and specific, detailed elaboration of certain human rights as they apply to children and women. The Charter is concerned with a more general expression of rights as they affect everyone. I think it is preferable to leave the Charter to operate at this level of generality and to include specific elaboration of rights as they affect certain groups in other legislation.*

CRC

[236] SARC received many submissions in support of some or all of the rights in the *CRC* being incorporated into the Charter.[168]

Ageing Victoria), p. 4; Submission 182 (Athena Nguyen), pp. 3-4; Submission 202 (Brimbank City Council), p. 4; Submission 211 (Public Interest Advocacy Centre), p. 3; Submission 234 (Women's Electoral Lobby), p. 2; Submission 247 (Law institute of Victoria), pp. 10, 12-14; Submission 264 (Australian Lawyers for Human Rights), p. 3; Submission 290 (League of Women Voters of Victoria), p. 1; Submission 291 (Australian Federation of University Women (Victoria)), p. 2.

163 Submission 87 (Domestic Violence Resource Centre Victoria), p. 2.

164 Submission 85 (YWCA Victoria), p. 6.

165 Submission 278 (VEOHRC), p. 67.

166 Submission 19 (FamilyVoice Australia), p. 6.

167 Submission 63 (Michael Pearce SC), p. 2.

168 E.g. Submission 14 (Dr Peter Zammit), p. 1; Submission 16 (Community Child Care), p. 2; Submission 38 (Action for Aboriginal Rights, Bendigo), p. 2; Submission 43 (United Macedonian Diaspora Submission), p. 2; Submission 55 (Kendall Lister), p. 1; Submission 76 (Jane Douglas), p. 1; Submission 87 (Domestic Violence Resource Centre Victoria), p. 3; Submission 92 (Save the Children), pp. 1-2; Submission 105 (Victorian Aboriginal Child Care Agency), p. 3; Submission 111 (City of Darebin), p. 6; Submission 115 (Maribyrnong City Council), p. 1; Submission 117 (Child Safety Commissioner), pp. 1, 3; Submission 118 (Western Region Health Centre and Women's Health West), p. 17; Submission 126 (MacKillop Family Services), p. 1; Submission 130 (Australian Association of Social Workers), pp. 13, 14; Submission 147 (Amnesty International), p. 6; Submission 154 (Centre for Multicultural Youth), p. 2; Submission 131 (Eastern Community Legal Centre), pp. 7, 17; Submission 160 (Victorian Alcohol & Drug Association), p. 3; Submission 161 (Whitehorse City Council), p. 1; Submission 166 (Council on the Aging Victoria), p. 4; Submission 182 (Athena Nguyen), p. 4; Submission 195 (National Children's and Youth Law Centre), p. 6; Submission 202 (Brimbank City Council), p. 4; Submission 211 (Public Interest Advocacy Centre), pp. 2-3;

[237] The Charter already recognises some rights of the child. Charter s. 17(2), which is based upon art. 24(1) of the *ICCPR*, provides:

> *Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.*

[238] Charter s. 23 concerns children in the criminal justice process and is based on art. 10 of the *ICCPR*, and Charter s. 24(3) provides that a decision must be published unless the best interests of a child otherwise requires.

[239] Charter s. 25(3), which draws upon art. 10(2) of the *ICCPR*, provides:

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

[240] Further, SARC observes that some rights contained in the *CRC* overlap with the rights in the Charter, some rights contained in the *CRC* partially overlap with the rights in the Charter, and some rights in the *CRC* are not reflected in the Charter.

[241] SARC also observes that many of the rights in the *CRC* are already reflected in the law, such as the *Child Employment Act 2003* (Vic); the *Child Wellbeing and Safety Act 2005* (Vic); the *Children's Services Act 1996* (Vic); and the *Children, Youth and Families Act 2005* (Vic), which in s. 10 enshrines the 'best interests' of the child principles contained in the *CRC*.

[242] In support of incorporating the rights in the *CRC*, the Child Safety Commissioner submitted that including rights from the *CRC* would 'provide scaffolding on which the whole of Government would focus on developing systems and a culture of service provision that ensures all services prioritise children and work collaboratively in their best interests'. The Child Safety Commissioner submitted that although the Charter does not of itself create services, it would require more agencies to consider more carefully the impact of their actions on children, particularly those children who are most vulnerable, to listen more carefully to what children are saying and to place the best interests of children at the centre of decision-making.[169]

[243] By way of example, the Child Safety Commissioner referred to the Charter for Children in Out-of-home Care, which identifies rights of children in care who are unable to live at home, often because of abuse or neglect. The Charter for Children in Out-of-home Care has been endorsed by the Secretary of the Department of Human Services. The Child Safety Commissioner gave evidence that he was confident that the Charter for Children in Out-of-home Care has had an impact on the way services are delivered to children in the out-of-home care sector, much of which stems from the fact it has encouraged more conversations between children and the adults who care for them.[170]

[244] Save the Children submitted that the fundamental general principles of children's rights be included in the Charter:[171]

> *Given the vulnerable nature of children, their lack of influence over laws and institutions, and the fact that the Australian Government has committed to the CRC, it is critical that the rights not covered or only partially covered by the Charter are included in any revision of the Charter. In particular, the provisions relating to the best interests of the child (Article 3 of the CRC), the right to survival and development (Article 6 of the CRC) and the right of the child to express his or her views*

Submission 247 (Law institute of Victoria), pp. 7, 12-13; Submission 258 (VALS), p. 32-4; Submission 274 (Jamie Gardiner), p. 3; Submission 270 (Victorian Gay and Lesbian Rights Lobby), p. 3; Submission 291 (Australian Federation of University Women (Victoria)), p. 2.

169 Submission 117 (Child Safety Commissioner), p. 4.

170 Submission 117 (Child Safety Commissioner), p. 3.

171 Submission 92 (Save the Children), p. 3.

> *and be heard (Article 12 of the CRC) should be incorporated fully into the Charter. Along with the principle of non-discrimination (Article 2 of the CRC), these provisions represent the fundamental general principles of children's rights.*

[245] Several submissions also specifically identified as important to young people art. 12 of the *CRC*, which provides:[172]

> *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
>
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

[246] VEOHRC's submission to SARC included the recommendation to add only art. 12 of the *CRC* to the Charter, and to do so by amending the terms of Charter s. 17, which provides for the protection of families and children.[173] In relation to the right to participation, VEOHRC submitted:

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

VEOHRC further submitted that incorporating the protections that the convention provides for the human rights of children would not infringe on the rights of parents to decide what is in the best interests of their children.[174]

[247] SARC observes that the principle of giving children rights commensurate with their age and maturity is contained in the common law[175] and has been given statutory recognition in Victoria.[176]

[248] SARC also received submissions opposing the inclusion of the *CRC* rights.[177]

[249] In particular, FamilyVoice Australia expressed concern that the rights in the *CRC* could be used to undermine parental supervisory rights by reason of art. 5 of the *CRC*, which provides that 'State Parties shall respect the responsibilities, rights and duties of parents … in a manner consistent with the evolving capacities of the child'.[178] FamilyVoice submitted:[179]

> *Incorporating children's autonomy rights in the Charter would open up the possibility that public authorities – including schools and health services – would consider themselves obliged under s. 38 of the Charter to determine a child's 'evolving capacity' and make decisions that effectively undermined parental rights. What reason do we have for thinking that public authorities are better placed than parents to make decisions in the best interests of the child?*

172 Submission 111 (City of Darebin), p. 6; Submission 156 (Youthlaw), p. 5; Submission 278 (VEOHRC), p. 64.
173 Submission 278 (VEOHRC), p. 60.
174 Submission 278 (VEOHRC), p. 65.
175 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [186]–[187].
176 E.g. the *Children, Youth and Families Act 2005* (ss. 10(3)(d)) and 254) provides that a legal practitioner of a child must act in accordance with the child's instructions having regard to the child's maturity.
177 Submission 19 (FamilyVoice Australia), p. 3; Submission 63 (Michael Pearce SC), p. 1.
178 Submission 19 (FamilyVoice Australia), p. 4.
179 Submission19 (FamilyVoice Australia), p. 4.

CRPD

[250] SARC received a significant number of submissions supporting the inclusion in the Charter of rights contained in the *CRPD*.[180]

[251] The Charter contains no rights specifically concerning disability, although it contains general protections from discrimination in s. 8, which concerns equality before the law. SARC observes that the *Equal Opportunity Act 2010* (Vic), the *Disability Act 2006* (Vic), and federally, the *Disability Discrimination Act 1992* (Cth) and the *Disability Services Act 1986* (Cth), all concern the rights of persons with disability.

[252] SARC notes that the stated purpose of the *Disability Act 2006* (Vic) is 'to enact a new legislative scheme for persons with a disability which reaffirms and strengthens their rights and responsibilities and which is based on the recognition that this requires support across the government sector and within the community'. SARC also refers to the State Disability Plan 2002–2012, which is part of a progressive social framework for persons with disability.

[253] VEOHRC submitted that Victoria's approach to disability-related legislation has taken a rights-based approach for many years, and including rights of people with a disability in the Charter would be consistent with existing Victorian legislation and policy frameworks.[181]

[254] SARC also received evidence that the *CRPD* has had a meaningful impact upon persons with disability in Victoria. National Disability Services Victoria gave evidence that the *CPRD* was a paradigm shift in the approach to disability:[182]

> *The Convention rejected the medical model of disability which holds that disability is caused by impairment and is to be cured and treated through medical intervention and social welfare. Instead, the Convention reflects a social model of disability in which disability is seen as a result of the interaction of people who have impairments with attitudinal and environmental barriers such as policies, legislation and practices that hinders them from full and effective participation in society.*

It was also submitted that including the *CRPD* rights in the Charter would promote understanding of disability within the community. For example, Australian Association of Social Workers submitted that including the *CRPD* rights in the Charter gives the Victorian government, the non-government sector and the Victorian community the opportunity to improve their knowledge about how well the rights of people with disability are respected.[183]

[255] VEOHRC submitted that the rights of people with disability should be recognised in the objects of the Charter to inform the interpretation of all Charter rights.[184]

Addition of other rights

[256] SARC also received submissions proposing the incorporation in the Charter of rights recognised in other international documents.

180 E.g. Submission 14 (Dr Peter Zammit), p. 1; Submission 16 (Community Child Care), p. 1; Submission 90 (Youth Disability Advocacy Services), p. 1; Submission 118 (Western Region Health Centre and Women's Health West), p. 12; Submission 126 (MacKillop Family Services), p. 1; Submission 130 (Australian Association of Social Workers), p. 10; Submission 131 (Eastern Community Legal Centre), p. 7; Submission 147 (Amnesty International), p. 6; Submission 176 (Association of Employees with Disability), p. 3; Submission 282 (National Disability Services Victoria), p. 4; Submission 296 (Mental Health Legal Centre), p. 3.

181 Submission 278 (VEOHRC), p. 81.

182 Submission 282 (National Disability Services Victoria), p. 1.

183 Submission 130 (Australian Association of Social Workers), p. 10.

184 Submission 278 (VEOHRC), p. 81.

[257] SARC received a few submissions calling for the Charter to recognise the rights of the elderly.[185] Specific mention was made of the rights contained in the International Principles for Older Persons. SARC notes the *Equal Opportunity Act 2010* (Vic) and the *Age Discrimination Act 2004* (Cth), which both deal with protection from age discrimination. It also notes the recent passage of the *Sex and Age Discrimination Legislation Amendment Bill 2010* (Cth), which creates the position of Age Discrimination Commissioner.

[258] SARC also received a few submissions proposing adoption in the Charter of the rights reflected in the United Nations Principles for the Protection of Persons with Mental Health Illness and the Improvement of Mental Health Care (2001).[186] SARC observes that an Exposure Draft Mental Health Bill 2010 (Vic) was provided for community comment, and that the government is currently considering revised policy for the proposed Bill.

[259] SARC received a number of submissions supporting the inclusion of environmental rights.[187] Some of the submissions were framed in terms of individuals having the right to the maintenance of the natural environment, others contended for a stand-alone right that the environment itself be accorded the right to exist. By way of example, the Environment Defenders Office submitted that there is considerable and growing recognition at the international level and in numerous countries around the world of the interdependence of human rights and the environment and that it would be appropriate for environmental rights to be protected and promoted within the human rights context.[188]

SARC's findings and recommendations about the rights in the ICESCR and other rights

[260] SARC makes the following general observation. The long-standing approach adopted to law reform (or constitutional reform as the case may be) in the common law world has been to identify a particular problem in the law as it stands, and to enact legislation to remedy that specific problem. By contrast, the decision to expand the rights enumerated in the Charter would not now be directed at remedying any identifiable problem caused by Victoria's current laws; the decision to expand the rights enumerated in the Charter would be directed at generally improving the functioning of the government and public authorities, as well as the Parliament, as their functions relate to the protection of human rights.

[261] SARC considers that there are powerful reasons not to expand the Charter in its current form with ESC rights found in the *ICESCR*, or with rights found in any of the *CERD*, the *CEDAW*, the *CAT*, the *CRC*, the *CPRD* or elsewhere.

[262] SARC considers that economic and social rights should not be added to the Charter because this would involve courts commenting upon the appropriateness of government resource allocations. What is of concern is that courts will be opining about the Parliament's allocation of resources in areas where the Parliament has made a deliberate choice to allocate those resources as a result of balancing competing socio-economic policy goals.

[263] SARC expressly notes that the court's expression of opinion under the existing Charter model would not require the Parliament to change how it allocates resources. But SARC sees no evidence to suggest that the Parliament legislating for the courts to opine on the appropriateness of resource allocation in such areas as health, education, or public housing (when that resource allocation is made taking account of competing demands for resources) will produce better public policy outcomes in these areas for Victorians.

185 Submission 14 (Dr Peter Zammit), p. 1; Submission 130 (The Australian Association of Social Workers), p. 20; Submission 131 (Eastern Community Legal Centre), p. 7.

186 E.g. Submission 130 (The Australian Association of Social Workers), p. 18.

187 Submission 38 (Action for Aboriginal Rights, Bendigo), p. 2; Submission 71 (The Bendigo & District Environment Council Inc), p. 1; Submission 211 (Public Interest Advocacy Centre), p. 5; Submission 271 (Environment Defenders Office), p. 5.

188 Submission 271 (Environment Defenders Office), p. 5.

[264] It is unclear how the courts' involvement could assist the Parliament's deliberations about the allocation of resources to competing socio-economic policy goals. SARC expressly refers to the example given by the National Human Rights Consultation Committee of a government's decision between closing the clinic or the primary school in a remote community. In such a scenario, the Parliament being informed by a court that the decision to close the primary school will adversely impact upon the educational prospects of some children says nothing about whether or not those same funds were in fact better spent on keeping the clinic.

[265] Further, the court process is designed to resolve disputes between parties according to prescribed rules; it is not designed to assess the appropriateness of spending in one area, for example health, as against competing socio-economic policy goals across all areas of government. It is not even clear how courts could ever become fully apprised of what those competing socio-economic policy goals for the same limited resources might be.

[266] SARC considers that the Parliament should continue to be the forum where issues of economic and social policy are scrutinised and debated, and it sees no useful role for a dialogue between the Parliament and the courts in relation to these issues. At the end of the day it is the Parliament that has been elected to determine how the resources of the state are spent among many competing needs and the Parliament that is answerable to the people for its decisions.

[267] SARC also observes that the United Kingdom government and other governments in Australia, including the Victorian government in its Statement of Intent to the Human Rights Consultation Committee, have expressed similar concerns about courts increasing their intervention in debates about resource allocation among competing socio-economic needs.

[268] SARC considers that once economic and social rights are removed from consideration, the evidence before it does not establish a broad consensus for other rights to be added to the Charter. SARC observes that the laws of the Commonwealth and Victoria (including the Australian Constitution and the common law of Australia) provide protections for all Victorians.

[269] This recommendation also applies to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report. The question of the inclusion of further rights (other than pursuant to the terms of Recommendation 1) in relation to the second of the two options recommended by SARC for consideration will be further discussed in Chapter 6.[189]

Recommendation 2

Additional rights

If the Charter is retained in its current form, SARC recommends that, except pursuant to the terms of Recommendation 1, no further rights be added to the Charter.

3.2 Whether the right to self-determination should be included in this Charter

[270] SARC's terms of reference include whether the right to self-determination should be included in the Charter. Although SARC received submissions that understood the right to self-determination as applying to individuals and non-indigenous groups, SARC proceeds on the basis that the terms of reference relate to the right of self-determination of Indigenous peoples in Victoria.

189 See [650], [687] and Recommendation 35.

[271] The right to self-determination is contained in art. 1(1) of the *ICCPR* and art. 1(1) of the *ICESCR*. They contain mirror wording, which provides:

> *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

[272] The right is not contained in the Charter. The Human Rights Consultation Committee recommended in relation to the right to self-determination:[190]

> *The Committee notes that there is a lack of consensus both domestically and internationally on what the right to self-determination comprises beyond the idea that it involves participation in decision-making.*
>
> *The Committee is concerned that, in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences. The Committee wants to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities' understanding of the term. This is not something that can be achieved in a Charter that must be general in its terms and operate across all of the varied communities in Victoria.*
>
> *Accordingly, the Committee recommends that the Charter not include a right to self-determination.*

[273] The Human Rights Consultation Committee did, however, make the following recommendations in its report in relation to Indigenous rights:[191]

- Indigenous rights should be protected through the recognition of specific cultural rights. The preamble should also recognise Indigenous rights.
- A right to self-determination should not be included in the Charter as a free-standing right, but it should be reflected in the preamble to the Charter.

[274] The explanatory memorandum to the Charter of Human Rights and Responsibilities Bill stated that the right to self-determination was omitted because:

> *the right to self-determination is a collective right of peoples. Moreover, there is a lack of consensus both within Australia and internationally on what the right to self-determination comprises.*

[275] The Charter does, however, give specific recognition to Indigenous peoples. The preamble states that the Charter is founded on principles including the following:

> *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.*

[276] And Charter s. 19 relevantly provides:

> *(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community –*
>
> *(a) to enjoy their identity and culture; and*
>
> *(b) to maintain and use their language; and*
>
> *(c) to maintain their kinship ties; and*

190 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 39.

191 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 46 (Recommendation 7).

> *(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.*

[277] Equivalent committees or bodies to the Human Rights Consultation Committee in other Australian jurisdictions have taken different approaches to the right of self-determination. The ACT Bill of Rights Consultation Committee recommended that an ACT Human Rights Act should include the right to self-determination.[192] But the ACT government did note follow this recommendation, and the ACT *Human Rights Act 2004* does not include a right to self-determination. The Tasmanian Law Reform Institute recommended that the right be included in a Tasmanian Charter.[193] And the Consultation Committee for a Proposed WA Human Rights Act did not recommend that a right to self-determination be included in a WA Human Rights Act. It considered that the right to self-determination raised complex questions that required longer and more detailed consideration and discussion than their consultation process permitted.[194]

[278] SARC received numerous submissions supporting the incorporation of a right to self-determination in the Charter as that right relates to Indigenous peoples.[195] SARC notes that it has sought to use the nomenclature used by submitters to describe Indigenous peoples in Victoria; for example, some submissions refer to Indigenous Victorians, others to Aboriginal and Torres Strait Islanders in Victoria.

[279] The submissions identified two principal reasons to include the right to self-determination in the Charter.

[280] First, the submissions noted that Indigenous peoples in Victoria had been subject to historical discrimination by government policies, and there remains a culture of state paternalism towards Indigenous peoples, and a present experience of dispossession and marginalisation. It was submitted that recognising the right to self-determination would be a step down the path towards reconciliation for past wrongs and towards remedying the current marginalisation of many Indigenous people.[196]

[281] Second, the submissions noted that Victoria's Indigenous population, which was estimated to be 36,700 in 2010,[197] is disadvantaged in terms of health, education, economic participation, political representation, and over-representation in the criminal justice system. It was submitted that the expression of the right to self-determination would engage the Victorian government to actively protect and promote this right, which in turn would be one tool in tackling the disadvantage faced by many Indigenous Victorians.[198]

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192 ACT Bill of Rights Consultation Committee, *Towards an ACT Human Rights Act*, May 2003, 6.62 (Recommendation 11).

193 Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, p. 134.

194 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, November 2007, p. 95.

195 Submission 38 (Action for Aboriginal Rights, Bendigo), p. 2; Submission 76 (Jane Douglas), p. 1; Submission 96 (Arnold Bloch Leibler), p. 2; Submission 105 (Victorian Aboriginal Child Care Agency), p. 4; Submission 127 (The Top End Women's Legal Service Inc), p. 2; Submission 130 (Australian Association of Social Workers), p. 9; Submission 131 (Eastern Community Legal Centre), p. 7; Submission 118 (Western Region Health Centre and Women's Health West), p. 21; Submission 172 (Catie Shavin), p. 13; Submission 229 (Jesuit Social Services), p. 4; Submission 244 (Martin Foley MP), p. 3; Submission 245 (International Commission of Jurists in Victoria), p. 8; Submission 247 (Law Institute of Victoria), pp. 15-17; Submission 256 (Synod of Victoria and Tasmania Uniting Church in Australia), pp. 10-11; Submission 262 (VCOSS), pp. 9, 10; Submission 263 (Human Rights Law Centre), pp. 7, 66; Submission 270 (Victorian Gay and Lesbian Rights Lobby), p. 3; Submission 285 (Castan Centre for Human Rights Law), p. 3; Submission 291 (Australian Federation of University Women (Victoria)), p. 7; Submission 297 (ANTaR Victoria), p. 3.

196 Submission 285 (Castan Centre for Human Right Laws), p. 4; Submission 245 (International Commission of Jurists in Victoria), p. 11; Submission 258 (VALS), p. 11; Submission 38 (Action for Aboriginal Rights, Bendigo), p. 4.

197 *Victorian Government Indigenous Affairs Report 2009–10*, prepared by Aboriginal Affairs Taskforce, Department of Planning and Community Development, p. 9.

198 Submission 258 (VALS), p. 11; Submission 285 (Castan Centre for Human Rights Law), p. 4; Submission 298 (Native Title Services Victoria), p. 4.

[282] SARC observes that both reasons identify the inclusion of the right to self-determination as a stepping-stone for Indigenous peoples to obtain tangible improvements. But it would only be through the actual implementation of that right that any concrete progress would occur.

[283] The right to self-determination at international law is a broad and flexible concept. It has been described as an:[199]

> *ongoing process of choice for the achievement of human security and fulfilment of human needs with a broad scope of possible outcomes and expressions suited to different specific situations. These can include, but are not limited to, guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity.*

[284] Prof James Anaya, a recognised scholar in this area, suggests that there are five elements to the right to self-determination: non-discrimination, cultural integrity, lands and natural resources, social welfare and development, and self-government.[200]

[285] The Tasmanian Law Reform Institute described the right in the following terms:[201]

> *The right to self-determination is a complex right, consisting of both internal self-determination and external self-determination. As an external right, it has been understood to mean the right of a State to be free from external domination or the right of peoples to alter territorial boundaries and possibly to secede from the dominion of a colonising power. As an internal right, it has come to mean, the right of peoples within a State to participate fully in the political process. (footnotes omitted)*

[286] The National Human Rights Consultation Committee concluded in relation to the meaning of the right to self-determination:[202]

> *The most appropriate interpretation of the right is that Aboriginal and Torres Strait Islander peoples ought to be free to determine their internal and local affairs but in such a way as not to 'dismember or impair, totally or in part, the territorial integrity' of Australia and subject to those limits necessary for 'Securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society'. This interpretation is consistent with the position of the Federal Government, which 'does not support an interpretation of self determination that has the potential to undermine Australia's territorial integrity or political sovereignty'.*

[287] SARC observes that there is a lack of clarity about how the right to self-determination should be understood.

[288] One of the issues faced by SARC was in obtaining the views of Victoria's Indigenous communities about their attitudes to the right to self-determination and what it meant to them. SARC notes that there was no single consensus position expressed by the Victorian Indigenous communities, although Indigenous organisations did make submissions.

[289] SARC has been assisted by the reports from two separate consultative processes with members of the Victorian Indigenous communities undertaken for the purposes of the present review.

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199 UNESCO, 'Conclusions and Recommendations of the Conferences' in M C van Walt van Praag with O Seroo (eds.), *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (1999), p. 19.

200 S J Anaya, *Indigenous Peoples in International Law*, 2nd edn, Oxford University Press, 2004.

201 Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, p. 133.

202 National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, p. 218.

[290] VEOHRC coordinated the first consultation process, and provided two reports to SARC. The first report provided a framework for consultation about the meaning of self-determination,[203] and the second report summarised feedback from a consultation with 90 Victorian Indigenous people about the meaning of self-determination.[204] VEOHRC summarised the key findings from the consultation in its submission, which include:[205]

- The consultation clarified that the content of self-determination will be defined by the activities of Aboriginal people in Victoria. Any definition of self-determination in Victoria must allow flexibility to accommodate a broad range of perspectives.
- The needs, goals and aspirations of Victorian Aboriginal people are diverse. These include, very immediately, fundamental social and economic needs – access to good health care and education, better training and employment, housing and support for families and individuals. They also include a strong desire for Aboriginal culture to be recognised and valued, and for Aboriginal people to be acknowledged as First People who have unique, inherent rights.
- Although there was not unanimous agreement, the people that the Commission spoke to generally support the inclusion of the right to self-determination in the Charter. There was also clear expression for the right to self-determination to be recognised as the foundation on which other social, economic and cultural rights for Aboriginal people should rest.

[291] The Victorian Council of Social Services (VCOSS), the Victorian Aboriginal Legal Service (VALS), the Victorian Aboriginal Child Care Agency (VACCA), the Victorian Aboriginal Education Association Limited (VAEAI), the Victorian Aboriginal Controlled Health Organisation (VACHO), and the Victorian Aboriginal Community Services Association Limited (VACSAL) coordinated the second consultation process. Those organisations co-hosted a forum on 12 May 2010 for Aboriginal and Torres Strait Islander Victorians to discuss human rights and self-determination.[206] That forum also showed there to be a general lack of consensus among participants as to what the right of self-determination meant to them.

[292] The outcomes of these consultation processes were broadly consistent with the findings of the National Human Rights Consultation Committee in relation to there being no common understanding of the right to self-determination within the community.[207]

[293] SARC received several submissions about how the plurality of meanings about the right to self-determination might be dealt with in the Charter.

[294] Native Title Services Victoria supported including a right to self-determination in the Charter so long as it was broad so that 'self-determination would not be denied by imposing on Indigenous Victorians a very specific articulation of the right which does not reflect their understandings of its content'.[208] It submitted:

> *Ultimately, the definition/substance of the right to self-determination must be developed in partnership with Indigenous Victorians. Given the importance of ensuring that Indigenous self-determination is not denied through the imposition of a definition of self-determination that Indigenous Victorians do not agree with, NTSV submits that the definition/substance of the right should be determined and agreed upon in collaboration with the Victorian Traditional Owner Land Justice Group and with the Victorian Indigenous community more broadly.*

203 VEOHRC, *Indigenous Self-Determination and the Charter of Human Rights and Responsibilities – A Framework for Discussion*, occasional paper prepared by Prof Larissa Behrendt and Alison Vivan (2010).

204 VEOHRC, *Talking Rights: Consulting with Victoria's Indigenous Community about Self-Determination and the Charter*, prepared by Ingenuity – SED Consulting (2011).

205 Submission 278 (VEOHRC), pp. 94-95.

206 'Aboriginal and Torres Strait Islander Peoples – "Participants Not Recipients"', Self-Determination and Human Rights Forum, 12 May 2010.

207 National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, p. 217.

208 Submission 298 (Native Title Services Victoria), p. 6.

[295] The VACCA recommended that the Charter should include the right to self-determination expressed in broad terms, and that at some time in the future it should be further defined in the Charter after consultation and negotiations with Victorian Aboriginal communities.[209]

[296] Other submissions supported Indigenous peoples' right to self-determination, but recommended further consultation to identify with precision what the content of such a right would be and what impact it would have.[210]

[297] VALS proposed that the preamble to the Charter recognise the traditional owners and custodians of the lands and waters of Victoria and Aboriginal and Torres Strait Islander persons in Victoria as self-determining peoples in accordance with art. 1 of the *ICCPR* and *ICESCR*.[211] But VALS submitted that recognising the right to self-determination in the preamble to the Charter without more would be insufficient and tokenistic, and generally emphasised that there should be an implementation plan for policy development and monitoring established.[212] A similar concern was identified during VEOHRC's coordinated consultation process: 'The risk of including the right to self-determination for Indigenous peoples without further engagement is that the reference is not relevant or is considered tokenistic."[213]

[298] SARC also received submissions that the Charter should include more Indigenous specific rights, and particular reference was made to the rights contained in the United Nations Declaration on the Rights of Indigenous Peoples (*UNDRIP*), which Australia formally endorsed on 3 April 2009. The *UNDRIP* contains rights specific to indigenous peoples, and includes rights relating to indigenous peoples organising themselves for political, economic, social and cultural enhancement.

[299] SARC observes that the *UNDRIP* was frequently referred to in submissions in terms of its function as an aspirational document and a tool to achieve desired policy outcomes for Indigenous peoples. For example, Native Title Services Victoria stated:

> *NTSV support the protection and promotion of rights contained in the DRIP that support Victorian Traditional Owners to regain access to their traditional lands and waters, participate in decision making over their traditional lands and waters, develop and participate in cultural practices and have access to economic opportunities deriving from their traditional lands and waters. The DRIP rights also help give full expression to the right to self-determination, whether or not that right is separately and expressly protected.*

[300] The VACCA supported the rights in *UNDRIP* being included in the Charter, but suggested in light of the legal complexities involved that, initially at least, an Aboriginal Social Justice Commissioner, possibly within the Victorian Equal Opportunity and Human Rights Commission, could be given the power to advise on whether public authorities are operating in a manner which conforms to the *UNDRIP*.[214] VALS recommended that the *UNDRIP* be used as a benchmark for the Victorian human rights framework, and therefore the Charter.

[301] SARC considers that the right to self-determination in art. 1(1) of both the *ICCPR* and the *ICESCR* should not be included as a right in the Charter. The content of the right to self-determination is intentionally flexible and hence is not susceptible to precise definition. In consequence, SARC considers that the right would need to be modified to provide precision as to its intended scope and operation within Victoria. However, Victoria's Indigenous peoples do not have a consensus view about the scope and

209 Submission 105 (Victorian Aboriginal Child Care Agency), p. 7.
210 Submission 292 (Catholic Social Services Victoria), p. 14.
211 Submission 258 (VALS), p. 16.
212 Submission 258 (VALS), p. 16.
213 VEOHRC, *Talking Rights: Consulting with Victoria's Indigenous Community about Self-Determination and the Charter*, prepared by Ingenuity – SED Consulting (2011), p. 5.
214 Submission 105 (Victorian Aboriginal Child Care Agency), p. 4.

operation that they see for a right to self-determination. SARC takes the same view in relation to the *UNDRIP*.

[302] SARC notes the comment of the Consultation Committee for a Proposed WA Human Rights Act:[215]

> *The right to self-determination for Indigenous people is an issue requiring much wider and more cross-communities discussion than our process could provide. It needs discussion and clarification within Indigenous communities, between the Government and Indigenous people and within the wider community.*

[303] SARC also observes that some existing programs seek to provide Indigenous Victorians with greater participation in and control over their affairs, including:

- Koori Court, which recognises the authority of Elders and Respected Persons in Aboriginal and Torres Strait Islander culture through such persons providing advice to judicial officers
- the Victorian Aboriginal Justice Agreement, an agreed direction for delivering a more culturally responsive justice system for Indigenous persons
- the Victorian Aboriginal Heritage Council, which was established under the *Aboriginal Heritage Act 2006* (Vic) to provide a 'voice for Aboriginal people on the management of cultural heritage'[216]
- the Aboriginal Child Placement Principles, which is incorporated by s. 12 into the *Children, Youth and Families Act 2005* (Vic) and aims to strengthen Aboriginal children's connections to their families, communities and cultural identity
- the state-based native title settlement framework under the *Traditional Owner Settlement Act 2010* (Vic), which provides a framework for Victorian traditional owner groups to enter into negotiated settlement agreements directly with the Victorian government[217]
- Local Indigenous Networks (LINs), which provide Indigenous communities with an opportunity to identify aspirations, local challenges and issues and represent these to government and decision-making bodies so they can be addressed.

[304] SARC considers that the Victorian government should, in consultation with Victorian Indigenous communities, continue to develop specific programs that foster improved outcomes for Victoria's Indigenous peoples.

[305] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[218]

Recommendation 3

Right to self-determination

If the Charter is retained in its current form, SARC acknowledges that there was no agreement on the definition of the right to self-determination and subsequently does not recommend that the right to self-determination be added to the human rights in the Charter, but recommends that the Victorian government, in consultation with Victorian Indigenous communities, continue to develop specific programs that foster improved outcomes for Victoria's Indigenous peoples.

215 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, November 2007, p. 97.
216 Aboriginal Heritage Bill, Second Reading Speech, 6 April 2006 (Legislative Assembly).
217 Traditional Owner Settlement Bill 2010, Second Reading Speech, 28 July 2010 (Legislative Assembly), p. 2751.
218 See Chapter 6, [687] and Recommendation 35.

3.3 Mandatory auditing of public authorities

Introduction

Relevant provisions of the Charter

[306] The functions that Charter s. 41 gives to VEOHRC include:

> *(a) to present to the Attorney-General an annual report that examines –*
>
> *(i) the operation of this Charter, including its interaction with other statutory provisions and the common law; …*
>
> *(b) when requested by the Attorney-General, to review the effect of statutory provisions and the common law on human rights and report in writing to the Attorney-General on the results of the review; and*
>
> *(c) when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights; …*

[307] Charter s. 44(2)(c) requires that the four-year review (i.e. this inquiry) consider whether 'regular auditing of public authorities to assess compliance with human rights should be made mandatory'.

Relevant reports and inquiries

Human rights consultations

[308] In 2003, the ACT consultation report adopted a recommendation recently made by the UK Joint Committee on Human Rights for the creation of a Human Rights Commission to provide independent, expert oversight on human rights. It stated:[219]

> *The Human Rights Commissioner, who stands at arm's length from government, would be in an ideal position to determine whether public authorities have responded appropriately to findings of inconsistency and altered their practices accordingly.*

The report separately recommended as follows:[220]

> *In order to allow effective monitoring of the progress of the executive, the Consultative Committee recommends that ACT government departments be required to report on how they have implemented the Human Rights Act in their annual reports.*

The *Human Rights Act 2004* (ACT) appointed the ACT Discrimination Commissioner to this new position, with functions including reporting on the effect of the Territory's law on human rights.[221] Unlike Charter s. 41, these functions are not limited to annual reports or requests by the Attorney-General or a public authority. As well, the ACT's annual reporting legislation required the annual report of each 'administrative unit' to 'include a statement describing the measures taken by the administrative unit during the financial year to respect, protect and promote human rights' and authorised the inclusion of such a requirement in the ministerial direction for 'public authority annual reports'.[222]

219 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, May 2003, p. 83, citing Joint Committee on Human Rights, *The Case for a Human Rights Commission*, March 2003.

220 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, May 2003, p. 82.

221 *Human Rights Act 2004* (ACT), s. 41(1)(c).

222 *Annual Reports (Government Agencies) Act 2004* (ACT), ss. 5(2)(a), 9(3)(e).

[309] In 2005, the Victorian consultation report recommended the adoption of the ACT Human Rights Commissioner model in Victoria.[223] However, this was qualified in three ways. First, although the consultation committee found that independent reports 'are needed because they help to identify systemic problems', its recommendation was limited to 'establishing the principle of an annual report that sets out how well the government and community is doing in regards to respecting and promoting human rights'.[224] Second, it recommended that the proposed Commissioner's function of reviewing Victorian laws be limited to reviews requested by the Attorney-General, such as those carried out by the then Equal Opportunity Commission Victoria. Third, after noting that the ACT Human Rights Commissioner's audit of a juvenile detention centre was done 'in partnership with' the relevant ACT government department, the consultation committee stated:[225]

> *Auditing should be undertaken on a voluntary basis. The Committee considers that, as in the ACT, there will be strong incentives for departments and other public authorities to participate. Auditing will help to avoid breaches of the Charter and will help to find solutions to human rights issues that can be faced on a day-to-day basis. The Committee believes that the Victorian Human Rights Commissioner should make a positive contribution to enabling such bodies to better deliver front line services and serve the community. This is best achieved through cooperation and the building of strong partnerships rather than by compulsion.*

However, the report recommended that consideration be given to permitting the Commissioner 'to undertake audits at his or her own volition' at the four-year review (i.e. this inquiry), noting that '[t]he appropriateness of this step will depend on how the Charter has operated over that first four years and the extent to which public authorities are complying with it.'[226] The Charter implemented each of these recommendations.[227]

[310] The Tasmanian consultation report recommended that its proposed Human Rights Commissioner should have 'functions and powers akin to those granted the ACT and Victorian Human Rights Commissioners', but its specific recommendation of a power '[t]o review the programs and practices of public authorities to determine their compatibility with human rights' was not expressed to be contingent on a request by a public authority.[228] The equivalent part of the Western Australian report specified that 'the power to conduct an audit should not depend upon an invitation from an agency to do so (as is the case under the Victorian Charter) or depend upon a complaint in relation to a particular agency', citing the similar powers of that state's Equal Opportunity Commission.[229] The Western Australian report also recommended requiring 'human rights compliance reports' for government agencies (as part of their existing annual reports) and public authorities (in direct reports to the Commission), while the Tasmanian report recommended 'that government departments be required to include in their annual reports detailed information of what they have done to comply with the Charter'.[230] However, neither report has been implemented to date.

[311] The national consultation report noted the Australian Human Rights Commission already has a function 'to inquire into any act or practice that may be inconsistent with or contrary to any human right',[231] but observed that the Commission's recommendations were not enforceable.[232] The report

223 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 102.
224 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, pp. 103-4.
225 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, pp. 106-7.
226 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 107.
227 Charter ss. 41(a)(i), (c), 44(2)(c).
228 Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, pp. 149-50.
229 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, November 2007, p. 221. See *Equal Opportunity Act 1984* (WA), s. 80(a).
230 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, November 2007, p. 147; Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, pp. 149-109.
231 *Australian Human Rights Commission Act 1984* (Cth), s. 11(1)(f).
232 National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, pp. 123, 128.

recommended that this function be extended to a wider list of rights and to all entities exercising a public function under federal law, but that was preceded by a comment that the report was 'not recommending that the Australian Human Rights Commission have the power to review the policies and practices of public authorities on its own initiative'.[233] In addition, the report recommended the 'Federal Government require federal departments and agencies… report on human rights compliance in their annual reports.'[234] Neither of these recommendations is addressed in the Human Rights (Parliamentary Scrutiny) Bill 2010 or the 'Australian Human Rights Framework', but the latter states that '[t]he Government will consider appropriate recognition of the need for public servants to respect human rights in policy making in any revision of the APS Values or Code of Conduct'.[235]

ACT reports

[312] The 12-month review of the *Human Rights Act 2004* (ACT) described the Human Rights Commissioner's auditing function as a part of the human rights dialogue with 'a distinct public character and openness' and noted that the Commissioner's audit of the ACT juvenile justice centre 'was understood to be the first time that operational practices at [the centre] had been assessed against relevant human rights standards'.[236] The five-year review observed that the nearly all of the Commissioner's second audit, into ACT correctional services, was adopted by the ACT government and that both audits 'have led to immediate reform as well as longer term plans for improvement'.[237] Neither report recommended changes to the Commissioner's auditing powers.

[313] The 12-month review included an analysis of annual reports by 43 ACT government agencies in the Human Rights Act's first year, which noted that the agencies took 'quite divergent' approaches to what was meant by 'respecting, protecting and promoting' rights.[238] Most reports said little about staff development or legislative reviews, and merely described processes on preparing compatibility statements without specific details. Half of the reports included a 'statement of commitment' to rights and 'some examined their existing functions in terms of how they gave practical effect to human rights', but '[t]here was little information reported by agencies about changes to work practices as a result of the HRA'. The five-year review noted '[w]hile a few departments have provided detailed commentary on their human rights activities, many have given only perfunctory accounts'.[239] The report recommended training 'to support the guidelines for departments' annual reports, so that there are more sophisticated HRA reports' and further reporting requirements.[240]

VEOHRC reports

[314] VEOHRC's 2007 report identified 11 agencies (in addition to itself) as 'uniquely placed to promote and/or monitor compliance with the Charter',[241] while its 2008 report identified a survey by the State Services Authority of public servants' understanding of the Charter as 'the first opportunity to test application of the values and principles relating to human rights within Victorian public sector

233 National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, pp. 359-60.
234 National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, p. 359.
235 Commonwealth of Australia, *Australia's Human Rights Framework*, April 2010, p. 6. See *Public Service Act 1999* (Cth), ss. 41(1)(a), 44.
236 Department of Justice and Community Safety, *Twelve-Month Review – Report*, June 2006, p. 14.
237 ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of its Operation*, May 2009, p. 39.
238 Department of Justice and Community Safety, *Twelve-Month Review – Report*, June 2006, Appendix 2.
239 ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of its Operation*, May 2009, p. 43.
240 ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of its Operation*, May 2009, pp. 43, 45-6.
241 VEOHRC, *First Steps Forward*, April 2008, identifying the Offices of Police Integrity, the Child Safety Commissioner, the Disability Services Commissioner, the Health Services Commissioner, the Public Advocate, the Privacy Commissioner, as well as Ombudsman Victoria, the Public Sector Standards Commissioner and State Services Authority, Victoria Legal Aid, the Auditor-General's Office and the Multicultural Commission.

workplaces'.[242] The 2009 report identified three external reviews of public authorities' compliance with human rights by the Office of the Public Advocate (reporting on long-stay patients), the Auditor-General (assessing responses to mental health crises) and the Ombudsman (into child protection services).[243] The report also described a 'growing use of human rights audits' conducted by public authorities themselves, citing reviews by Victoria Police (as to whether it was complying with international disability statutes relating to Indigenous women) and the Health Department Unit of DH/DHS (identifying that staff wanted more information about human rights).[244] Finally, its 2010 Compilation Report noted three further rights-related external audits by each of the Ombudsman and the Auditor-General, four further human rights-related internal reviews by Victoria Police and various 'review and evaluation measures' across government departments, but observed that 'implementation of audit and monitoring mechanisms is by no means consistent across all public authorities'.[245]

[315] In its first annual Charter report, VEOHRC noted that its capacity to provide 'an independent report on the operation of the Charter' was limited by its lack of 'any power to require public authorities to supply relevant information'.[246] In 2007, it relied on surveys of government departments, Victoria Police and councils and roundtables with bodies with stronger powers.[247] After initial mixed response rates from councils, VEOHRC adopted a practice of identifying non-responding councils.[248] In 2010, all councils and 'an increasing number of public authorities' responded to VEOHRC's survey.[249] As well, VEOHRC noted in its 2010 Compilation Report:[250]

> *This year, a majority of Victorian public authorities have included reference to their obligations under the Charter within their Annual Reports and other key public documents, however the extent to which departments meaningfully integrate the Charter into these public reports varies.*

Observing that the 'model Annual Report' does not require such reporting, VEOHRC stated:[251]

> *In 2011, the Commission encourages public authorities to consider reporting more extensively on their compliance with the Charter and their adoption of a human rights-based approach to their work within their own documents and publications … [T]he Commission's Charter report – while important – presents only a summary of human rights activities by public authorities and should not be seen as the only source of public reporting on the Charter.*

VEOHRC concluded that it would continue to engage with public authorities about reporting practices, refine its own reporting practices and continue to give public authorities advance notice of its expectations.

Discussion

External audits

[316] VEOHRC's submission argued that it should be given the function of initiating reviewing public authorities' programs and practices for compatibility of human rights. VEOHRC remarks that Charter s. 41(c), which only permits such reviews at the request of a public authority:[252]

242 VEOHRC, *Emerging Change*, April 2009, p. 44.
243 VEOHRC, *Making Progress*, April 2010, p. 11.
244 VEOHRC, *Making Progress*, April 2010, p. 58.
245 VEOHRC, *Talking Rights: 2010 Compilation Report*, April 2011, pp. 38-40, 138.
246 VEOHRC, *First Steps Forward*, April 2008, p. 8.
247 VEOHRC, *First Steps Forward*, April 2008, p. 8.
248 VEOHRC, *Emerging Change*, April 2009, p. 50.
249 VEOHRC, *Talking Rights: 2010 Compilation Report*, April 2011, pp. 38, 55.
250 VEOHRC, *Talking Rights: 2010 Compilation Report*, April 2011, p. 20.
251 VEOHRC, *Talking Rights: 2010 Compilation Report*, April 2011, pp. 20, 49.
252 Submission 278 (VEOHRC), p. 101.

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

A number of submissions recommended the adoption of mandatory auditing, in most instances through own-motion reviews by VEOHRC.[253] Psychiatric Disability Services said:[254]

> *The Community-Managed Mental Health Sector has long been subject to standards, reporting and auditing mechanisms that aim to improve services … However, the ability to audit compliance with human rights would be ground-breaking and be welcomed by consumers, carers and Community-Managed Mental Health Services alike.*

However, several submissions argued that there was 'no added value' in mandatory auditing or that such a requirement would be unduly costly.[255] The Ethnic Communities Council of Victoria remarked:[256]

> *With regard to the matter of regular audits, ECCV is concerned that utilising the Charter as grounds for audits irrespective of whether a complaint has been lodged may be considered an over-reach of the Charter's intent and administration, and risk souring general support for the Charter's founding principles and practical application.*

Andrew Rowe, the councillor development officer for the Municipal Association of Victoria, told SARC:[257]

> *Councils have internal audit committees chaired by external chairs and with external members of those committees. Those audit committees are not about finance, they are about risk and compliance, and they are the appropriate body to be picking up council's obligations in response to the charter, without an expensive external audit process.*

[317] Several Victorian agencies have own-motion auditing powers that extend to human rights issues, including:

- The Victorian Auditor-General's Office, which can conduct 'performance audits' to examine 'compliance with all relevant acts', including Charter s. 38.[258]

253 Submission 51 (Community Information Victoria), p. 2; Submission 80 (North & West Homelessness Network), p. 2; Submission 83 (PILCH Homeless Persons Legal Clinic), p. 62; Submission 90 (Youth Disability Advocacy Service), p. 2; Submission 97 (Office of the Victorian Privacy Commissioner), p. 3; Submission 110 (Peninsula Community Legal Centre), p. 3; Submission 111 (City of Darebin), pp. 7-8; Submission 113 (Humanist Society of Victoria), p. 2; Submission 118 (Joint Submission), p. 23; Submission 129 (headspace), p. 11; Submission 131 (Eastern Community Legal Centre), pp. 20-2; Submission 138 (Fitzroy Legal Service), p. 2; Submission 146 (Leadership Plus), p. 4; Submission 148 (Youth Affairs Council of Victoria), p. 14; Submission 149 (Community Connections), p. 12; Submission 152 (Women's Legal Service Victoria), pp. 6-7; Submission 154 (Centre for Multicultural Youth), pp. 6-7; Submission 185 (Inner South Supported Residential Services Network), p. 14; Submission 199 (Victorian Advocacy League for Individuals with Disability), p. 199; Submission 204 (Victorian Local Governance Association), p. 2; Submission 205 (Federation of Community Legal Centres), p. 13; Submission 241 (Liberty Victoria), p. 41; Submission 245 (International Commission of Jurists), pp. 13-14; Submission 247 (Law Institute of Victoria), p. 18; Submission 257 (PILCH), p. 12; Submission 263 (Human Rights Law Centre), p. 71; Submission 288 (Moreland City Council), p. 2; Submission 295 (Mallesons Human Rights Group), p. 40; Submission 296 (Mental Health Legal Centre), pp. 8-9; Submission 323 (St Kilda Legal Service), p. 3. See also Submission 126 (MacKIllop Family Services), p. 2.

254 Submission 228 (Psychiatric Disability Services), p. 3.

255 Submission 52 (Yarra City Council), p. 52; Submission 102 (Magistrates' Court of Victoria), p. 1; Submission 112 (City of Manningham), p. 2; Submission 161 (Whitehorse City Council), pp. 2-3; Submission 170 (Victoria Police), p. 2; Submission 191 (Yarra Ranges Council), pp. 1-2; Submission 200 (Greater Dandenong City), p. 1; Submission 207 (City of Stonnington), p. 2; Submission 272 (Catholic Archdiocese of Melbourne), p. 12.

256 Submission 59 (Ethnic Communities Council of Victoria), p. 8.

257 SARC, Transcript of Public Hearings, 19 July 2011, Municipal Association of Victoria pp. 2-3.

258 *Audit Act 1994*, s. 15(1)(b). See Submission 295 (Mallesons Human Rights Group), p. 40.

- The Director, Police Integrity, which has a function 'to ensure that members of Victoria Police have regard to' Charter rights and a power to perform own-motion investigations.[259] The Office of Police Integrity submitted that, with respect to Victoria Police, 'an additional independent compliance or auditing process is unnecessary as it would effectively replicate the role currently performed by OPI'.[260]
- The Ombudsman, whose functions include 'enquir[ing] into or investigat[ing] whether any administrative action is incompatible with' the Charter and conducting own-motion investigations.[261]
- The Health Services and Privacy Commissioners, who can conduct audits to determine compliance by an organisation with the Privacy Principles.[262]

[318] VEOHRC argues:[263]

> *The activities of these organisations may include Charter compliance, however these bodies do not specifically report on human rights compliance, the Charter is not the primary driver of their work-program and does not form the basis of their compliance assessment framework … While a number of regulators conduct audits or reviews there is limited overlap because of the different jurisdictions and the relatively low number of audits, investigations or reviews undertaken each year.*

VEOHRC identifies 'the transportation of children with disabilities to and from school in special settings' as an issue that has not been given attention by bodies with own-motion review functions.[264] However, VEOHRC already has a function under the *Equal Opportunity Act 2010* of investigating serious matters involving suspected contraventions of that Act.[265]

[319] SARC considers that existing Victorian laws provide a sufficient regime for mandatory and voluntary auditing of human rights issues. While, as VEOHRC notes, VEOHRC's federal and ACT counterparts have own-motion powers to investigate human rights,[266] only one of the three audits conducted by the ACT Human Rights Commissioner to date was an own-motion inquiry, with the others being initiated 'in discussions with' the relevant department or as a reference from the Legislative Assembly.[267] The Office of Police Integrity remarked:[268]

> *OPI has on various occasions engaged with VEOHRC to provide training sessions to OPI personnel to promote greater understanding of the content of human rights and the obligations of public authorities to act compatibly with human rights. OPI values the approach of voluntary engagement with VEOHRC over an alternative regime of compulsory auditing against prescribed standards.*

Accordingly, SARC recommends that the present requirement in Charter s. 41(c) for a request from a public authority before VEOHRC review its programs and practices for compliance with the Charter be retained.

[320] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[269]

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259 *Police Integrity Act 2008*, ss. 8(1)(d), 44.
260 Submission 299 (Office of Police Integrity), p. 2 and see also pp. 4-5.
261 *Ombudsman Act 1973*, ss. 13(1A), 14(1).
262 *Health Records Act 2001*, s. 87(h); *Information Privacy Act 2000*, s. 58(j).
263 Submission 278 (VEOHRC), p. 102.
264 Submission 278 (VEOHRC), p. 102.
265 *Equal Opportunity Act 2010*, s. 127.
266 Submission 278 (VEOHRC), p. 102.
267 Human Rights and Discrimination Commissioner, *Human Rights Audit of Quamby Youth Detention Centre*, June 2005, p. 11; ACT Legislative Assembly, *Inquiry into the Youth Justice System in the ACT, and Human Rights Audit into Conditions of Detention at Bimberi Youth Justice Centre*, 8 December 2010.
268 Submission 299 (Office of Police Integrity), p. 3. See also Submission 192 (Municipal Association of Victoria), p. 3.
269 See Chapter 6, [687] and Recommendation 35.

Recommendation 4

Mandatory auditing

SARC recommends that no change be made to Charter s. 41(c)'s current provision that VEOHRC have a function of reviewing the programs and policies of public authorities to determine their compatibility with human rights 'when requested by a public authority'.

Internal audits

[321] The Municipal Association of Victoria submitted:[270]

> *Local Councils have a mandated Audit Committee which primarily advises them on issues of risk, compliance and finance. It would assist local government if compliance with the Charter was identified by each Council Audit Committee to review as part of its annual audit program.*

This suggestion was not addressed by the Victorian Local Government Association. However, although the Association was supportive of mandatory auditing requirements, that support was contingent on there being 'more support to local governments' and it noted a concern of Councils about 'the impact of time and resources in meeting the reporting requirements of the Charter'.[271]

[322] The matters that Council Audit Committees are to review are identified in current ministerial guidelines issued under s. 139 of the *Local Government Act 1989* as follows:[272]

> *LGEs and the audit committee will need to exercise their own judgement on the relevance of the roles contained in this list, which includes:*
>
> - *corporate governance*
> - *information and communications technology (ICT) governance*
> - *management and governance of the use of data, information and knowledge*
> - *internal and external reporting – financial and performance*
> - *risk management including fraud prevention, business continuity planning and disaster recovery*
> - *internal and external audit*
> - *internal control framework including policies and procedures as they apply to financial reporting; management policies, for example, on entertainment expenses, use of corporate credit cards, etc; administrative policies on records management; project management; and so on*
> - *compliance with the LG Act and other applicable legislation and regulations including national competition policy*

[323] SARC observes that the final point – 'compliance with … applicable legislation' – includes compliance with Charter s. 38. Given that, as well as the flexible approach to auditing requirements taken in these guidelines and the variation among councils in Victoria, SARC considers that the question of whether specific attention should be given to Charter compliance is a matter for individual councils and their audit committees to determine.

270 Submission 192 (Municipal Association of Victoria), p. 3. See also Submission 263 (Human Rights Law Centre), p. 71; Submission 278 (VEOHRC), p. 101.

271 Submission 204 (Victorian Local Governance Association), pp. 2, 5.

272 Audit Committees – A Guide to Good Practice for Local Government', *Government Gazette* No S34, 8 February 2011, p. 5.

Annual reports

[324] A number of submissions recommended that all public authorities be required to report on compliance with the Charter in their annual reports.[273] For example, VEOHRC argued:[274]

> *Reporting on Charter obligations should similarly be part of normal business practice. Embedding human rights within ordinary reporting activities would help to embed human rights within governance frameworks. There would also be efficiencies in including reports on Charter compliance within existing structures.*

The Homeless Persons Legal Clinic also recommended amending the accreditation and reporting requirements for non-government public authorities to include reports on Charter compliance.[275] However, a number of public authorities argued against reporting requirements, which are 'likely to move attention and effort to completing forms or registers'.[276]

[325] Many public authorities are already subject to mandatory reporting requirements on human rights issues, notably requirements for:

- the head of each public sector body to supply information specified by the State Services Authority to assist the preparation of an annual report on adherence to and application of public sector values, including respecting and promoting Charter rights[277]
- each public sector body to report on the implementation of its 'disability action plan' in its annual report[278]
- each department head to report 'any measures taken by the Department to promote human rights in accordance with the *Charter of Human Rights and Responsibilities Act 2006* for diverse communities'.[279]

VEOHRC argued reporting on human rights would therefore 'not be onerous'.[280] Also, such a requirement would streamline the existing reporting requirements and encourage standardised reporting.

[326] As discussed above, a similar requirement in the ACT has led to many 'perfunctory accounts' of Charter compliance in annual reports, with the five-year review recommending further training and guidelines.[281] By contrast, VEOHRC itself has reported that a majority of public authorities now include Charter compliance in their annual reports and that an increasing number of authorities, including all departments and councils, respond to VEOHRC's surveys.[282] SARC therefore does not recommend any further reporting requirements.

273 Submission 83 (PILCH Homeless Persons Legal Clinic), p. 62; Submission 111 (City of Darebin), pp. 7-8; Submission 118 (Joint Submission), p. 23; Submission 129 (headspace), p. 11; Submission 131 (Eastern Community Legal Centre), pp. 20-2; Submission 175 (Travellers' Aid), p. 5; Submission 208 (Springvale Monash Legal Service), p. 1; Submission 247 (Law Institute of Victoria), p. 18; Submission 263 (Human Right Law Centre), p. 71; Submission 278 (VEHORC), p. 99; Submission 295 (Mallesons Human Rights Group), p. 40. See also Submission 156 (Youthlaw), pp. 6-7.

274 Submission 278 (VEOHRC), p. 99.

275 Submission 83 (PILCH Homeless Persons Legal Clinic), p. 62.

276 Submission 52 (Yarra City Council), p. 4.

277 *Public Administration Act 2004*, ss. 7(1)(g) and 74.

278 *Disability Act 2006*, s. 38(3).

279 *Multicultural Victoria Act 2011*, s. 26(g).

280 Submission 278 (VEOHRC), p. 97. See also Submission 263 (Human Rights Law Centre), p. 71.

281 ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of its Operation*, May 2009, pp. 43, 45-6.

282 VEOHRC, *Talking Rights: 2010 Compilation Report*, April 2011, pp. 20, 38, 55.

3.4 Further provision for proceedings or remedies for breaches of the Charter by public authorities

Introduction

Relevant provisions of the Charter

[327] Charter s. 38(1) states:

> *Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.*

Charter s. 39(1) provides:

> *If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.*

Charter s. 39(3) states that 'A person is not entitled to be awarded any damages because of a breach of this Charter.'

[328] Also, the Charter amended the *Ombudsman Act 1973* to provide that the Ombudsman's principal functions 'include the power to enquire into or investigate whether any administrative action is incompatible with' Charter rights.

[329] Finally, Charter s. 44(2)(d) requires consideration of whether 'further provision should be made in this Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of this Charter' at the four-year review (i.e. this inquiry.)

Relevant reports and inquiries

[330] The ACT Bill of Rights Consultative Committee favoured the remedies provision for breaches by public authorities in the *Human Rights Act 1998* (UK), which permits a court to 'grant such relief or remedy, or make such order, within its powers as it considers just and appropriate',[283] commenting that 'this is merely a restatement of existing legal principle'.[284] The *Human Rights Act 2004* (ACT) as enacted contained no Charter obligations for public authorities and therefore no remedies provision, with the ACT government stating:[285]

> *The Government considers that the best approach for the Act is to introduce legislation that recognises the ICCPR rights and requires laws to be interpreted as far as possible in accordance with them but does not give a direct right of court action to enforce those rights.*

However, the 12-month review recommended reversing this approach, citing legal uncertainty in the absence of a remedies provision and the inadequacies of the suggested alternative of giving the Human Rights Commissioner a complaint-handling role.[286] Amendments to the Act in 2008 added an obligations provision (equivalent to Charter s. 38) and permitted the Supreme Court to 'grant the relief it considers appropriate except damages'.[287] The five-year review recommended that the damages proviso be

283 *Human Rights Act 1998* (UK), s. 8.
284 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, May 2003, p. 80.
285 *Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights Act*, p. 4.
286 Department of Justice and Community Safety, *Twelve-Month Review – Report*, June 2006, pp. 28-33.
287 *Human Rights Act 2004* (ACT), s. 40C(4).

removed in favour of a limited damages remedy equivalent the UK model and also a provision permitting a person who obtains a declaration of incompatibility to apply to the government for ex gratia compensation.[288]

[331] Victoria's Human Rights Consultation Committee rejected the UK remedies model, arguing that 'any new approach should build upon our existing systems for dealing with complaints against government'.[289] The report discussed the following options:

- Conciliation and mediation by the proposed new human rights commission. This option was deferred until 'a fully fledged human rights commission is set up', which would require both time and resolving 'governance arrangements'.[290]
- Complaints to the Ombudsman. The Consultation Committee considered that the Ombudsman already had the power to handle human rights complaints, but recommended clarifying that it could consider Charter rights.[291]
- Judicial review. The Consultation Committee reasoned that human rights considerations be incorporated into existing judicial review mechanisms.[292]
- Merits review. The Consultation Committee recommended against permitting the Victorian Civil and Administrative Tribunal (VCAT) to review the merits of decisions on human rights grounds, citing the absence of similar approaches overseas. However, it also recommended consideration of limited merits review by VCAT (and Charter remedies more generally) at the four-year review.[293]
- Damages. The Consultation Committee did 'not think that damages add significant extra value to the Charter model at this stage'.[294]

The Charter adopted all of the above recommendations, except that Charter s. 39 was expressed in terms of remedies 'on a ground of unlawfulness', rather than judicial review.

[332] The Tasmanian and national consultation reports recommended following the UK model on remedies, including a limited damages option, and also providing for a mediation and consultation process.[295] By contrast, the Western Australian report recommended a 'multi-layered system' consisting of internal complaints processes within public authorities, a conciliation process run by the Equal Opportunity Commission and a court remedies provision similar to Charter s. 39.[296] None of these recommendations has been implemented to date.

Discussion

Internal complaints

[333] The Ombudsman submitted:[297]

> *In my view the effectiveness of the Charter could be enhanced by public authorities improving the quality of their complaint handling practices. Public authorities should identify complaints which*

288 ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of its Operation*, May 2009, pp. 23-4.
289 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 119.
290 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 122.
291 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 123.
292 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 125.
293 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 126.
294 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 128.
295 Tasmanian Law Reform Institute, *Report No. 10: A Charter of Rights for Tasmania*, October 2007, p. 142; National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, pp. 359-60, 376-7.
296 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, November 2007, pp. 200-15.
297 Submission 65 (Victoria Ombudsman), p. 2. See also Submission 278 (VEOHRC), p. 115.

> *engage the rights protected by the Charter and consider whether they have acted compatibly with relevant rights when responding to the complaint. Public authorities should also be required to inform a complainant that they may complain to me if they do not consider the matter resolved.*

[334] VEOHRC's reports have identified a number of public authorities that have added Charter obligations to their internal complaints processes.[298] For example:[299]

> *Information about the Transport Accident Commission's compliance with the Charter has been included in its business plan for the past two years. More generally, TAC's Community Relations Division oversees Charter implementation, with a dedicated team the first point of contact for all Charter-related complaints. The team also conducts a Charter audit of all TAC claims policies and any proposed amendments.*
>
> *TAC maintains a register of all claims concerning the Charter that documents any rights identified as engaged, the alleged compliance issue and the outcome. Nine human rights complaints were received in 2008–09. Several related to cultural rights when assessing reasonable burial costs, while one raised the right of families and children to protection when seeking childcare costs for a child born after a transport accident.*

[335] SARC considers that, in light of the establishment of these processes and the variety of public authorities, there is no need to specify how public authorities should approach complaints about breaches of their Charter obligations. However, SARC recommends that public authorities that do not have internal complaints procedures relating to human rights be supported through the development and distribution of templates for such procedures, such as ones based on the models adopted in public authorities to date. SARC also recommends that public authorities be encouraged to provide information to people who bring internal complaints about the Ombudsman's ability to inquire into unresolved human rights complaints. SARC will address the jurisdiction of the Ombudsman to hear human rights complaints against public authorities in Chapter 4.

[336] These recommendations are relevant to both of the options for reform or improvement recommended by SARC for consideration at the conclusion of this Report.[300]

Recommendation 5

Internal complaints

If the Charter is retained, then SARC recommends that public authorities that do not have internal complaints procedures relating to human rights be supported through the development and distribution of templates for incorporating such procedures into existing complaints processes.

Recommendation 6

Complaints to the Ombudsman

If the Charter is retained, then SARC recommends that public authorities who are subject to the Ombudsman's jurisdiction be encouraged to inform people who bring internal complaints that the Ombudsman may be able to investigate any unresolved complaints, including complaints concerning Charter rights.

298 VEOHRC, *First Steps Forward*, April 2008, p. 27 (Department of Infrastructure, now Department of Transport); VEOHRC, *Emerging Change*, April 2009, pp. 28 and 42 (Department of Justice (Prisons), State Revenue Office, Department of Sustainability and Environment, Victoria Police); VEOHRC, *Making Progress*, April 2010, pp. 63-4 (Department of Primary Industries, Transport Accident Commission); VEOHRC, *Talking Rights 2010 Compilation Report*, April 2011, pp. 19, 41, 68 (International Students Care Service, Sheriff's Operations Unit, Brimbank City Council.)

299 VEOHRC, *Making Progress*, April 2010, p. 64.

300 See Chapter 6, [687] and Recommendation 35.

Dispute resolution

[337] VEOHRC's submission argued:[301]

> *Access to court should not be the only mechanism for people to pursue a breach of their Charter rights. Court is often a last resort for people because of cost, time and the risk associated with an unsuccessful claim.*
>
> *A simple and effective model that allows for the resolution of alleged breaches through conciliation by an independent statutory body would allow the community to better engage with government, and resolve many issues without the cost and complexity of court proceedings. It would also provide greater transparency about the range of human rights issues in the community and would improve the accountability of government.*

VEOHRC suggested that it would be an appropriate body, given that it already has a dispute resolution function under Division 1 of Part 8 of the *Equal Opportunity Act 2010*.[302] This suggestion was supported in a number of submissions.[303] At the inquiry's public hearings, VEOHRC CEO Karen Toohey observed that, of roughly 1000 complaints relating to equal opportunity last year, only six proceeded to litigation.[304]

[338] VEOHRC's existing dispute resolution function relates to unlawful discrimination. SARC notes that discrimination, while a complex concept, is a single rule that is comprehensively regulated by a statute that exhaustively defines how the rule operates in different settings and sets out a comprehensive range of detailed exceptions and exemptions. By contrast, Part 2 of the Charter sets out 20 rules (including many sub-rules) that are of broad application across and beyond the Victorian government, while Charter ss. 7(2) and 38 set out a handful of broad, complex exceptions. VEOHRC itself acknowledged that these rules are broader than its current institutional role, by recommending the exclusion of some rights (Charter ss. 24–27, including the rights to a fair hearing and of criminal defendants) from its proposal because 'these rights should operate in conjunction with the relevant court's rules and procedures'.[305] SARC observes that the substantive rights in Part 2 of the Charter, such as the rights to life, to privacy, to vote, to liberty and of children in criminal proceedings, may also impinge on other Victorian agencies, such as the Coroner, the Office of the Victorian Privacy Commissioner and the Director, Police Integrity.

[339] VEOHRC observed that its federal counterpart, the Australian Human Rights Commission (AHRC), has a conciliation power in relation to both its equal opportunity and human rights functions, with the latter only attracting roughly two hundred complaints a year.[306] However, SARC notes that, if human rights conciliation fails in a federal matter, then the only consequence is a report to the federal Attorney-General, as federal enforcement of human rights law is limited to discrimination matters.[307] Because Division 4 of Part 3 of the Charter makes it unlawful for public authorities to act incompatibly with human rights and provides for remedies or reliefs in legal proceedings, any conciliation performed in relation to human rights in Victoria will occur in a quite different context to the conciliations performed by the AHRC. SARC observes that, in the ACT, New Zealand, Canada, England and Ireland (which all provide enforceable legal remedies

301 Submission 278 (VEOHRC), p. 114.

302 Submission 278 (VEOHRC), pp. 116-7.

303 Submission 86 (2020Women), p. 2; Submission 97 (Office of the Victorian Privacy Commissioner), p. 3; Submission 110 (Peninsula Community Legal Centre), p. 3; Submission 111 (City of Darebin), pp. 8-9; Submission 127 (Top End Women's Legal Centre), p. 3; Submission 173 (Women's Health Victoria), p. 7; Submission 182 (Athena Nguyen), pp. 4-5; Submission 184 (Gippsland Women's Health), p. 1; Submission 185 (Inner South Supported Residential Services Network), p. 14; Submission 192 (Municipal Association of Victoria), p. 4; Submission 205 (Federation of Community Legal Centres), p. 13; Submission 245 (International Commission of Jurists), p. 16; Submission 247 (Law Institute of Victoria), pp. 19-20; Submission 263 (Human Rights Law Centre), p. 50; Submission 276 (Australian Centre for Human Rights Education), p. 18. See also Submission 176 (Association of Employees with Disability), p. 7.

304 SARC, Transcript of Public Hearings , 18 July 2011, VEOHRC, p. 17.

305 Submission 278 (VEOHRC), p. 118,

306 SARC, Transcript of Public Hearings, 18 August 2011, VEOHRC, p. 5.

307 *Australian Human Rights Commission Act 1986* (Cth), s. 11(1)(f)(ii), Part IIB.

for breaches of human rights) the conciliation functions of human rights commissions do not extend to disputes about human rights.[308]

[340] In short, SARC observes that there are two approaches to dispute resolution by human rights commissions:

- In jurisdictions (both within Australia and in comparable countries) where human rights breaches are subject to court-enforced remedies, the dispute resolution role of human rights commissions is limited to narrow, highly regulated fields governed by detailed, specific statutes such as equal opportunity.
- In the federal Australian jurisdiction, where only the narrow highly regulated rights issues such as equal opportunity are subject to court-enforced remedies, the dispute resolution role of the human rights commission extends to broader human rights issues.

Accordingly, SARC recommends that, if Division 4 of Part 3 of the Charter is retained, then VEOHRC should not be given a dispute resolution function in relation to human rights.

[341] This recommendation also applies to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report. The question of dispute resolution in relation to the second of the two options recommended by SARC for consideration will be further discussed in Chapter 6.[309]

Recommendation 7

Dispute resolution

SARC recommends that, if Division 4 of Part 3 of the Charter is retained, then VEOHRC should not be given a dispute resolution function in relation to human rights.

Legal proceedings

[342] A number of submissions to the inquiry recommended that the Charter be amended to include a provision for an independent cause of action for breaches of human rights, such as is presently provided for in the ACT.[310] Section 40C of the *Human Rights Act 2004* (ACT) provides:

> *(1) This section applies if a person –*
>
> *(a) claims that a public authority has acted in contravention of section 40B ; and*
>
> *(b) alleges that the person is or would be a victim of the contravention.*
>
> *(2) The person may –*
>
> *(a) start a proceeding in the Supreme Court against the public authority; or*

308 *Human Rights Commission Act 2005* (ACT), Part 4, Division 1; *Human Rights Act 1993* (NZ), s. 76(1)(b); *Canadian Human Rights Act 1985* (Can.), Part 3; *Equality Act 2006* (UK), s. 27; *Equal Status Act 2000* (Ireland), s. 24; cf. *Human Rights Commission Act 2000* (Ireland).

309 See Chapter 6, [651], [687] and Recommendation 35.

310 Submission 51 (Community Information Victoria), p. 2; Submission 74 (Australian Macedonian Human Rights Committee), p. 10; Submission 80 (North & West Homelessness Network), p. 2; Submission 83 (PILCH Homeless Persons Legal Clinic), p. 61; Submission 95 (Victorian Bar), p. 15; Submission 100 (Tenants Union of Victoria), pp. 6-7; Submission 110 (Peninsula Community Legal Centre), p. 3; Submission 118 (Joint Submission), p. 23; Submission 138 (Fitzroy Legal Service), p. 2; Submission 146 (Leadership Plus), p. 4; Submission 156 (Youthlaw), pp. 6-7; Submission 168 (Australian Lawyers' Association), p. 12; Submission 171 (Victoria Legal Aid), p. 4; Submission 192 (Municipal Association of Victoria), p. 4; Submission 205 (Federation of Community Legal Centres), p. 13; Submission 220 (National Association of Community Legal Centres), p. 2; Submission 239 (Barlow Community Legal Service), p. 2; Submission 241 (Liberty Victoria), pp. 38-9; Submission 245 (International Commission of Jurists), p. 16; Submission 247 (Law Institute of Victoria), p. 19; Submission 263 (Human Rights Law Centre), p. 47; Submission 276 (Australian Centre for Human Rights Education), p. 18; Submission 278 (VEOHRC), p. 114; Submission 285 (Castan Centre for Human Rights Law), p. 15; Submission 296 (Mental Health Legal Centre), p. 9. See also Submission 299 (Office of Police Integrity), pp. 3-4; Submission 323 (St Kilda Legal Service), p. 3.

(b) rely on the person's rights under this Act in other legal proceedings.

(3) A proceeding under subsection (2)(a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.

(4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.

The major difference between this provision and Charter s. 39 is that it is not limited to reliefs or remedies for unlawful conduct set out in other laws. Rather, if the ACT Supreme Court finds a breach of the ACT equivalent to Charter s. 38, then the only limits on what reliefs the court can give is that the court must consider the relief 'appropriate' and it cannot order that the public authority pay 'damages' (i.e. money) to the alleged victim.

[343] As well, some submissions suggested that the remedy of damages be made available.[311] Amnesty International argued:[312]

> *For human rights to be adequately respected, protected and fulfilled there must be effective remedies for people who have had their rights violated. Compensation and reparation are an accepted part of human rights law and therefore should be recognised and included in the Charter to ensure protection of human rights.*

The Human Rights Law Centre argued that any damages remedy should be limited to 'where there is no effective or adequate alternative remedy'.[313] A number of submissions recommended that 'VCAT is the appropriate body to hear and determine complaints' under the Charter.[314]

[344] SARC considers that provisions like s.40C of the *Human Rights Act 2004* (ACT) place considerable discretion in the hands of courts and tribunals to determine what is and isn't 'appropriate', what remedies are sufficient and the correct amount of compensation. While wide discretion is a feature of Victorian remedies regimes, it is nevertheless typically bounded by detailed statutes and precedents and the jurisdictional limits of courts and tribunals. By contrast, the absence of such boundaries in relation to the Charter means that remedies decisions made by individual tribunal members or judges may operate in ways that undermine both the established jurisdictional limits of courts and tribunals and the operation of other Victorian statutes.

[345] The language of s. 40C of the *Human Rights Act 2004* (ACT) is ultimately derived from jurisdictions where human rights laws have a constitutional status that overrides other laws and gives courts and tribunals a role as enforcers of those constitutional rights.[315] While similar approaches have been adopted in the United Kingdom and New Zealand, both those jurisdictions did so on the basis of obligations under international laws to provide appropriate remedies in local courts and tribunals. In Victoria, by contrast, courts' and tribunals' functions are limited to providing remedies in accordance with statutory law and the common law. While the ACT Legislative Assembly has chosen to provide its Supreme Court with an independent remedial power, it does so in a jurisdiction and legal system that is considerably smaller and simpler than Victoria's.

311 Submission 83 (PILCH Homeless Persons Legal Clinic), p. 61; Submission 97 (Office of the Victorian Privacy Commissioner), p. 3; Submission 100 (Tenants Union of Victoria), pp. 6-7; Submission 114 (Julie Debeljak), pp. 7-9; Submission 168 (Australian Lawyers' Association), pp. 12-13; Submission 245 (International Commission of Jurists), p. 18; Submission 247 (Law Institute of Victoria), p. 19; Submission 263 (Human Rights Law Centre), p. 49; Submission 285 (Castan Centre for Human Rights Law), p. 15. See also Submission 299 (Office of Police Integrity), p. 4.

312 Submission 147 (Amnesty International), p. 6.

313 Submission 263 (Human Rights Law Centre), p. 49. See also Submission 245 (International Commission of Jurists), p. 18; Submission 278 (VEOHRC), pp. 121-2.

314 Submission 66 (Justice Kevin Bell), pp. 5-6; Submission 278 (VEOHRC), p. 118.

315 E.g. *Constitution Act 1982* (Can.), s. 24(1); *Constitution Act 1996* (South Africa), s. 38; *Constitution of India*, s. 32(2).

[346] A number of submissions argued against further provision for legal proceedings for breaches of human rights.[316] Yarra City Council argued:[317]

> *One of the strengths of the Charter is its emphasis on engagement around issues relating to rights rather than providing remedies through legal proceedings. Intelligent and robust debate on human rights protection is more effective when located within the public realm rather than in the justice system.*

[347] SARC recommends that Charter s. 39 not be amended to provide for an independent legal remedy or damages for breaches of Charter s. 38. Chapter 4 contains SARC's recommendations for amending Charter s. 39.

[348] This recommendation is relevant to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[318]

Recommendation 8

Legal proceedings

SARC recommends that Charter s. 39 not be amended to provide for an independent legal remedy or damages for breaches of Charter s. 38.

316 Submission 161 (Whitehorse City Council), pp. 2-3; Submission 170 (Victoria Police), p. 2; Submission 233 (Andrew Venn), p. 1. See also Submission 272 (Catholic Archdiocese of Melbourne), p. 12.

317 Submission 52 (Yarra City Council), p. 5.

318 See Chapter 6, [687] and Recommendation 35.

4

The Effect of the Charter Report

Introduction

[349] The inquiry's second term of reference requires SARC to report on how the Charter has affected the following aspects of Victoria's government and legal system:

- the development and drafting of statutory provisions
- the consideration of statutory provisions by the Parliament
- the provision of services, and the performance of other functions, by public authorities
- litigation and the roles and functioning of courts and tribunals
- the availability to Victorians of accessible, just and timely remedies for infringements of rights.

This chapter sets out SARC's findings on each of these potential effects in turn.

[350] The chapter includes recommendations for amending particular provisions of the Charter. In accordance with the second term of reference, the recommendations in this chapter are based solely on the evidence provided to the inquiry of the Charter's effects in the four and a half years since its commencement and are aimed at remedying inefficiencies in the Charter's operation that SARC has identified from that period. When it considers the fourth term of reference (options for reform or improvement of the regime for protecting and upholding human rights and responsibilities in Victoria) in Chapter Six, SARC will make further recommendations about the Charter based on a wider set of considerations. Accordingly, the recommendations in this chapter are expressed as contingent on the retention of particular provisions of the Charter. SARC's recommendations on whether those provisions should be retained are set out in Chapter 6.[319]

Methodology

[351] There are, broadly, two types of effects a law like the Charter can have:

- First, references to the Charter and language from it may be incorporated into documents (including laws, policies and websites) or into conversation (including debates, arguments and discussions)
- Second, the Charter may cause people to do particular things (including make laws, make decisions or perform acts, as well as refraining from doing any of those things). 'Cause' means either these things wouldn't have happened without the Charter or they would have happened in a significantly different way.

The first type of effect is largely a matter of fact, while the second is largely a matter of inference.

319 See Chapter 6, [687] and Recommendation 35.

[352] The evidence of the first type of effect consists of either primary sources (such as statutes, Hansard debates, and documents containing policies) or of secondary accounts (such as submissions describing policies, and letters or conversations). SARC will generally accept secondary accounts at face value (unless there are conflicting accounts). However, SARC will not simply assume that, because the Charter was raised in one document or conversation (such as an exchange between a public authority and a client), it will also be typically raised in all documents or conversations of that type (absent some other reason to infer such a pattern).

[353] The evidence of the second type of effect mainly consists of descriptions of particular activities (such as laws, decisions or actions) that people have identified to the inquiry (or some other agency) as caused by the Charter. SARC will generally accept accounts of these at face value (unless there are conflicting accounts). However, SARC will not find that the activities described were actually caused by the Charter simply because:

- they were done pursuant to laws or policies that mentioned the Charter
- they were done after the Charter was raised in advocacy or conversation
- the people involved perceived the Charter as influential on their or someone else's activities.

All these circumstances can exist for activities that would have occurred without the Charter. Instead, SARC will draw its own inference, based on objective links between the Charter and the activity, such as the activity's particular features, measurable changes in people's actions or patterns of behaviour.

[354] For example, VEOHRC's submission identified flexible tax arrangements for people affected by the Global Financial Crisis and the 2009 bushfires as a result of the State Revenue Office (SRO) taking 'the Charter into account by seeking to balance their responsibility to collect tax with an approach that is fair and equitable.'[320] In response to a question at the inquiry's public hearings,[321] VEOHRC explained that this information was provided by the Department of Treasury and Finance in response to a questionnaire sent by VEOHRC when preparing its 2010 annual report on the Charter.[322] VEOHRC stated:

> *The report on the SRO provides an excellent example of an agency integrating Charter compliance within its normal business practices and applying it in ways that help it to address risks, consider individual circumstances and provide fairer services to all Victorians. When the Charter was enacted, the SRO reviewed its legislation, policies and procedures to look at how they interact with the Charter. The Department reported that the 'initial review triggered a rethink of the strategic, tactical and operational impacts of the Charter on SRO processes and decision-making, resulting in changes to SRO investigations policies and procedures and the development of a SRO Human Rights Policy'. The SRO also implemented an education and awareness plan to inform staff about their human rights obligations and built Charter compliance into personal development plans. In 2009–2010 the SRO included compliance with the Charter in its Business Plan.*
>
> *In relation to the Global Financial Crisis and those who lost homes in the 2009 bushfires the Department reported that:*
>
> > *During and in the aftermath of the Global Financial Crisis, the SRO provided Victorians affected by job loss and reduced income with more time to pay taxes and the option of payment arrangements. This sought to 'balance our responsibility to collect tax with an approach that is fair and equitable.' This reflects the SRO's commitment to taxpayers under the SRO Customer Charter and our obligations under the Charter. SRO also took the Charter into account following the 2009 bushfires. People whose homes were destroyed were entitled to reduced duty when buying another home and a full or partial exemption was offered to those replacing*

320 Submission 278 (VEOHRC), p. 152 and see SARC; VEOHRC, *Making Progress*, April 2010, p. 52.
321 Transcript of Public Hearings, 18 July 2011, VEORHC, p. 15.
322 VEOHRC, Supplementary Information, 10 August 2011, pp. 3-4.

> *vehicles. The SRO also took a flexible approach to the recovery of outstanding tax from survivors.*
>
> *The Commission was not provided with information about specific rights taken into account in these cases but relevant rights include the right to equality (section 8), the right not to have privacy, family, and home unlawfully or arbitrarily interfered with (section 13), and the protection of families and children (section 17).*

SARC does not doubt the veracity or sincerity of the information provided by any of these agencies. Based on this evidence, SARC accepts that the Charter was considered in the SRO's review of its operations and is now referenced in a number of SRO documents, programs and policies.[323] However, because flexibility is an inevitable human, political and bureaucratic response to tragedies or extraordinary events and is part of the SRO's Customer Charter, SARC does not find that the SRO's response to the 2009 bushfires and the Global Financial Crisis was caused (in the sense described earlier) by the (human rights) Charter. The latter conclusion does not mean SARC considers that the activities described were not caused by the Charter. Rather, it only means that the evidence provided is not sufficient to make a positive finding under the inquiry's second term of reference.

[355] In addressing the inquiry's second term of reference (which requires findings about the Charter's effects) and formulating specific recommendations in this chapter, SARC has considered evidence of arguments made in ongoing litigation and statements made by various courts. In some instances, SARC has found that certain matters appear to be the subject of legal disputes or uncertainty. SARC emphasises that such findings involve neither criticism of courts and/or parties to litigation nor views about how any of the proceedings should be (or should have been) resolved.

Relevant reports and inquiries

[356] The inquiry's terms of reference permit SARC to take account of relevant reports and inquiries into the protection of human rights and responsibilities in Australia. Three sets of reports are relevant to assessing the effects of the Charter. They are:

- The report of Victoria's Human Rights Consultation Committee, which details the intended effect of many of the Charter's provisions.[324]
- VEOHRC's four annual reports, mandated by Charter s. 41(a)(i), into the operation of the Charter.[325] The four reports are primarily informed by the public record, VEOHRC's role in intervening in Charter litigation and reports from government departments and agencies. The most recent 'Compilation Report' includes surveys of the perspectives of public authorities and the wider community.[326]
- The two reports commissioned by the ACT government into the operation of its *Human Rights Act 2004* (ACT), pursuant to similar statutory review requirements to the one that mandates this inquiry.[327] The ACT statute has been in operation for two and a half years longer than the Charter, albeit in a much smaller jurisdiction and, at the time of these two reports, in a reduced form.

The discussion below will refer to these reports as relevant.

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323 See also State Revenue Office, 'Customer Charter', available under 'About Us' at the SRO's website, <http://www.sro.vic.gov.au>, stating that the SRO will 'comply with our obligations under the Charter of Human Rights'.

324 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005.

325 VEOHRC, *First Steps Forwards*, April 2008; VEOHRC, *Emerging Change*, April 2009; VEOHRC, *Making Progress*, April 2010; VEOHRC, *Talking Rights: Compilation Report*, May 2011.

326 VEOHRC, Talking Rights: Compilation Report, May 2011.

327 Department of Justice and Community Safety, *Twelve-Month Review – Report*, June 2006; ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation*, May 2009 and see *Human Rights Act 2004* (ACT) ss. 43-44.

4.1 The development and drafting of statutory provisions

Relevant provisions of the Charter

[357] The principal provision of the Charter relating to the development and drafting of statutory provisions is Charter s. 28(1), which sets out a requirement for the preparation of a statement of compatibility:

> *A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.*

Similar requirements for human rights certificates for statutory rules (apart from court rules and machinery provisions) and legislative instruments (apart from temporary, urgent instruments) are set out in ss. 12A and 12D of the *Subordinate Legislation Act 1994*. These provisions do not require human rights to be considered in the development and drafting of legislation as the documents need not be produced until after the legislation is drafted and (at least in the case of Bills) the statement may conclude that the legislation is not compatible with human rights. This section will assess whether these provisions nevertheless have an impact on the development and drafting of new legislation, while the next section will address their impact on parliamentary consideration of new legislation.

[358] The Charter also added a new 'public sector value' to the *Public Administration Act 2004*, creating non-enforceable requirements for all public sector employees to provide advice and make decisions consistently with human rights and to actively implement and promote human rights.[328] As well, the development and drafting of many Victorian statutory provisions may be affected by Charter s. 38, which requires that public authorities act compatibly with and give proper consideration to human rights.[329] The definition of 'public authority' includes a number of entities with functions that may include the development and drafting of statutory provisions, including public sector employees, the Victorian Law Reform Commission, Ministers and Councils.[330] The inclusion of Councils is especially significant, as local laws are not subject to the Charter's provisions for scrutiny of new laws.[331]

[359] The above provisions all commenced on 1 January 2007, except for s. 12D of the *Subordinate Legislation Act 1994* (which commenced on 1 July 2011) and the obligations of public authorities (which commenced on 1 January 2008). Therefore, they have been mostly operational for over four and a half years.

Discussion

[360] The development and drafting of statutory provisions usually occurs within government (or, in the case of private members Bills, within political organisations) and, therefore, predominantly out of the public eye. There are three sources of information that are available about the impact of the Charter on the development and drafting of statutory provisions: evidence of internal processes, public processes and legislative outcomes.

Internal processes

[361] The first source of information – evidence of internal processes for developing and drafting legislation – is inevitably sourced from the government itself. The Victorian government's submission to this inquiry remarks that details of these processes that related to the previous government, were cabinet-

328 *Public Administration Act 2004*, s. 7(1)(g).

329 Charter s. 38.

330 Charter s. 4(1)(a), (e) and (f). 'Councils' are defined in the *Local Government Act 1989* to mean 'municipal councils', including the Cities of Melbourne and Geelong.

331 Charter s. 28; *Subordinate Legislation Act 1994* (Vic), s. 3 (definitions of 'statutory rule' and 'legislative instrument').

in-confidence and were not published during the term of that government cannot now be released.[332] The government submission identifies the following information about processes for legislative development after the enactment of the Charter:

- In 2007, the Department of Justice, in consultation with other departments, audited most legislation and policies for compatibility with the Charter and concluded that '[m]ost of the audited legislation' was compatible.[333] However, six laws identified as high priorities for review (including Victoria's drug and mental health statutes) were 'deferred' from the audit due to existing reviews.[334] Laws that were not audited may have had their compatibility assessed as part of other reviews.
- The capacities of officers involved in legislative development were developed through training programs, an online resource and guidelines and templates,[335] as well as department-specific programs. In addition, a 'Human Rights Unit' was developed in the Department of Justice to support and assist government departments in legislative development, although officers also sought advice from the Victorian Government Solicitor's Office on Charter matters.
- The Charter did not lead to a new process for developing statutory provisions, but rather 'introduce[d] a new and common framework' consisting of: identification of human rights implications in legislative bid forms; the preparation of a human rights impact assessment for proposals (which is provided for Parliamentary Counsel and the Human Rights Unit if it limits a Charter right); the provision of a summary of that assessment to cabinet at the 'approval in principle' stage; and the provision of a statement of compatibility to cabinet at the 'Bill at Cabinet' stage.[336]

The Law Institute of Victoria's submission argues that a gradual increase in the percentage of statements of compatibility that identify rights engaged by Bills 'could indicate an increased awareness and understanding of human rights impacts over that time' among officers responsible for the development of legislation.[337] Submissions from a number of Councils and the Municipal Association of Victoria identify five Councils that changed a number of provisions in local laws in response to human rights concerns.[338] For example, a submission from Yarra City Council asserted that a local law on public drinking was influenced by human rights analysis, resulting in provisions for warnings prior to enforcement and the exclusion of public parks from the regulation.[339]

Public processes

[362] Evidence of public processes for developing legislation is limited to those statutes that are exposed to some level of external consultation. Submissions to the inquiry identified a number of examples of external consultations on proposed Victorian statutes that were accompanied by express reference to human rights impact assessments, including:

- a 2008 Department of Health review of Supported Residential Services, which resulted in the *Supported Residential Services (Private Providers) Act 2010*[340]
- stakeholder consultations concerning the *Corrections Regulations 2009*[341]

332 Submission 324 (Victorian Government), p. 5.
333 Submission 324 (Victorian Government), p. 6.
334 Submission 324 (Victorian Government), p. 5.
335 See *Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria* (2008), available at the VGSO website, <http://humanrights.vgso.vic.gov.au>.
336 Submission 324 (Victorian Government), pp. 10-11.
337 Submission 247 (Law Institute of Victoria), p. 22, noting that statements of compatibility to the effect that rights were engaged were made in relation to 63% of Bills in 2007, 81% of Bills in 2008 and 2009, and 98% of Bills in 2010.
338 Submission 192 (Municipal Association of Victoria), addendum and see Submission 188 (City of Port Phillip), pp. 13-14 (concerning its Meetings Procedure Local Law). See also Submission 111 (City of Darebin), pp. 4-5.
339 Submission 52 (Yarra City Council), pp. 5-6 and see Yarra City Council Local Law No. 8 of 2009 (Consumption of Liquor in Public Places), ss. 10, 21.
340 Submission 324 (Victorian Government), p .12.
341 Submission 205 (Federation of Community Legal Centres), p. 15; Submission 265 (Human Rights Law Centre), p. 16.

- stakeholder consultations concerning the Transport Integration Bill 2009[342]
- SARC's inquiry into exceptions and exemptions to the *Equal Opportunity Act 1995*[343]
- the Exposure Draft Mental Health Bill 2010.[344]

A submission from the Office of the Victorian Privacy Commissioner remarks that Charter s. 28 has 'led to a significant increase in the number of public sector organisations seeking to consult with the Privacy Commissioner when developing legislative proposals and drafting legislation'.[345] Additionally, a number of submissions describe using the Charter in advocacy relating to other proposed legislation, even when the legislation was not the subject of a public consultation.[346] However, one submission, setting out 'focus group' research concerning an unnamed statutory authority, cited employees' views that an unnamed department rebuffed all attempts to use the Charter in this way.[347] Further, the Victorian Law Reform Commission has repeatedly referred to the Charter in reports on bail, child protection, civil justice and surveillance in public places, as well as its ongoing inquiries into the *Guardianship and Administration Act 1986* and the *Sex Offenders Registration Act 2004*.[348] An exception is the VLRC's inquiry into abortion, which did not analyse the Charter (and confined its discussion of human rights to an appendix), on the rationale that existing and future laws relating to abortion are subject to the savings clause in Charter s. 48.[349]

Legislative outcomes

[363] The final source of evidence – the outcomes of the above processes – requires inferring the Charter's influence from statutory provisions themselves. The submissions to the inquiry have identified a number of statutory provisions whose development appears to have been influenced by the Charter. The clearest example is the *Statute Law Revision (Charter of Human Rights and Responsibilities) Act 2009*, amending 11 provisions in seven statutes,[350] which was expressed to be developed through a comprehensive government review of existing statutes for human rights compatibility.[351] Other examples include:

- statutes that expressly reference the Charter, for example *Equal Opportunity Act 2010*, *Multicultural Victoria Act 2011*[352]
- statutes accompanied by official documents (such as second reading speeches, explanatory memoranda and statements of compatibility) that expressly state their content was altered in

342 Submission 278 (VEOHRC), p. 128.
343 SARC, *Exceptions and Exemptions to the Equal Opportunity Act 1995, Final Report*, November 2009, p. 4.
344 Department of Health, *Exposure Draft Mental Health Bill 2010 Explanatory Guide*, October 2010, p. vii. See Submission 60 (beyondblue); Submission 83 (PILCH Homeless Persons Legal Clinic), pp. 34-5; Submission 129 (headspace), pp. 5-6; Submission 278 (VEOHRC), p. 131; Submission 296 (Mental Health Legal Centre), p. 11.
345 Submission 97 (Office of the Victorian Privacy Commissioner), p. 4.
346 E.g. Submission 83 (PILCH Homeless Persons Legal Clinic), pp. 15-16; Submission 156 (Youthlaw), pp. 8-9; Submission 185 (Inner South Supported Residential Services Network), pp. 14-15; Submission 205 (Federation of Community Legal Centres), pp. 14-15; Submission 247 (Law Institute of Victoria), pp. 23-4; Submission 257 (PILCH), p. 6.
347 Submission 125 (Rob Watts), p. 94.
348 Victorian Law Reform Commission, *Review of the Bail Act Final Report*, 2007, p. 20; Victorian Law Reform Commission, *Protection Applications in the Children's Court Final Report 19*, June 2010, p. 15; Victorian Law Reform Commission, *Civil Justice Review Report*, 2008; Victorian Law Reform Commission, *Surveillance in Public Places Final Report 18*, June 2010, p. 12 and see Submission 278 (VEOHRC), p. 130; Victorian Law Reform Commission, *Guardianship: Consultation Paper 10*, February 2011, p. 14, terms of reference 1(b) and 3(e) and see Submission 83 (PILCH Homeless Persons Legal Clinic), p. 34; Victorian Law Reform Commission, *Sex Offenders Registration: Information Paper*, June 2011, pp. 34-6.
349 Victorian Law Reform Commission, *Law of Abortion Final Report*, March 2008, p. 162.
350 *Australian Grand Prix Act 1994*, s. 51; *Education and Training Reform Act 2006*, ss. 2.4.31 and 2.4.53A; *Fair Trading Act 1999*, ss. 4 and 14; *Forests Act 1958*, ss. 59 and 61; *Project Development and Construction Management Act 1994*, s. 43; *Transport Act 1983*, ss. 228ZL and 228ZN; *Victorian Urban Development Authority Act 2003*, s. 72.
351 Submission 247 (Law Institute of Victoria), p. 23; Submission 324 (Victorian Government), p. 6.
352 See *Equal Opportunity Act 2010*, s. s3(b); *Multicultural Victoria Act 2011*, s. 26(b).

response to a human rights assessment, for example *Professional Boxing and Combat Sports Amendment Act 2008*, *Major Sporting Events Act 2009*[353]

- statutes whose terms appear to be framed with a particular Charter right in mind, for example *Public Health and Wellbeing Act 2008*, *Assisted Reproductive Treatment Act 2008*, *Traditional Owner Settlement Act 2010*[354]
- statutes whose provisions are believed by lobbyists to have been influenced by Charter-based advocacy, for example *Severe Substance Dependence Treatment Act 2010*[355]

Several witnesses at the inquiry's public hearings expressed disappointment at a perceived lack of human rights consideration in relation to particular statutes, notably the *Abortion Law Reform Act 200*8 and the *Summary Offences and Control of Weapons Amendment Act 2009*.[356]

Summary

[364] SARC considers there is evidence of the existence of processes for human rights assessment of new statutory provisions when they are being developed and drafted in Victoria, although it notes evidence that the operation of these processes may not be uniform over time and across different parts of the government. Some of these processes may also have been prompted by non-Charter laws or policies. The government's submission remarks that '[c]onsideration of individual rights were already taken into account during the development of statutory provisions prior to the commencement of the Charter Act', citing a pre-Charter policy that required legal and legislative policy officers to consult with the Department of Justice about appeal and review rights, same-sex relationships, privacy and police powers.[357] Yarra City Council attributed its process for assessing the human rights impact of its proposed public drinking law to both the Charter and to Councils' 'primary objective' of 'best outcomes for the local community' set out in the *Local Government Act 1989*.[358] The City of Port Philip noted that Charter s. 38's requirements 'were already entrenched in Council's approach to governance prior to the Charter becoming law', with the Charter supplying a 'useful framework to formalise and report … local laws that support human rights'.[359]

[365] In relation to the effect of these processes on the substance of proposed statutory provisions in Victoria, SARC considers the Charter has had some impact on a number of statutory provisions and may have had a significant impact in a number of instances. However, it not possible to identify the actual effect of these processes on any particular statutory provision. For example, at one extreme, the Statute Law Revision (Charter of Human Rights and Responsibilities) Bill 2009 was expressed to be based exclusively on human rights concerns; however, one of its provisions – the removal of a reverse onus in the *Fair Trading Act 1999* – would have been enacted in any event the following year as part of Victoria's adoption of the *Australian Consumer Law*.[360] At the other extreme, the two Bills on random weapons searches were expressed to be developed despite the recognition that they are incompatible with some human rights;

353 *Professional Boxing and Combat Sports Amendment Act 2008*, s. 15 and see Submission 324 (Victorian Government), p. 12; *Major Sporting Events Act 2009,* s. 84 and see Submission 278 (VEOHRC), p. 131, Submission 324 (Victorian Government), p. 7.

354 *Public Health and Wellbeing Act 2008*, s. 112; *Assisted Reproductive Treatment Act 2008*, s. 5 and see Submission 278 (VEOHRC), pp. 131 and 139; *Traditional Owner Settlement Act 2010*, s. 9(1) and see Submission 324 (Victorian Government), p. 12.

355 Submission 138 (Fitzroy Legal Service), p. 3.

356 Submission 110 (Peninsula Community Legal Centre), p. 5; Submission 217 (Ad Hoc Interfaith Committee), pp. 4-7; Submission 272 (Catholic Archdiocese of Melbourne), pp. 13, 15.

357 Submission 324 (Victorian Government), p. 10.

358 Submission 52 (Yarra City Council), p. 5 and see *Local Government Act 1989*, s. 3C(1).

359 Submission 188 (City of Port Philip), p. 14.

360 *Statute Law Amendment (Charter of Human Rights and Responsibilities) Act 2009*, s.7, amending s. 4 of the *Fair Trading Act 1999*, but see now s. 4(3)(b) of the *Australian Consumer Law* (applied in Victoria by the *Fair Trading Amendment (Australian Consumer Law) Act 201*0).

however, the first Bill included several provisions aimed at protecting human rights (and, indeed, SARC's scrutiny report on that Bill did not include a finding that it may be incompatible with human rights).[361]

Development and drafting of Bills

[366] Some submissions and reports argued for greater community consultation in the case of Bills with a significant human rights impact.[362] SARC considers that the feasibility of such processes is a matter for the government of the day and should not be mandated by the Charter.

[367] Several submissions remarked that the Exposure Draft Mental Health Bill 2010 lacked a concise draft statement of compatibility, with its explanatory guide merely noting that such a statement is required when the Bill is introduced to the Parliament.[363] Although human rights issues were addressed at various points in the explanatory guide, SARC observes that making a draft statement of compatibility available at the time of the exposure would ensure that the development and drafting of the exposure draft was informed by a human rights impact assessment, that the public is consistently informed about the potential human rights impact of proposed Bills and that the public has an opportunity for input into the human rights impact assessment process itself for such Bills. SARC accordingly recommends that, where a proposed Bill is exposed for public comment, consideration should be given to publishing a draft of the statement of compatibility for that Bill as appropriate.

[368] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[364]

Recommendation 9

Publication of draft statements of compatibility

If Charter s. 28(1) is retained, then SARC recommends that consideration be given to publishing a draft statement of compatibility, as appropriate, when drafts of Bills are exposed for public comment.

Development and drafting of subordinate legislation

[369] In contrast to Bills, many proposed statutory rules are already subject to a public consultation process set out in the *Subordinate Legislation Act 1994*:

> *11 Comments and submissions*
>
> *(1) If a regulatory impact statement has been prepared, the responsible Minister must ensure that a notice in accordance with subsection (2) is published in –*
>
> *(a) the Government Gazette; and*
>
> *(b) a daily newspaper circulating generally throughout Victoria; and*
>
> *(c) if the responsible Minister considers it appropriate, in such trade, professional or public interest publications as the responsible Minister determines.*
>
> *(2) A notice must –*
>
> *(a) state the reason for, and the objectives of, the proposed statutory rule;*

361 E.g. *Summary Offences and Control of Weapons Act Amendment 2009*, s. 13, inserting a schedule setting out new rules for searches into the *Control Of Weapons Act 1990* and see SARC, *Alert Digest No. 14 of 2009* (reporting on the Summary Offence and Control of Weapons Amendment Bill 2009), pp. 43-4.

362 E.g. Submission 205 (Federation of Community Legal Centres), p. 17; Submission 263 (Human Rights Law Centre), pp. 17-18, Submission 278 (VEOHRC), pp. 134-5.

363 Submission 60 (beyondblue), p.3; Submission 278 (VEOHRC), p. 134) and see Department of Health, *Exposure Draft Mental Health Bill 2010 Explanatory Guide*, October 2010, p. vii.

364 See Chapter 6, [687] and Recommendation 35.

(b) summarise the results of the regulatory impact statement;

(c) specify where a copy of the regulatory impact statement and of the proposed statutory rule can be obtained;

(d) invite public comments or submissions within such time (being not less than 28 days from the publication of the notice) as is specified in the notice.

(3) The responsible Minister must ensure that all comments and submissions are considered before the statutory rule is made.

A similar process for legislative instruments is provided for by s. 12I. These provisions do not currently require publication of the human rights certificate for proposed subordinate legislation. Rather, the *Subordinate Legislation Act 199*4 only requires the human rights certificate be laid before the Parliament and provided to SARC respectively within six sitting days and 10 working days of the promulgation of the subordinate legislation.[365]

[370] For similar reasons to those listed above in relation to exposure drafts, SARC recommends the *Subordinate Legislation Act* be amended to require that the proposed human rights certificate be published alongside the regulatory impact statement for a proposed statutory rule. SARC notes this recommendation only applies to rules and instruments for which a regulatory impact statement has been prepared. For rules and instruments that are exempt from that requirement, the current requirements should apply.

[371] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[366]

Recommendation 10

Publication of draft human rights certificates

If ss. 12A and 12D of the Subordinate Legislation Act 1994 are retained, then SARC recommends that ss. 11 and 12I of that Act be amended to require that copies of the proposed human rights certificate be made available for public comment in respect of subordinate legislation for which a regulatory impact statement has been prepared.

4.2 The consideration of statutory provisions by the Parliament

Relevant provisions of the Charter

[372] There are five provisions of the Charter affecting the Parliament's consideration of the human rights impact of statutory provisions.

[373] First, Charter s. 28(2) requires the member who prepared a statement of compatibility to cause it 'to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.' The *Subordinate Legislation Act* requires any human rights certificate for a statutory rule be given to SARC within ten working days of the making of the rule.

[374] Second, Charter s. 30 requires SARC to 'consider any Bill introduced into Parliament' and 'report to the Parliament as to whether any Bill is incompatible with human rights'. The Charter also amended SARC's functions under s. 17 of the *Parliamentary Committees Act 2003* and s. 21 of the *Subordinate Legislation Act 1994* to include reporting to the Parliament whether a Bill, an Act that could not be considered when it was a Bill or a statutory rule 'is incompatible with' a human right set out in the Charter.

365 *Subordinate Legislation Act 1994* ss. 15, 15A(2), 16B and 16C(2).

366 See Chapter 6, [687] and Recommendation 35.

[375] Third, Charter s. 31 provides for the Parliament to 'expressly declare' that an Act or a provision of an Act 'has effect despite being incompatible with' human rights. A member who introduces a Bill containing such a statement must make a statement 'explaining the exceptional circumstances that justify the inclusion of the override declaration' either during the second reading speech or (unless leave is obtained) at least 24 hours before the third reading speech.

[376] Fourth, Charter s. 37 requires that the Minister administering a statutory provision that has been the subject of a Supreme Court declaration of inconsistent interpretation must cause a copy of the declaration and the Minister's written response to it to be laid before each House of Parliament within six months of the declaration (subject to any appeal process).

[377] Finally, Charter s. 43 requires the Attorney-General to cause VEOHRC's annual reports (including reports on the Charter's 'interaction with other statutory provisions'), and any other reports from VEOHRC 'when requested by the Attorney-General, to review the effect of statutory provisions … on human rights' to be laid before each House of Parliament within six sitting days of receiving then.[367]

[378] The above provisions impose no requirements on the Parliament. Rather, they impose obligations on particular individuals or entities (members, SARC and Ministers) to provide information to the Parliament.

[379] The above provisions have been in force since 1 January 2007 (except for Charter s. 37, which came into force a year later.) Therefore, they have been mostly operational for over four and a half years.

Discussion

[380] In contrast to the processes of statutory development and drafting, parliamentary proceedings are almost entirely on the public record. There are four aspects of that record relevant to this inquiry: compatibility documents, SARC's scrutiny reports, reports from VEOHRC and parliamentary debates.

Compatibility documents

[381] Victorian law requires all statements of compatibility and humans rights certificates be laid before Parliament.[368] One submission has identified 403 statements of compatibility tabled up to July 2011.[369] SARC is aware from its scrutiny role that over 500 human rights certificates were provided to it from 2007 to 2010. Two statements of compatibility (both relating to random weapons search schemes) concluded that a statutory provision is incompatible with human rights and no human rights certificates have reached such a conclusion. Submissions to the inquiry have noted a steady increase in statements of compatibility that actually identify human rights issues and a roughly correlating increase in the length of statements of compatibility, with statements in 2010 identifying human rights issues for 98% of Bills with a mean of almost 3000 words each.[370] SARC is aware from its scrutiny role that there has been no equivalent trend in the case of human rights certificates, which identified potential rights limitations in fewer than 70 statutory rules up to mid-2011. One submission remarks that statements of compatibility 'improved over time, in particular because they have become more thorough and well researched, with increasing reference to relevant case law from Australia and overseas'.[371] SARC's scrutiny reports identified deficiencies in a number of compatibility documents (especially in 2008 and earlier),[372] including reporting that one

367 See Charter s. 41(a)(i) and (b).

368 Charter s. 28(2); *Subordinate Legislation Act 1994* ss. 15(1) and 16B(1).

369 Submission 295 (Mallesons Human Rights Law Group), p. 13.

370 Submission 247 (Law Institute of Victoria), p. 22; Submission 295 (Mallesons Human Rights Law Group), p. 13, but see Submission 324 (Victorian Government), pp. 15-16, finding a median of 1.5 pages for statements in the 2009–10 financial year.

371 Submission 295 (Mallesons Human Rights Law Group), p. 13.

372 E.g. the statements of compatibility for the Animals Legislation Amendment (Animal Care) Bill 2007; Transport Legislation Amendment Bill 2007; Port Services Amendment Bill 2007; Criminal Procedure Legislation Amendment Bill 2007; Crown Land

statement of compatibility (for a Bill regulating public access to Carlton Gardens during special events) unnecessarily addressed a human rights issue (the right to freedom of movement).[373] SARC also identified several especially helpful examples of compatibility documents.[374]

Scrutiny reports

[382] SARC's scrutiny reports on Bills are tabled before the Parliament and correspondence on Bills and statutory rules are also tabled respectively in SARC's alert digests and annual reports. Submissions to the inquiry counted that SARC issued 195 Charter s. 30 reports (or 48% of the Bills it considered) and put approximately 150 questions concerning Charter compatibility to Ministers or members, including 99 government Bills (or 26% of the total).[375] One study of SARC's pre-Charter reporting found that, in 2003, SARC reported on human rights issues in relation to 36% of all Bills.[376] SARC reported that a Bill 'may be incompatible with human rights' in relation to 17 (or 4% of all) Bills (including one of the two Bills that the government identified as incompatible with human rights).[377] While SARC has not issued any reports on statutory rules since the Charter commenced, it entered into correspondence concerning human rights in relation to 24 (or approximately 5% of all) statutory rules One submission to the inquiry asserted that SARC's reports on Bills were 'generally of a very high standard';[378] however, another submission observed that SARC's scrutiny was marred by excessive deference to government explanations of compatibility[379] and some submissions identified deficiencies in particular SARC Charter reports, notably its report on the Equal Opportunity Bill 2010.[380]

VEOHRC reports

[383] As VEOHRC itself has observed, its ability to produce an independent report to the Parliament is compromised by the absence of any obligation of public authorities to provide VEOHRC with information, leaving it dependent (for information not on an accessible public record) on others' cooperation to perform

(Reserves) Amendment (Carlton Gardens) Bill 2008; Major Crime Legislation Amendment Bill 2008; Justice Legislation Amendment Bill 2008; Local Government Amendment (Councillor Conduct and Other Matters) Bill 2008; Relationships Amendment (Caring Relationships) Bill 2008; Crimes Amendment (Identity Crime) Bill 2009; Education and Training Reform Amendment (School Age) Bill 2009; Constitution (Appointments) Bill 2009; Serious Sex Offenders Monitoring Amendment Bill 2009; Serious Sex Offenders (Detention and Supervision) Bill 2009; Summary Offences and Control of Weapons Amendment Bill 2009; and human rights certificates for the *Transport (Conduct) Amendment Regulations 2008*; *Transport (Passenger Vehicles) (Miscellaneous Amendments) Regulations 2008*; and the *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2008*.

373 SARC, *Alert Digest No. 2 of 2008* (reporting on the Crown Land (Reserves) Amendment (Carlton Gardens) Bill 2008), p. 2.

374 E.g. the statements of compatibility for the Police Integrity Bill 2008; Primary Legislation Amendment Bill 2008; Criminal Procedure Bill 2009; Fair Work (Commonwealth Powers) Bill 2009; Confiscation (Amendment) Bill 2010; and the human rights certificate for the *Sex Offenders Registration (Amendment) Regulations 2007* and the *Child Wellbeing and Safety Regulations 2007*.

375 Submission 295 (Mallesons Human Rights Law Group), p. 13; Submission 324 (Victorian Government), p. 17. The count of the number of Charter reports is complicated by SARC's changing practices, as SARC only began issuing separate Charter s. 30 reports in August 2007. It changed its practice in May 2008 to only issue such reports when it considered that a Bill may have limited a human right and it sometimes issues more than one Charter s. 30 report for a Bill.

376 C Evans and S Evans, 'The effectiveness of Australian parliaments in the protection of rights', paper delivered at the 'Legislatures and the Protection of Human Rights Conference', Melbourne Law School, June 2006, p.6.

377 The 17 Bills were the Superannuation Amendment (Contribution Splitting and Other Measures) Bill 2007; Constitution Amendment (Judicial Pensions) Bill 2008; Primary Industries Legislation Amendment Bill 2008; Major Sporting Events Bill 2009; Local Government Amendment (Conflicting Duties) Bill 2009; Major Transport Project Facilitation Bill 2009; Consumer Affairs Legislation Amendment Bill 2009; Severe Substance Dependence Treatment Bill 2009; Credit (Commonwealth Powers) Bill 2010; Justice Legislation Amendment Bill 2010; Association Incorporation Amendment Bill 2010; Control of Weapons Amendment Bill 2010; Plant Biosecurity Bill 2010; Marine Safety Bill 2010; Residential Tenancies Amendment Bill 2010; Judicial Commission of Victoria Bill 2010; and the Road Safety Amendment (Hoon Driving) Bill 2010.

378 Submission 295 (Mallesons Human Rights Law Group), p. 13.

379 Submission 125 (Robb Watts), p. 7-8.

380 Submission 258 (VALS), pp. 36-8 and see VEOHRC, *Talking Rights: Compilation Report*, May 2011, pp. 108-9.

its reporting function.[381] Accordingly, in reporting on the operation of the Charter outside of courts and the Parliament, it must rely primarily on responses to surveys directed at government departments, Victoria Police and (less reliably) Councils and 'case studies' volunteered to it by various entities.[382] There have been four VEOHRC reports under Charter s. 41(a) that were tabled in accordance with Charter s. 43. Each report contains a summary of the impact of the Charter on parliamentary proceedings, as well as the results of information provided to VEOHRC by public authorities and gathered by VEOHRC through surveys. In its most recent report, VEOHRC conducted surveys of the community; however, the sample was limited to stakeholders 'identified by the Commission' and an 'online survey' of organisations and 'unaffiliated individuals' yielding '89 completed responses'.[383] One submission to the inquiry criticised VEOHRC's resulting reports for their 'cheerful optimism' despite the Charter's alleged lacklustre impact.[384] There have not been any reports on the impact of Victoria's law on human rights (under Charter s. 41(b)) tabled in the Parliament to date.

Parliamentary debates

[384] The final source of evidence about the effect of the Charter on the Parliament – reports of parliamentary debates on all Bills and (if they are considered) tabled regulations – is recorded in Hansard. According to VEOHRC, 37 (out of 109) Bills in 2009 and 42 (out of 90) Bills in 2010 were the subject of 'parliamentary comment relating to human rights issues'.[385] However, a submission from SARC's former Chair remarked that it is rare for Ministers to discuss SARC reports during parliamentary debates.[386] Charter s. 30 reports have twice prompted amendments to Bills while they were being debated.[387] However, nearly all Bills where SARC reported a potential incompatibility with human rights were nevertheless passed.[388] Some VEOHRC reports on the Charter were addressed in members' statements in the Legislative Council.[389]

[385] SARC's correspondence with Ministers has sometimes been considered in detail in parliamentary debates. For example, SARC's report on the Criminal Legislation Amendment Bill 2007 was repeatedly cited in the Legislative Council's debates on that Bill and in proceedings of its legislation committee, during which government members made statements about the effects of some of its provisions and the Bill was amended to introduce a sunset clause.[390] In addition, on two occasions, SARC reports have led to changes to a Bill's statement of compatibility when the Bill was introduced into the second House.[391]

[386] Several submissions to the inquiry argued that, even where the content of legislation was not affected by Charter ss. 28 and 30, they nevertheless increased the level of 'transparency' in the rationale

381 VEOHRC, *First Steps Forwards*, April 2008, p. 8. Chapter 3 discusses whether or not there should be mandatory reporting requirements concerning Charter compliance.

382 VEOHRC, *Emerging Change*, April 2009, p. 19.

383 VEOHRC, *Talking Rights: Compilation Report*, May 2011, p. 20.

384 Submission 125 (Rob Watts), p. 73.

385 VEOHRC, *Making Progress*, April 2010, p. 94; VEOHRC, *Talking Rights: Compilation Report*, May 2011, p. 84. There are no statistics available for 2007 and 2008.

386 Submission 122 (Carlo Carli), p. 3.

387 The amendments were to the Crimes (Rape) Bill 2007 and the Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009.

388 The exception was the Judicial Commission of Victoria Bill 2010, which lapsed with the 2010 election.

389 *Parliamentary Debates* (*Hansard*), Legislative Council, 56th Parliament, 1st Session, 17 April 2008, pp. 1341-2; *Parliamentary Debates* (*Hansard*), Legislative Council, 56th Parliament, 1st Session, 8 May 2008, p. 1577, (discussing VEOHRC, *First Steps Forward*, April 2008); *Parliamentary Debates* (*Hansard*), Legislative Council, 56th Parliament, 1st Session, 4 June 2009, p. 2666 (discussing VEOHRC, *Emerging Change*, April 2009.)

390 See Legislative Council Legislation Committee, Report on the Consideration in Detail of the Criminal Procedure Legislation Amendment Bill 2007, February 2008.

391 See the statements of compatibility in the Legislative Council for the Justice Legislation Amendment (Sex Offenders Procedures) Bill 2008 (correcting a number of errors in the statement introduced into the Legislative Assembly: see SARC, *Alert Digest No. 5 of 2008*, p. 37) and the Constitutional Amendment (Judicial Pensions) Bill 2008 (identifying two provisions that limit human rights and providing a reasonable limits analysis, in comparison to the Legislative Assembly statement of compatibility, which identified no limits on human rights).

for the passage of legislation, provided a formal focus for advocacy efforts and occasionally generated public debate.[392] However, others cited outcomes of parliamentary debates – notably the *Abortion Law Reform Act 2008* and the *Summary Offences and Control of Weapons Amendment Act 2009* – that they saw as involving a manifest disregard for human rights.[393]

[387] The Charter's provisions for scrutiny of new legislation may have an effect on events after the enactment of that legislation. The most significant example to date has been a number of occasions when a SARC report or correspondence has been cited as a reason for later enactments.[394] One submission attributes a provision of the *Coroners Act 2008* that imposed limits on public access to coroners' files to debate generated by the statement of compatibility for an earlier Bill that contained fewer limits.[395] SARC's Charter s. 30 reports have also prompted changes to administrative practices,[396] ministerial considerations of statutory reforms[397] and alterations to the drafting of statements of compatibility,[398] as well as being referred to in litigation before the Supreme Court.[399] SARC notes that statements of compatibility and ministerial responses to SARC reports may potentially be significant in future litigation over the meaning of those statutes,[400] but no such instances of such uses have occurred to date.

Summary

[388] SARC considers that Charter ss. 28(2) and 30 have together resulted in a large quantity of information being made available to the Parliament concerning the possible human rights impact of proposed Bills and has informed debate on those Bills, while the *Subordinate Legislation Act 1994* has led to significant information about the human rights impact of regulations being made available to SARC in its scrutiny of regulations role. SARC observes that these provisions have had only a modest effect on the content of Victoria's statutes and no impact to date on the Parliament's powers to disallow regulations, but have some effect on the development and drafting of later legislation.

Statements of compatibility

[389] The inquiry has received a number of submissions critical of some statements of compatibility. Some argued that statements of compatibility, by addressing minor issues, 'add very little to serious debate on human rights'.[401] Others, arguing that a number of statements of compatibility were 'overly technical and lengthy', recommended that '[t]he detail and length of Statements of Compatibility should be commensurate with the human rights implications of the proposed legislation or legislative instrument.'[402] The government submission observes that the median length of statements in the 2009–10 financial year

392 Submission 83 (PILCH Homeless Persons Legal Clinic), pp. 32-3; Submission 97 (Office of the Victorian Privacy Commissioner), p. 4; Submission 138 (Fitzroy Legal Service), p. 4; Submission 247 (Law Institute of Victoria), p. 26; Submission 257 (PILCH), p. 5; Submission 265 (Human Rights Law Centre), p. 11; Submission 278 (VEOHRC), p. 135; Submission 295 (Mallesons Human Rights Law Group), pp. 15 and 18-20.

393 E.g. Submission 110 (Peninsula Community Legal Centre), p. 5; Submission 217 (Ad Hoc Interfaith Committee), pp. 4-7; Submission 272 (Catholic Archdiocese of Melbourne), pp. 13, 15.

394 E.g. *Police Integrity (Amendment) Regulations 2009*; *Working With Children Amendment Act 2010*, ss. 11, 14 and 18; *Justice Legislation Further Amendment Act 2010*, s. 6; *Equal Opportunity Amendment Act 2011*, s. 27.

395 Submission 247 (Law Institute of Victoria), pp. 23-4.

396 SARC, *Annual Review 2009 Regulations 2009*, p. 60, concerning procedures for strip searches of prison visitors.

397 See, e.g., SARC, Alert Digest No. 9 of 2007 (reporting on the Superannuation Legislation Amendment (Contribution Splitting and Other Matters) Bill 2007), p. 12; SARC, *Alert Digest No. 4 of 2009* (reporting on the Primary Industries Legislation Amendment Bill 2008), p. 15; SARC, *Alert Digest No. 13 of 2009* (reporting on the Road Legislation Amendment Bill 2009), p. 31.

398 See SARC, *Alert Digest No. 15 of 2008* (reporting on the Professional Boxing and Combat Sports Amendment Bill 2007), p. 22. See also SARC's *Practice Note No. 3*, July 2010, discussed in Submission 324 (Victorian Government), p. 18.

399 *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346, [147]–[150].

400 See *Interpretation of Legislation Act 1984*, s. 35(b)(iii) and (iv).

401 Submission 19 (Family Voice), pp. 11-12; Submission 133 (Institute of Public Affairs), pp. 7-8; Submission 190 (Church and Nation Committee), pp. 9-10.

402 Submission 263 (Human Rights Law Centre), pp. 11-12 and see Submission 160 (Victorian Alcohol and Drug Association), p. 4; Submission 205 (Federation of Community Legal Centres), p. 16; Submission 324 (Victorian Government), p. 16.

was 1.5 pages and that 86% of statements were under four pages. It attributes the lengthier statements to 'a range of factors', including the length of Bills, the complexity or diversity of Bills, and 'whether SoCs include analysis of a large number of rights, including rights that are affected to a low degree by Bills'.[403]

[390] SARC considers there are three aspects of the Charter that affect the readability and utility of statements of compatibility: Charter s. 28; the rights set out in Part 2 of the Charter; and the reasonable limits test set out in Charter s. 7(2).

Charter s. 28

[391] Charter s. 28(3) provides:

> *A statement of compatibility must state –*
>
> *(a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and*
>
> *(b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.*

Charter s. 28(3)(a)'s requirement that a statement of compatibility include a statement of 'how' a Bill is compatible with human rights is a distinctive feature of Victoria's Charter and does not appear in equivalent provisions in the United Kingdom and the ACT. An explanation of 'how' a Bill is 'compatible' requires the statement to address any provision that engages a human right, even if the effect is benign, minor or manifestly not a limit on a human right. Such explanations may be lengthy, given the need to describe the statutory scheme, the various human rights that might be implicated and the explanation (including, where relevant, reference to other provisions or court decisions) as to why the right isn't limited. One submission, asserting that there were 123 statements of compatibility for Bills 'with marginal or no human rights implications', recommended waiving the Charter's requirement for statements of compatibility where a competent independent authority certified that the Charter was not 'materially engaged'.[404] However, SARC notes this would add a further layer to the existing human rights impact assessment process.

[392] SARC considers an appropriate threshold for the need for a statement of compatibility could be identified through a distinction already drawn in existing compatibility documents. Human rights assessments consist of two stages:

- First, an assessment of whether any provision of a Bill limits a human right. This includes determining the scope of the relevant right, assessing whether the provision falls within that scope and determining whether the provision falls within an exception to the right.
- Second, for any provision that does limit a human right, an assessment of whether it is a reasonable limit on that right. Under the Charter, that involves applying the test set out in Charter s. 7(2).

Existing statements (following the template developed by the Department of Justice's Human Rights Unit) reflect both of these stages, with Charter s. 7(2) analyses generally appearing separately from limitation analyses. By contrast, human rights certificates and SARC reports are directed to the second stage of analysis. SARC's recommendation is that Charter s. 28 be amended to only require statements of compatibility for Bills that limit a human right (i.e. that involve the second stage of the analysis).

[393] SARC notes this recommendation will both reduce the number of statements (as over half of all Bills have no provisions that are considered to actually limit a human right[405]) and reduce the length of

403 Submission 324 (Victorian Government), p. 16.
404 Submission 295 (Mallesons Human Rights Law Group), p. 24.
405 Submission 324 (Victorian Government), p. 15.

statements that are tabled (as each will only address those provisions of a Bill that limit a human right). Such a reduction will both increase the readability of statements of compatibility and better signal to parliamentarians the Bills that particularly affect human rights.[406]

[394] However, the information provided in existing statements of compatibility about provisions that engage but do not limit a human right may still be useful to some parliamentarians, as well as to SARC in its scrutiny role and to the wider community.[407] In the United Kingdom and the ACT, pertinent information about human rights issues is often provided in a Bill's explanatory memorandum. SARC recommends that consideration be given to providing some of the information from the first stage of analysis described above (i.e. about how provisions that engage human rights nevertheless do not limit those rights) in the corresponding section of the explanatory memorandum of the Bill. It may be appropriate to consult with users of existing statements of compatibility (including members of Parliament and SARC) in order to determine the form and content of this additional information. Also, guidance about the appropriate content of explanatory memoranda could be provided by SARC through its practice notes.[408] SARC considers that, apart from Bills that raise especially complex legal issues,[409] the additional information should generally be brief and written in language accessible to lay readers.

[395] SARC considers it is appropriate for statements of compatibility to continue to inform members of Parliament about provisions of Bills that promote particular Charter rights,[410] at the discretion of the member introducing the Bill.

[396] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[411]

Recommendation 11

When statements of compatibility are required

If Charter s. 28 is retained, then SARC recommends that it be amended to provide that statements of compatibility must be prepared and tabled only for provisions of Bills that limit a human right. For provisions of Bills that do not limit a human right, consideration should be given to providing, where appropriate, a brief account of why particular provisions do not limit a human right in the relevant section of the explanatory memorandum for the relevant Bill. Statements of compatibility may continue to provide information about provisions that promote particular Charter rights, at the discretion of the member of Parliament introducing the Bill.

The human rights set out in Part 2 of the Charter

[397] SARC observes that the way some rights are presently defined means that Bills routinely 'limit' those rights with provisions that are commonplace and manifestly reasonable. The result is that statements of compatibility must set out a full reasonable limits analysis of those provisions. For example, many statements of compatibility contain an analysis of why provisions that create exceptions, provisos, defences or qualifications to criminal offences, and hence typically impose a mild evidential burden on

406 See Submission 295 (Mallesons Human Rights Law Group), p. 24.

407 E.g., although the statement of compatibility for the Confiscations Legislation (Amendment) Bill 2010 was criticised in some submissions as overly lengthy given that no rights were limited (e.g. Submission 263 (Human Rights Law Centre), p. 11), that same statement was expressly commended by SARC for its 'thorough and balanced account of the very complex human rights issues raised by schemes to confiscate crime-tainted property': SARC, *Alert Digest No. 12 of 2010*, p. 7.

408 See SARC, *Practice Note No. 1*, 17 October 2005, (on retrospective provisions, delegations, delayed proclamations and insufficient explanations); SARC, *Practice Note No. 2*, 6 August 2007, [2.2] (on statute law revision amendments).

409 E.g. the Confiscation Amendment Bill 2010. See Submission 324 (Victorian Government), p. 14, identifying only one statement of compatibility in the 2009–10 financial year (for the Major Transport Projects Facilitation Bill 2010) as involving 'high' complexity but finding no rights limitations.

410 E.g. the statement of compatibility for the Multicultural Victoria Bill 2011, which identified the Bill's promotion of Charter s. 19(1).

411 See Chapter 6, [687] and Recommendation 35.

defendants, are reasonable limits on rights.[412] Such analyses unnecessarily introduce technical legal questions into statements of compatibility and also send confusing signals about the human rights significance of the Bill in question. SARC recommends that consideration be given to changing human rights impact assessment processes or the way that statements of compatibility are drafted or communicated to avoid such unnecessary analyses. For example, the government may produce general statements of compatibility for particular types of provisions (such as evidential burdens on exceptions) that avoid the need for such analyses to be restated for each statement of compatibility.[413]

[398] In some instances, it may be necessary to change the drafting of a right set out in Part 2 to avoid classifying routine, minor and reasonable provisions as limiting a human right. The principal example is the right to freedom of movement in Charter s. 12, which states:

> *Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.*

This formulation differs from other broad rights in Part 2, such as privacy and freedom of expression that contain internal limiting language (such as the restriction of Charter s. 13(a) to 'arbitrary or unlawful' interferences with privacy and the express statement in Charter s. 15(3) that the right to freedom of expression is subject to responsibilities and can be limited to achieve certain purposes). The absence of such language in Charter s. 12 has resulted in statements of compatibility (and human rights certificates for statutory rules) that contain a full reasonable limits analysis for trivial restrictions on movement, such as temporary closures of Carlton Gardens or barring someone from boarding a moving train.[414] SARC therefore recommends that consideration be given to redrafting the Part 2 rights to avoid occasions when routine, minor provisions are regarded as limiting a right. For example, limiting words could be added to Charter s. 12 along the lines of the limits on the equivalent right in Article 12.3 of the *ICCPR*, which permits lawful restrictions that 'are necessary to protect national security, public order, public health or morals or the rights and freedoms of others'.

[399] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[415]

Recommendation 12

Whether rights are limited

If Part 2 is retained, then SARC recommends that consideration be given to altering the guidelines and practices for drafting of statements of compatibility and, where necessary, particular human rights in Part 2 to avoid occasions when routine, minor provisions are regarded as limiting a human right.

Charter s. 7(2)

[400] Charter s. 7(2) provides that:

> *A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –*
>
> *(a) the nature of the right; and*

412 E.g. the statement of compatibility to the Consumer Acts Amendment Bill 2011, discussing a criminal offence in substituted s. 55 of the *Estate Agent Act 1980*.

413 SARC provided some guidance on statements of compatibility for reverse onus provisions in its *Practice Note No. 3*, issued in 2010.

414 E.g. the statement of compatibility for the Crown Land (Reserves) Amendment (Carlton Gardens) Bill 2008 and the human rights certificate for the Transport (Conduct) Amendment Regulations 2008. See SARC, *Alert Digest No. 2 of 2008* (reporting on the Crown Land (Reserves) Amendment (Carlton Gardens) Bill 2008), pp. 1-2.

415 See Chapter 6, [687] and Recommendation 35.

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

SARC considers this portion of the analysis of human rights is properly placed in statements of compatibility. However, current statements often set out a separate discussion of each of the five paragraphs of Charter s. 7(2), even though the first three factors typically have already been addressed earlier in the statement and sometimes amount to little more than descriptions of the relevant provisions of the Bill and the Charter. On the other hand, the most significant requirements of Charter s. 7(2) – that the limit be 'under law', 'reasonable' and 'demonstrably justified' – often receive little express analysis.[416]

[401] The text of Charter s. 7(2) is taken from South Africa's post-apartheid Constitution, where its principal purpose is to regulate when that nation's courts may declare legislation invalid. SARC considers such a lengthy and convoluted test for reasonable limits is unsuitable for Victoria's Charter, where reasonable limits analyses must be performed, not only by higher courts, but throughout the government and (possibly) by all public authorities. SARC recommends Charter s. 7(2) be redrafted in plain language that is accessible to Victorians without reference to comparative jurisprudence and that the list of factors for mandatory consideration be removed or reduced, for example by deleting paras (a)–(c). A possible example is the test used by the High Court of Australia to determine whether or not Australian laws are compatible with the Australian Constitution's freedom of political communication, that is, whether the law is 'reasonably appropriate and adapted to serve a legitimate end'.[417]

[402] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[418]

Recommendation 13

Whether rights are reasonably limited

If Charter s. 7(2) is retained, then SARC recommends that the provision be redrafted to state the test for limiting rights in plain language that is accessible to Victorians without reference to comparative jurisprudence, and to remove or reduce the list of factors that must be considered when applying this test.

Scrutiny reports

[403] Several submissions recommend changes be made to Charter s. 30 or SARC itself to enhance SARC's capacity to achieve its functions under the Charter. According to one submission, SARC was unable to report on six Bills until after they were enacted and, of 108 letters that SARC wrote in relation to Charter compatibility, only 60 responses were received prior to the passage of the relevant Bill.[419] Several submissions recommended amendments to the Charter or the Parliament's standing orders to place some restrictions on the passage of Bills in the absence of a SARC report and/or a response to SARC correspondence.[420] Other recommendations included obliging Ministers to respond within a reasonable time to SARC queries or empowering SARC to recommend the adjournment of debate on a Bill.[421]

416 Submission 125 (Rob Watts), p. 57; Submission 155 (Youthlaw), p. 9; Submission 206 (Amy Fulton), p. 6; Submission 241 (Liberty Victoria), p. 24.

417 *See Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520.

418 See Chapter 6, [687] and Recommendation 35.

419 Submission 295 (Mallesons Human Rights Law Group), pp. 22-3.

420 Submission 155 (Youthlaw), p. 9; Submission 206 (Amy Fulton), p. 7; Submission 205 (Federation of Community Legal Centres), p. 16; Submission 211 (Public Interest Advocacy Centre), p. 11; Submission 2451 (Liberty Victoria,), p. 25;

[404] While SARC has limited powers under the *Subordinate Legislation Act 1994* to suspend statutory rules until the Parliament has considered its reports, no entity has such a power in relation to the Parliament's consideration of Bills. SARC considers recommendations that would impose limitations of any sort on parliamentary processes will infringe this core feature of Victoria's constitutional arrangements. Also, any rules that give SARC a function beyond its reporting role on Bills would be inconsistent with SARC's bipartisan nature. As former SARC Chair Carlo Carli stated at the inquiry's public hearings:[422]

> *I do not think any good comes from having SARC in conflict with the executive, such as saying that a bill will not go through the Parliament. I think both the formal role of writing to ministers and also the informal one where members, particularly SARC members who are members of the government and the chair who is a member of the government, have the opportunity to grab people in the corridor and have a chat are far more productive than trying to mandate those sorts of impediments or obstacles. At the end of the day if you force a minister to write a response in X amount of time, they will give you the response, but it might not be a very considered one.*

Each House of Parliament has the power to adjourn debates on Bills. On one occasion, the Legislative Council referred a Bill back to SARC for further consideration under its scrutiny terms of reference.[423]

[405] SARC observes that Charter s. 29 aims to ensure that Parliamentary processes are not affected by the Charter, by providing that:

> *A failure to comply with section 28 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.*

However, SARC observes that, due to an apparent drafting error, Charter s. 29 only applies to failures to comply with the Charter's provisions for statements of compatibility (in Charter s. 28) and not its requirement for scrutiny by SARC (in Charter s. 30.) The equivalent provision in the *Human Rights Act 2004* (ACT) applies to that Act's requirements for both compatibility statements and committee reports.[424] SARC accordingly recommends that Charter s. 29 be amended so that it also applies to non-compliance with Charter s. 30.

[406] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[425]

Recommendation 14

Scrutiny of Acts and Regulations Committee

If Charter s. 30 is retained, then SARC recommends that Charter s. 29 be amended to clarify that a failure to comply with Charter s. 30 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or any other statutory provision.

[407] A number of submissions recommended that SARC establish a human rights subcommittee with functions that go beyond scrutiny of Bills, including reporting on planned legislation, existing legislation and

Submission 262 (Victorian Council of Social Services), p. 14; Submission 263 (Human Rights Law Centre), p. 13; Submission 295 (Mallesons Human Rights Law Group), p. 21.

421 Submission 138 (Fitzroy Legal Service), p. 7; Submission 205 (Federation of Community Legal Centres), p. 17; Submission 262 (Victorian Council of Social Services), p. 14; Submission 263 (Human Rights Law Centre), p. 13; Submission 272 (Catholic Archdiocese of Melbourne), p. 13; Submission 278 (VEOHRC), p. 144; Submission 295 (Mallesons Human Rights Law Group), p. 23.

422 SARC, Transcript of Public Hearings, 21 July 2011, Carlo Carli, p. 4.

423 See SARC, *Report on the Police Integrity Bill 2008*, June 2008.

424 *Human Rights Act 2004* (ACT), s. 39.

425 See Chapter 6, [687] and Recommendation 35.

systemic human rights issues.[426] SARC notes that, while both the UK and federal Parliaments have created or propose to create Joint Committees on Human Rights with broader functions of investigating human rights issues, those committees are additional to existing committees for scrutiny of bills.[427] The question of whether an additional committee is needed to examine broader human rights issues is a matter for the Parliament.

Amendments to Bills

[408] Several submissions raised concerns about the scrutiny of amendments made to Bills during parliamentary debate.[428] Charter s. 28 is limited to Bills as introduced and therefore does not require statements of compatibility in respect of amendments to Bills. SARC observes that proposing amendments to Bills is an important way for members of Parliament to debate the merits of Bills and that it would be onerous to require a statement of compatibility for all proposed amendments.

Amendments that broaden a Bill's purpose clause

[409] On two occasions since the Charter's commencement, a House amendment has broadened the purpose clause of a Bill. In the previous Parliament, the Crimes Legislation Amendment Bill 2010 (an omnibus Bill) was amended to provide for and validate a broader class of suppression orders by Royal Commissions. In the current Parliament, the Justice Legislation Amendment (Infringement Offences) Bill 2011 (which extended the trial period for some infringement offence provisions) was amended to retrospectively classify some infringement offences as 'lodgeable' and to validate past enforcement actions. Following a query by SARC in relation to the latter Bill, the Attorney-General has indicated that, in future, he will provide compatibility information to SARC about amendments to Bills in his portfolio that are unrelated to their original purpose.[429]

[410] SARC considers that amendments of this sort could be regarded as, in substance, equivalent to new Bills introduced into the Parliament. SARC therefore recommends that Charter s. 28 be amended to require a statement of compatibility in respect of such a proposed amendment drafted by the member who proposes to circulate it and laid before the relevant House when the amendment is circulated. While SARC recognises such amendments are often proposed as a matter of urgency, it observes that the same may be said of some Bills. Charter s. 29 provides that there are no consequences for the validity, operation or effect of statutory provisions if Charter s. 28 is not complied with. The absence of a statement of compatibility for such a proposed amendment is, therefore, a matter for the Parliament.

[411] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[430]

Recommendation 15

Statements of compatibility for proposed amendments

If Charter s. 28 is retained, then SARC recommends that it be amended to extend its requirements for Bills so that they also apply to proposed House amendments to a Bill that broaden the Bill's purpose clause.

426 Submission 122 (Carlo Carli), p. 3; Submission 211 (Public Interest Advocacy Centre), p. 11; Submission 262 (Victorian Council of Social Services), p. 14; Submission 263 (Human Rights Law Centre), p. 13; Submission 278 (VEOHRC), p. 146; Submission 295 (Mallesons Human Rights Law Group), p. 27.

427 See Submission 97 (Office of the Victorian Privacy Commissioner), p. 4.

428 Submission 205 (Federation of Community Legal Centres), p. 16; Submission 278 (VEOHRC), p. 142.

429 SARC, *Alert Digest No. 8 of 2011*, p. 13 (reporting on the *Justice Legislation Amendment (Infringement Offences) Act 2011*).

430 See Chapter 6, [687] and Recommendation 35.

Amendments that are accepted by both Houses

[412] In the case of other amendments, SARC recommends that a revised statement of compatibility be prepared and tabled only in the event that proposed amendments are accepted by both Houses. As is the case for the present practice of preparing a revised explanatory memorandum for amended Bills, this requirement will not limit parliamentary debate, as it only operates after the amendment has been debated and does not interfere with the Parliament's ability to proceed to a vote on the Bill itself. A revised statement of compatibility will be unnecessary in the case of amendments that do not alter whether or not a Bill limits a human right.

[413] An appropriate timeframe for the tabling of the revised statement in the Parliament is indicated by s. 17(1)(c) of the *Parliamentary Committees Act 200*3 (inserted by the Charter), which permits SARC:

> *(c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –*
>
> *(i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or*
>
> *(ii) within 10 sitting days after the Act receives Royal Assent –*
>
> *whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs; …*

To ensure that the revised statement of compatibility is available to SARC if it exercises this function in relation to an Act that results from an amended Bill, SARC recommends that the revised statement of compatibility be tabled in advance of the time specified in s. 17(1)(c).

[414] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[431]

Recommendation 16

Revised statements of compatibility

If Charter s. 28 is retained, then SARC recommends that it be amended to require that, if amendments are accepted by both Houses, the member who introduced the Bill shall cause the preparation of a revised statement of compatibility and cause that statement to be laid before both Houses of Parliament in advance of the time specified in s. 17(1)(c) of the Parliamentary Committees Act 2003.

Scrutiny of amended Bills

[415] The five-year review of the *Human Rights Act 2004* (ACT) includes a recommendation that 'All amendments introduced on the floor of the Assembly should be referred to the Scrutiny Committee unless they are urgent, minor or in response to a Scrutiny Committee report.'[432] SARC considers that this proposal may restrict parliamentary proceedings and notes that SARC already has the capacity to issue fresh reports on Bills that it has already reported on.[433]

[416] However, the terms of s. 17(c) do not expressly cover occasions when SARC reported on a Bill but the resulting Act (because of House amendments) contained provisions that differed to the Bill. On the two occasions that SARC has reported on such amendments, it relied on the chance event that the

431 See Chapter 6, [687] and Recommendation 35.

432 ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation*, May 2009, pp. 320-3.

433 Parliament of Victoria, *Parliamentary Debates (Hansard)*, Legislative Council, 56th Parliament, 1st Session, 9 May 2008, p. 1665.

amendments broadened the purpose clause of the Bill (and, thus, could be equated to a new Bill).[434] SARC recommends that s. 17(c) be amended to clarify that SARC may report on provisions of Acts that were not considered when they were provisions of Bills.

[417] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[435]

Recommendation 17

SARC reports on amended Bills

If s. 17(1)(c) of the Parliamentary Committees Act 2003 is retained, then SARC recommends that it be amended to clarify that the Scrutiny of Act and Regulations Committee may consider any provisions of an Act that were not considered by SARC when the Act was a Bill.

National Uniform Legislation Schemes

[418] In a number of its scrutiny reports, SARC has drawn attention to the issues of scrutiny (including scrutiny in relation to Charter rights) raised by national uniform legislation schemes, where a Victorian law gives force and effect to a non-Victorian law.[436] Statements of compatibility for Bills for such schemes usually include a human rights assessment of the non-Victorian laws, and regulations under them, that are enacted or proposed to be enacted when the Victorian Bills are introduced.[437] However, there is no provision in the Charter for statements of compatibility for subsequent amendments to the non-Victorian laws, or regulations subsequently made under them, as those amendments and regulations are made by non-Victorian bodies. So, new laws may become applicable in Victoria, pursuant to Victorian statutes, without the Parliament being advised of their human rights impact.

[419] SARC recommends that consideration should be given to providing for a system of statements of compatibility and human rights certificates for new laws made under national uniform legislation schemes that is equivalent to the Charter's procedures for new laws made by the Victorian Parliament and executive. Such a process may help to ensure that members of Parliament are informed about significant changes to national uniform legislation schemes. The process would not impinge on or involve other participating Australian jurisdictions, as the preparation of the statements and certificates will be done within the section of the Victorian public service that is responsible for Victoria's participation in the national cooperative scheme. For example, the formal requirement for preparing the statement or certificate could be imposed on the Minister responsible for the Victorian statute that gives the national uniform legislation scheme force and effect in Victoria. The passage of the Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) may mean that, in some instances, equivalent statements of compatibility and human rights certificates will already be prepared by the federal government and could simply be tabled in the Victorian Parliament.

[420] This recommendation is relevant to both of the options for reform or improvement of the Charter that are recommended by SARC for consideration at the conclusion of this Report.[438]

434 SARC, *Alert Digest No. 4 of 2010* (reporting on the *Crimes Legislation Amendment Act 2010*), pp. 5-7; SARC, *Alert Digest No. 7 of 2011* (reporting on the *Justice Legislation Amendment (Infringement Offences) Act 2011*), pp. 4-7.

435 See Chapter 6, [687] and Recommendation 35.

436 E.g. SARC, *Alert Digest No. 8 of 2009* (correspondence on the Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009); SARC, *Alert Digest No. 12 of 2009* (correspondence on the Fair Work (Commonwealth Powers) Bill 2009); SARC, *Alert Digest No. 13 of 2009* (reporting on the Health Practitioner Regulation National Law (Victoria) Bill 2009). See also Submission 122 (Carlo Carli), p. 4; Submission 205 (Federation of Community Legal Centres), p. 16.

437 See SARC, *Practice Note No. 3*, 2010.

438 See Chapter 6, [687] and Recommendation 35.

Recommendation 18

Compatibility information about national uniform legislation schemes

If Charter s. 28 is retained, then SARC recommends that consideration be given to providing for a system for causing the preparation and laying before the Parliament of statements of compatibility for amendments to national uniform legislation schemes, and human rights certificates for regulations made under those schemes.

[421] Some recent national uniform legislation schemes include provisions for scrutiny of regulations made under those laws by SARC.[439] However, such provisions are not uniform and do not apply to amendments made to the statutes that comprise those schemes. SARC recommends that consideration be given to providing for a system for referring both amendments to non-Victorian statutes that have force and effect in Victoria pursuant to a Victorian law, and regulations under those statutes, for scrutiny by SARC.

[422] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[440]

Recommendation 19

Scrutiny of national uniform legislation schemes

If Charter s. 30 is retained, then SARC recommends that consideration be given to providing for a system for referring amendments to non-Victorian laws that a Victorian law gives force and effect to in Victoria, and regulations under those laws, to SARC for scrutiny.

Exemptions from the Charter's parliamentary scrutiny provisions

[423] Since the Charter's commencement on 1 January 2007, only one Bill – the Abortion Law Reform Bill 2008 – lacked a statement of compatibility. When she introduced that Bill into the Parliament, the Minister for Women's Affairs remarked:

> *In accordance with section 48 of the Charter of Human Rights and Responsibilities, a statement of compatibility for the Abortion Law Reform Bill 2008 is not required.*
>
> *The effect of section 48 is that none of the provisions of the charter affect the bill. This includes the requirement under section 28 of the charter to prepare and table a compatibility statement and the obligation under section 32 of the charter to interpret statutory provisions compatibly with human rights under the charter.*

A statement of compatibility was prepared for an earlier private members bill on the decriminalisation of abortion; however, that statement cited Charter s. 48 to conclude that the Bill 'does not raise any human rights issues'. In the second reading speech to the Charter, the then Attorney-General described the purpose of Charter s. 48 as follows:

> *The government is mindful of the range of strong community views on this issue and has never intended the charter, which is aimed at enshrining the generally accepted core civil and political rights, to be used as a vehicle to attempt to change the law in relation to abortion.*

SARC issued a Charter s. 30 report on the Abortion Law Reform Bill 2008, including its argument that Charter s. 48 did not apply to the Charter's provisions for scrutiny of Bills.[441]

439 E.g. *Education and Care Services National Law Act 2010* Schedule 1, cl. 303(2).

440 See Chapter 6, [687] and Recommendation 35.

441 SARC, *Alert Digest No. 11 of 2008* (reporting on the Abortion Law Reform Bill 2008), pp. 4-8.

[424] Also, a number of statutory rules were issued without a human rights certificate as a result of s. 12A(3)(a) of the *Subordinate Legislation Act 1994*, which provides an exemption where 'the responsible Minister certifies in writing that in his or her opinion … the proposed statutory rule is a rule which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal.' In response to a query from SARC about the purpose of s. 12A(3)(a), the Attorney-General responded:[442]

> *The reason for the exemption is that the Government was of the view that the exemptions should mirror the exemptions in section 8(1) of the Subordinate Legislation Act with respect to the requirement to prepare a regulatory impact statement in respect of statutory rules.*
>
> *Despite the fact that these statutory rules do not require the preparation of a human rights certificate, I note that, pursuant to section 21(1)(ha) of the Subordinate Legislation Act, the Scrutiny Committee may nevertheless report to each House of the Parliament if the Committee considers that any statutory rule laid before Parliament is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities.*

However, there is no similar exemption from the requirement for a human rights certificate for statutory rules that fall within most of the remaining exemption categories in s. 8(1) of the *Subordinate Legislation Act 1994*, including rules that impose no significant burden, fee increases, rules necessary under national uniform legislation schemes and the like.

[425] SARC considers that the issues of whether or not controversial laws should be subject to the Charter's provisions for legal proceedings and whether or not proposed statutory rules should be subject to prior public consultation are separate from the question of whether or not the Parliament should be provided information about their human rights impact. While SARC may report to the Parliament on such legislation, SARC's capacity to make effective reports to the Parliament may be affected by the absence of compatibility documents that set out a member or Minister's case for the compatibility of those provisions with human rights. SARC therefore recommends that consideration be given to removing these two subject-matter-based exceptions to the Charter's and the *Subordinate Legislation Act 1994*'s provisions for scrutiny of new legislation.[443]

[426] This recommendation does not apply to exemptions based on matters other than subject-matter, such as the current exemptions for classification regulations, extension regulations and emergency legislative instruments.[444] SARC also notes that courts and tribunals should be consulted about any changes that affect the development of rules by courts and tribunals themselves.

[427] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[445]

Recommendation 20

Exemptions from scrutiny of new legislation

If Charter s. 28 and s. 12A of the Subordinate Legislation Act 1994 are retained, then SARC recommends that consideration be given:

(a) to amending Charter s. 48 to provide that it does not affect the provisions for scrutiny of new legislation in Division 1 of Part 3 of the Charter

(b) to examining, in consultation with Victoria's courts and tribunals, whether the exemption from the requirement for human rights certificates in s.12A(3)(a) of the Subordinate Legislation Act 1994 is necessary.

442 SARC, *Annual Review 2007 Regulations 2007*, 2008, pp. 31-2.
443 See Submission 292 (Catholic Social Services Victoria), p. 21.
444 *Subordinate Legislation Act 1994*, ss. 12A(3)(b)-(c) and 12D(3).
445 See Chapter 6, [687] and Recommendation 35.

Override declarations

[428] The inquiry received a number of submissions recommending the repeal of the Charter's provision for 'override declarations', arguing that, while such provisions play an appropriate role in human rights laws that limit parliamentary sovereignty, they have no relevant role to play under the Charter.[446] For example, the Human Rights Law Centre argued:[447]

> *An override declaration is unnecessary in the Victorian Charter because Parliament already has the ability to pass legislation that is not compatible with human rights, if it so intends. Typically, a derogation or override provision has relevance in a Constitutional Charter model, such as in Canada, where the Charter otherwise prevents Parliament from passing laws that are incompatible with human rights.*

By contrast, some submissions argued that the conditions for using an override declaration should be tightened.[448] For example, the Law Institute of Victoria argued:[449]

> *[T]he general override provision should be removed because it is inconsistent with our international law commitments to the extent that human rights cannot be abrogated except in limited circumstances. If retained, the override provision should be amended so that it does not apply to rights that are absolute or which cannot be limited in times of emergency under international law.*

[429] The key subsections of Charter s. 31 provide:

> *(1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.*
>
> *(3) A member of Parliament who introduces a Bill containing an override declaration, or another member acting on his or her behalf, must make a statement to the Legislative Council or the Legislative Assembly, as the case requires, explaining the exceptional circumstances that justify the inclusion of the override declaration.*
>
> *(6) If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.*
>
> *(7) A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.*

Charter s. 31 is based on the so-called 'notwithstanding' clause in Canada's *Charter of Rights and Freedoms*.[450] In contrast to Victoria's Charter, Canada's Charter limits the sovereignty of all Canadian Parliaments by allowing Canada's courts to declare that statutes are invalid because they are incompatible with human rights.[451] However, the 'notwithstanding' clause permits any Canadian Parliament to expressly declare that a statute is valid notwithstanding its incompatibility with human rights. In the Canadian Charter's first decade, the clause was used on a limited number of occasions to reverse or prevent court decisions invalidating legislation.[452]

446 Submission 114 (Julie Debeljak), p. 26; Submission 122 (Carlo Carli), p. 4; Submission 263 (Human Rights Law Centre), pp. 13-14; Submission 285 (Castan Centre for Human Rights Law), pp. 12-13.

447 Submission 263 (Human Rights Law Centre), pp. 13-14.

448 Submission 110 (Peninsula Community Legal Centre), p. Submission 114 (Julie Debeljak), p. 28; Submission 247 (Law Institute of Victoria), p. 26.

449 Submission 247 (Law Institute of Victoria), p. 26.

450 *Constitution Act 1982* (Can.), s. 33.

451 *Constitution Act 1982* (Can.), s. 32.

452 E.g. *Land Planning and Development Act 1982* (Yukon Territory), s. 39(1); *SGEU Dispute Settlement Act 1986* (Saskatchewan), s. 9; *An Act to Amend the Charter of the French Language 1988* (Quebec), s. 10. See also *Marriage Act 2000* (Alberta), s. 2.

[430] In Victoria, the role of override declarations is very different, because Victoria's Charter does not expressly limit parliamentary sovereignty. Some submissions argue that declaration regimes such as Charter s. 31 may cause the Parliament to refrain from legislative actions that fall outside the dialogue model envisaged by the Charter (e.g. by choosing not to enact laws that are incompatible with Charter rights absent the extraordinary circumstances envisaged by Charter s. 31).[453] Others argue that the dialogue model (including Charter s. 31) does not disturb the Parliament's role as the sole and final decision-maker on whether or not to enact any statute.[454] SARC observes that, regardless of whether or not an override declaration is made, the Victorian Parliament retains its legal power to enact any legislation, including legislation that it or a court regards as incompatible with human rights. In particular, the Charter provides that neither the absence of a declaration under Charter s. 31 nor the making of a court declaration of inconsistent interpretation 'affect in any way the validity, operation or enforcement' of the relevant statutory provision.[455] For example, both the legislation permitting random weapons searches (which was accompanied by a statement that the legislation was partially incompatible with human rights) and the deemed possession provision in Victoria's drugs statute (which the Court of Appeal declared to be incapable of interpretation consistently with human rights) are and will remain valid in Victoria, even though neither included an override declaration.[456]

[431] Charter s. 31 has not been used since the Charter commenced. In relation to several Bills (including a Bill that was accompanied by a statement of incompatibility), SARC wrote to the Minister seeking information as to why no override declaration was made.[457] In each case, the Minister responded that he or she considered that there were no exceptional circumstances that justified such a declaration, noting that such circumstances would require a major emergency, such as a terrorist attack.[458] SARC observes that, if override declarations are confined to emergencies (whether pursuant to government practice or as a result of amendments to Charter s. 31), then they may be redundant, as emergency legislation will inevitably be accompanied by parliamentary statements about the circumstances, will typically be accompanied by sunset provisions and will usually be a reasonable limit on relevant human rights.[459]

[432] SARC considers that Charter s. 31 is unnecessary in any event, given that the Charter is an ordinary statute and the Parliament is therefore free to amend or repeal it at any time, or to pass a Bill that is incompatible with human rights. Also, the inclusion of Charter s. 31 may create the misleading impression that an override declaration is the only way that the Charter can be 'overridden'. Accordingly, SARC recommends that Charter s. 31 be repealed. To avoid doubt, the amending statute or explanatory memorandum should expressly state that Charter s. 31 has been repealed in order to confirm the Parliament's continuing authority to enact any statute, including statutes that are incompatible with human rights.

[433] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[460]

453 E.g. SARC, Transcript of Public Hearings, 20 August 2011, Institute of Public Affairs, pp. 2, 6.

454 E.g. SARC, Transcript of Public Hearings, 19 August 2011, Law Institute of Victoria, p. 7; SARC, Transcript of Public Hearings, 20 August 2011 Office of the Public Advocate, p. 6.

455 Charter ss. 31(9) and 36(5).

456 See *Control of Weapons Act 1990*, s. 10G; *Drugs, Poisons and Controlled Substances Act 1983*, s. 5.

457 E.g. SARC, *Alert Digest No. 7 of 2007*, p. 14 (reporting on the Superannuation Legislation Amendment (Contribution Splitting and Other Measures) Bill 2007); SARC, *Alert Digest No. 14 of 2009* (reporting on the Summary Offences and Control of Weapons Acts Amendment Bill 2009), p. 46.

458 E.g. SARC, *Alert Digest No. 1 of 2010* (reporting on the Summary Offences and Control of Weapons Acts Amendment Bill 2009), p. 54.

459 See also Submission 122 (Carlo Carli), p. 4.

460 See Chapter 6, [687] and Recommendation 35.

Recommendation 21

Override declarations

If the Charter is retained, then SARC recommends that Charter s. 31 be repealed. To avoid doubt, the amending statute or explanatory memorandum should expressly state that Charter s. 31 has been repealed in order to confirm the Parliament's continuing authority to enact any statute, including statutes that are incompatible with human rights.

4.3 The provision of services, and the performance of other functions, by public authorities

Relevant provisions of the Charter

[434] Public authorities are primarily regulated by Charter s. 38(1), which states:

> *Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.*

The meaning of 'public authority' is defined at length in Charter s. 4 and extends to both state entities and 'functional' public authorities (i.e. non-state bodies carrying out public functions on behalf of Victoria).

[435] In addition, the *Public Administration Act 2004* sets out a non-enforceable 'public service value' requiring 'public officials' (including public sector employees and some public office holders) to make decisions and provide advice consistently with the Charter and to actively implement, promote and support the human rights set out in the Charter.[461] 'Public sector body Heads' are required to 'promote' this value to public officials, to ensure that 'statements of values' adopted or applied by the body are consistent with this value and to establish employment processes that ensure the human rights set out in the Charter are upheld.[462] As well, the Director, Police Integrity has a function of ensuring members of Victoria Police 'have regard to' Charter rights.[463]

[436] Charter s. 38(1) came into force on 1 January 2008 and has therefore been in operation for over three and a half years. The provisions of the *Public Administration Act 2004* and a provision giving a function to the Director, Police Integrity relating to the Charter commenced a year earlier and have therefore been in operation for over four and a half years.

Discussion

[437] The provision of services and other functions by public authorities occurs both internally within those authorities, in private or semi-private interactions with individuals and in public or semi-public interactions with the community. Public authorities, their functions and the impact of the Charter are likely to vary dramatically across this very broad part of Victorian life. There are three main categories of information available to the inquiry about the Charter's effects on public authorities: public authorities themselves, people who deal with them and bodies that assess their compliance with the Charter.

Public authorities

[438] Public authorities, although often best placed to identify the impact of the Charter on their services and other functions, face barriers to communicating this experience publicly, including that those communications concern ongoing, enforceable legal obligations and that being implicated in limitations of

461 *Public Administration Act 2004*, s. 7(1)(g) but see s. 7(4).
462 *Public Administration Act 2004*, ss. 7(2) and 8(ca).
463 *Police Integrity Act 2008*, s. 8(1)(d).

human rights may be damaging to an entity's reputation.[464] This barrier was partly avoided in a 'focus group' study of an unnamed statutory entity, whose anonymous employees voiced sharp criticisms of the government and various unnamed departments and agencies for their lip service to the Charter,[465] but SARC observes it has no way to assess the accuracy of either the study's or the participants' claims, or their representativeness. VEOHRC's reports and submission have compiled a lengthy list of activities of public authorities attributed to Charter s. 38 that have been reported to it those authorities, which have in turn been relied on in a number of submissions to the inquiry, including the government submission.[466] However, SARC observes that it is difficult for either itself or VEOHRC to assess whether these activities were the result of the Charter and that, in some instances, cabinet-in-confidence protocols prevent the government from providing additional information (e.g. about the outcomes of auditing processes) beyond what was provided to VEOHRC by previous governments.[467]

[439] The government's submission to the inquiry details the following ways that the Charter affected government departments:

- In 2007 and 2008, the Departments of Education and Early Childhood Development, Human Services and Justice audited their policies and procedures against Charter rights. The submission states that the audit yielded a 'number of changes', including to policies for student dress codes and strip searches, but that '[s]ome departments' made no changes as their existing policies were assessed as compatible.[468] Following the audit process, the Charter was considered when policies were developed or reviewed, for example the Human Rights Unit being consulted on policies concerning hunger strikes and transgender prisoners.[469]
- Internal government decision-making was affected by the Charter as a result of express requirements in policies (e.g. on children of female prisoners and transfer of public housing tenancies), internal appeal mechanisms (e.g. in public housing), 'audit tools' (e.g. the incorporation of information about the Charter into the Standard Operating Procedures for liquor licensing officers), contractual requirements (e.g. the Victorian Prisoner Transport Contract) and litigation (e.g. prompting the Mental Health Review Board to conduct monthly audits of its adjourned hearings to ensure compliance with statutory timeframes.)[470]
- External interactions were also affected by the Charter, with the submission citing two published service standard documents that refer to the Charter. Clients also raised the Charter, albeit in a variety of ways, ranging from non-specific references to the Charter (e.g. in a 'diminishing' number of prisoner complaints) to the incorporation of 'allegations of negative impacts on specific rights' into the existing 'frequent correspondence and communication' about decision-making (e.g. in tenancy cases) and detailed references to the Charter by advocates (e.g. in involuntary treatment cases).[471]

The government submission observes that a number of aspects of public services and functions were largely unchanged by the Charter, with the audit resulting in no changes in '[s]ome departments'; the

464 See SARC, Transcript of Public Hearings, 20 July 2011, Public Interest Law Clearing House, p. 9.
465 Submission 105 (Rob Watts), pp. 90-7.
466 VEOHRC, *Emerging Change*, April 2009, Chapter 7; VEOHRC, *Making Progress*, April 2010, Chapter 6; Submission 278 (VEOHRC), pp. 148-59 and see Submission 110 (Peninsula Community Legal Centre), p. 5; Submission 173 (Women's Health Victoria), p. 7; Submission 211 (Public Interest Advocacy Centre) p. 12; Submission 228 (Psychiatric Disability Services) pp. 3-4; Submission 241 (Liberty Victoria), pp. 27-9; Submission 245 (International Commission of Jurists), p. 26; Submission 247 (Law Institute of Victoria), p. 28; Submission 262 (Victorian Council of Social Services), p. 15; Submission 263 (Human Rights Law Centre), p. 20; Submission 324 (Victorian Government), p. 20.
467 See Submission 324 (Victorian Government), p. 5.
468 See Submission 324 (Victorian Government), p. 20 and see Department of Education and Early Childhood Development, 'School Policy and Advisory Guide: Human Rights and Anti-Discrimination Requirements' (for student dress codes) at < http://www.education.vic.gov.au/management/governance/spag/management/dresscode/humanrights.htm>; VEOHRC, *Emerging Change*, April 2009, p. 37.
469 Submission 324 (Victorian Government), p. 20.
470 Submission 324 (Victorian Government), pp. 20-1.
471 Submission 324 (Victorian Government), pp. 23-4.

Charter having 'little impact' on government decision-making and 'merely reinforc[ing] existing practice' in 'other areas' than those identified; and service standards 'often' based on Australia-wide or international standards that are 'adapted' to the Victorian context.[472]

[440] Many submissions to the inquiry from public authorities were from local government bodies. The Municipal Association of Victoria's submission remarked that initial concerns that the Charter would be burdensome proved unfounded, with the Charter instead proving to be a continuation of existing Council programs for engaging with communities.[473] When asked during the public hearings what impact the repeal of the Charter would have on local government and its ratepayers, Andrew Rowe (the Association's councillor development officer) responded:[474]

> *To be frank, I am not sure that there would be an overwhelming impact on local government or the community. I think what the charter does is provide a framework for councils to engage in a lot of the work they have been engaged in consistently in Victoria for the past 20 years in the whole social justice and community development area.*

In its submission, the Victorian Local Governance Association remarked that one concern of Councils was the lack of recognition 'of the impact of time and resources in meeting the reporting requirements of the Charter'.[475] The Association's submission focused on efforts to create a human rights 'culture' (notably in service staff) and on the barriers to the Charter's implementation in some rural Councils (where the Charter is perceived as a 'Melbourne issue').[476] It described two projects, which led to the creation of a human rights toolkit[477] and the identification of significant barriers to rural Councils' participation in human rights training.[478] In addition to reviews of Local Laws (discussed earlier in this chapter), activities in compliance with Charter s. 38 identified in submissions include formal processes to assess the human rights impact of Council decisions, targeted or prioritised service delivery for Indigenous Victorians and people with disabilities and the formation of a proactive Human Rights Working Group.[479]

[441] Submissions were received from a number of other bodies that identified (or treated) themselves as public authorities to the effect that the Charter had augmented and refined existing practices.[480] However, submissions were also received from the former Director of Public Prosecutions and a public servant arguing that the application of Charter s. 38 to their decision-making did or would add time, complexities and costs to their functions and interfere with their roles.[481] In addition, representatives from the Adult Parole Board outlined the rationale for the Board's exclusion (by regulation) from Charter s. 38 at the Inquiry's public hearings (an exemption that will expire, unless renewed, on 27th December 2013.[482]) Justice Simon Whelan explained that the Board received legal advice that, in order to comply with the Charter, the Board would have to provide hearings to prisoners when making decisions about

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472 Submission 324 (Victorian Government), pp. 20, 21, 23.

473 Submission 192 (Municipal Association of Victoria), p. 3. See also Submission 112 (Manningham City Council), p. 1; Submission 143 (Hume City Council), pp. 7-8; Submission 188 (City of Port Phillip), p. 14. However, Submission 207 (City of Stonnington), p. 2 remarked that human rights analysis 'means applying an unnecessary extra layer'.

474 SARC, Transcript of Public Hearings, 19 July 2011, Municipal Association of Victoria, p. 3.

475 Submission 204 (Victorian Local Governance Association), p. 5.

476 Submission 204 (Victorian Local Governance Association), pp. 14, 16, 35.

477 Submission 204 (Victorian Local Governance Association), pp. 7-8, 13.

478 Submission 204 (Victorian Local Governance Association), pp. 6 and 10, 32-5.

479 Submission 204 (Victorian Local Governance Association), p. 15. See also Submission 52 (Yarra City Council), p. 6; Submission 111 (City of Darebin), pp. 10-11; Submission 112 (Manningham City Council), pp. 1-2; Submission 145 (Hume City Council), pp. 5-7; Submission 188 (City of Port Phillip), pp. 15-18; Submission 191 (Yarra Ranges Council), p. 1.

480 Submission 150 (Magistrates' Court of Victoria), p. 2; Submission 170 (Victoria Police), p. 3; Submission 158 (Office of the Public Advocate), p. 7; Submission 205 (Federation of Community Legal Centres), p. 18; Submission 240 (Disability Services Commissioner), p. 3; Submission 277 (Hanover Welfare Services), pp. 5-6; Submission 299 (Office of Police Integrity), pp. 5-6 but see Submission 230 (Centre for Intelligence in Child and Family Welfare), p. 6, reporting no use of the Charter in its advocacy by its member organisations.

481 Submission 5 (Jennifer Pakula); Submission 46 (Jeremy Rapke), p. 2.

482 SARC, Transcript of Public Hearings, 22 July 2011, Adult Parole Board. See *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009*, s. 6.

parole, including decisions about conditions, cancellations, refusals and youth transfers. David Provan of the Board estimated that the direct recurrent cost to the Board would be $1.6 Million (i.e. 60% of the Board's present budget.) Justice Whelan added that the change would also alter the 'philosophical basis' of the Board's operations (which is premised on prisoners' lack of a right to liberty), reduce the Board's willingness to grant parole (because of potential obstacles to conditions and cancellations), increase the risk of Supreme Court litigation and require legislative amendments, imposing additional costs, including the potential cost of housing and managing prisoners who would otherwise be paroled. However, other submissions to the Inquiry argued that these concerns were premised on an overstatement of the obligations that the Charter would impose on the Board.[483]

[442] SARC notes that there are many public authorities that have not made a submission to the inquiry, for example, key service providers such as educational facilities, suppliers of electricity, gas and water, public transport operators and Victoria's tribunals. Some witnesses at the inquiry's public hearings said that the Charter had little positive effect in hospitals and health services.[484]

People who deal with public authorities

[443] People who deal with public authorities, although best placed to understand the actual outcomes of changes to services or other functions, also face a number of barriers to communicating this experience, including their potentially ongoing relationship with the public authority, the potentially private nature of their interaction and the difficulty of judging the impact of the Charter from their own experiences. VEOHRC's most recent compilation report includes an 'online survey' of 89 selected organisations and 'unaffiliated' individuals, with almost half of the organisations and less than a third of the individuals perceiving a positive impact of the Charter on decision-making processes, accountability, transparency and service delivery by public authorities.[485]

[444] An additional source of information is organisations that represent or advocate for recipients of services from public authorities. The inquiry received a number of submissions from such bodies asserting that the Charter has had a profound positive effect on the behaviour of public authorities.[486] For example, a detailed submission from the PILCH Homeless Persons Legal Clinic described 20 instances of public housing decisions that illustrated the Charter's potential impact. One case study concerned a man who faced eviction from public housing after his partner (the tenant) died and he was unable to demonstrate 12 months' continuous residency at the premises.[487]

> *The HPLC appealed to the Housing Appeals Office. The Charter was used to highlight Ben's hardship and the need to properly consider his circumstances before evicting him. The appeal highlighted the OOH's [Office of Housing's] obligations under section 38 of the Charter and queried whether Ben's rights under section 13(a) of the Charter (not to have his home or privacy arbitrarily or unlawfully*

483 E.g. Submission 295 (Mallesons Human Rights Law Group), p. 39.

484 SARC, Transcript of Public Hearings, 21 July 2011, Jo Grainger, p. 9; SARC, Transcript of Public Hearings, 21 July 2011, Doctors in Conscience, p. 5.

485 VEOHRC, *Making Progress*, April 2010, p. 14.

486 Submission 95 (Victorian Bar), pp. 7-8; Submission 97 (Office of the Victorian Privacy Commissioner), p. 5; Submission 100 (Tenants Union of Victoria), pp. 9-10; Submission 138 (Fitzroy Legal Service), pp. 4-5; Submission 146 (Leadership Plus), pp. 6-13; Submission 148 (Youth Affairs Council Victoria), pp. 15-17; Submission 149 (Community Connections), pp. 3-4; Submission 151 (Council of Homeless Persons), pp. 2-6; Submission 158 (Office of the Public Advocate), pp. 3-8; Submission 159 (Disability Justice Advocacy), pp. 4-6; Submission 165 (Michael Power), p. 2; Submission 166 (Council on the Ageing), p. 5; Submission 171 (Victoria Legal Aid), pp. 1-3; Submission 205 (Federation of Community Legal Centres), pp. 19-21; Submission 211 (Public Interest Advocacy Centre), pp. 13-14; Submission 220 (Psychiatric Disability Services), pp. 3-4; Submission 229 (Jesuit Social Services), pp. 9-10; Submission 240 (Disability Services Commissioner), pp. 4-7; Submission 257 (Public Interest Law Clearing House), pp. 6-7; Submission 258 (Victorian Aboriginal Legal Service), pp. 39-40; Submission 262 (Victorian Council of Social Services), pp. 17-19; Submission 263 (Human Rights Law Centre), pp. 23-6; Submission 278 (VEOHRC), pp. 159-60; Submission 281 (Grampians Region Homelessness Network), pp. 1-5; Submission 296 (Mental Health Legal Centre), pp. 11-14.

487 Submission 83 (PILCH Homeless Persons Legal Clinic), pp. 10-11.

> *interfered with) had been given proper consideration in making the decision to reject his application for transfer.*
>
> *While the appeal was on foot, as a result of the stress and grief, Ben had a breakdown and was hospitalised. He was discharged under a mental health care plan, but his mental health remained fragile. This matter was resolved without going to VCAT [the Victorian Civil and Administrative Tribunal]. After being prompted by the Housing Appeals Office, the relevant housing office indicated that they did not want to evict Ben into homelessness, but could not leave him in the three bedroom property he was in because he was a single man. Ben accepted this, saying 'I'm not greedy; I just don't want to be on the streets,' and willingly relocated to a one bedroom unit.*

The submission contrasted this case study with a pre-Charter matter where a tenant's death led to the eviction of her partner and his children into homelessness, as he was unable to meet the 12 months' residency requirement due to his incarceration in prison during that period.

[445] The Homeless Persons Legal Clinic argued the 20 case studies provided evidence of the following:[488]

- The passage of the Charter coincided with a shift from a strict to a flexible application of an Office of Housing policy regarding transfer of tenancies. The government submission confirms that there was a change of policy on transfers of tenancies from the earlier 'rather narrow' considerations to 'a broader range of factors being … taken into account', which it likewise attributes to the Charter.[489]
- A review of the practice of automatically issuing notices to vacate to tenants of transitional housing followed advocacy concerning the obligations of the housing manager under the Charter.
- Advocacy about the Charter prompted negotiated outcomes of disputes.
- Compliance with Charter s. 38 by housing manages did not preclude evictions, including evictions into homelessness.

More generally, the Clinic argued that the Charter had been welcomed as a decision-making tool by officials in the public housing sector, had generated an interest in human rights training and had prompted an ongoing review of presently 'strict' public housing policies that lead to cycles of homelessness.[490] In its submission and at the inquiry's public hearings, the Clinic argued the Charter produced these outcomes because of the breadth and individual focus of human rights obligations, in contrast to procedural, complex, unenforceable and burdensome sector-specific service standards.[491]

[446] While SARC considers these and similar submissions illustrate the potential impact of the Charter, it notes that:

- there was very little measurable data establishing a change in service provision or the performance of functions by public authorities[492]
- case studies of advocacy are inevitably subjective and there is generally no evidence of the perspectives of the relevant public authorities

488 Submission 83 (PILCH Homeless Persons Legal Clinic), pp. 10-12, 12-14, 16-19, 26-9 and see Submission 63 (Michael Pearce), p. 5; Submission 262 (Victorian Council of Social Services), Victorian Community Sector: pp. 8-9.

489 Submission 324 (Victorian Government), p. 21.

490 Submission 83 (PILCH Homeless Persons Legal Clinic), pp. 19-25.

491 Submission 83 (PILCH Homeless Persons Legal Clinic), pp. 43-50; SARC, Transcript of Public Hearings, Public Interest Law Clearing House, 20th August 2011, p. 8 and see Submission 151 (Council of Homeless Persons), p. 7.

492 An exception was evidence at the Inquiry's public hearings by Jenny Smith, the CEO of the Council to Homeless Persons, who stated that referrals by the Council (a shopfront for complaints concerning the homeless services sector) to legal services fell from 510 (in the year before the Charter commenced) to 79 (in the last financial year.) SARC, Transcript of Public Hearings, Public Interest Law Clearing House, 20th August 2011, p. 6.

- the actual role played by the Charter in perceived changes of public authority behaviour generally cannot be determined[493]
- it is difficult to assess whether the Charter's described impact in frontline and negotiated outcomes is consistent with its intended legal operation[494]
- studies from particular sectors and involving advocates may not be generalisable to other sectors or to dealings where advocates are absent.[495]

The government submission, while confirming the impact of the Charter on the policy for transfers of tenancies, remarks that '[i]n other areas, the Charter merely reinforced existing practice and had little impact'.[496] Submissions from McKillop Family Services (a non-government public authority) and the Association for Employees with Disability (an advocacy group) reported that the Charter made little or no difference in their activities.[497]

Bodies that report on public authorities

[447] There are several bodies that report on public authorities' compliance with Charter s. 38. In its 2010 compilation report, VEOHRC stated that a 'majority' of public authorities refer to human rights in their annual reports, an 'increasing' number have strategic materials that convert Charter obligations into 'practical goals and measures' and there is 'an increased use' of human rights in policy development.[498] However, it also asserted that 'a small number' of key government initiatives made no mention of human rights and 'some' other references appeared to have been merely 'added on' to existing policies, while 'a significant number' of policies considered human rights 'from the outset'.[499] VEOHRC found a 'modest increase' in public authorities reporting comprehensive human rights impact assessments for all projects and a 'significant number' of internal reviews.[500] SARC notes that, as was the case for advocacy case studies, it is difficult to assess the significance, incidence or ubiquity of the activities reported to and described by VEOHRC.

[448] The Ombudsman, as part of its general function of reporting to the Parliament about Victorian administrative actions, has found failures to comply with Charter s. 38 by the Department of Human Services,[501] Victoria Police,[502] Corrections Victoria[503] and (functional public authority) GEO Group

493 See Submission 19 (Family Voice Australia), pp. 12-13; Submission 138 (Fitzroy Legal Service), p. 4; Submission 150 (Magistrates' Court of Victoria), p. 2; Submission 190 (Church & Nation Committee), p .10; Submission 324 (Victorian Government), p. 24.

494 See, e.g. Submission 158 (Office of the Public Advocate), p. 5, describing a case study where an advocate successfully raised a number of rights, including at least one ('the right to enjoyment of life') that is not protected by the Charter.

495 See, e.g. Submission 230 (Centre for Intelligence in Child and Family Welfare), p. 6, reporting no use of the Charter in its advocacy by its member organisations. See also Supplementary Information (Joseph Santamaria), pp. 16-19.

496 Submission 324 (Victorian Government), p. 21.

497 Submission 126 (McKillop Family Services), p. 2; Submission 176 (Association for Employees with Disability), p. 4.

498 VEOHRC, *Talking Rights: Compilation Report*, May 2011, pp. 20-2.

499 VEOHRC, *Talking Rights: Compilation Report*, May 2011, p. 23 and see VEOHRC, *Emerging Change*, April 2009, p. 39; Submission 173 (Women's Health Victoria), p. 7.

500 VEOHRC, *Talking Rights: Compilation Report*, May 2011, pp. 26-8.

501 Ombudsman Victoria, Own Motion Investigation into the Department of Human Services Child Protection Programme, November 2009, p. 82; Ombudsman Victoria, Own Motion Investigation into Child Protection – Out of Home Care, May 2010, pp. 20, 83-4, Ombudsman Victoria, Investigation Into Conditions at the Melbourne Youth Justice Precinct, October 2010, pp. 37-9, 60, 70, 72; Ombudsman Victoria, Investigation into the Failure of Agencies to Manage Registered Sex Offenders, February 2011, p. 35; Ombudsman Victoria, Assault of a Disability Services Client by Department of Human Services Staff, March 2011, p. 19.

502 Ombudsman Victoria, Investigation into the use of excessive force in the Melbourne Custody Centre, November 2007, p. 8; Ombudsman Victoria, Ombudsman's Recommendations – Report on their Implementation, February 2010, p. 25; Ombudsman Victoria, Investigation into the Failure of Agencies to Manage Registered Sex Offenders, February 2011, p. 35.

503 Ombudsman Victoria, Investigation into the Failure of Agencies to Manage Registered Sex Offenders, February 2011, p. 35.

Australia Inc.[504] The Office of Police Integrity has reported on breaches of Charter s. 38 by Victoria Police.[505] Victoria's courts and tribunals have found breaches of Charter s. 38 by the Director of Public Prosecutions (DPP), the Mental Health Review Board, (functional public authority) Homeground Services, the Director of Housing, the Victorian Civil and Administrative Tribunal (VCAT) and Victoria Police.[506]

Summary

[449] SARC considers that there is evidence from a number of public authorities directed towards compliance with Charter s. 38, but that the extent of compliance is variable and has been found to be lacking in some instances. Councils' compliance with Charter s. 38 in relation to their services and functions appears to have been largely achieved through pre-existing community engagement programmes and the Charter may have had an especially limited impact outside of Melbourne. While, in at least some areas of public life, the Charter has been expressly incorporated into some government policies and practices and enabled advocacy groups to encourage some public authorities to be more flexible in their decision-making in relation to a number of individuals, SARC is unable to reach any general conclusions about the broad impact of the Charter on the users of public services across Victoria. This topic will be further addressed in Chapter Five.[507]

What is a public authority?

[450] Charter s. 4 sets out a lengthy and complex definition of 'public authority', consisting of multiple paragraphs. While some entities – Victoria Police, Councils (and their staff) and Ministers – are expressly identified as public authorities in Charter s. 4(1)(d)–(f), the position of most entities in Victoria is determined by three complex categories listed in Charter s. 4(1)(a)–(c):

> *(a) a public official within the meaning of the Public Administration Act 2004; or*
>
> *(b) an entity established by a statutory provision that has functions of a public nature; or*
>
> *(c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise); …*

There is evidence that two aspects of Charter s. 4(1)(a)–(c) have been difficult to apply.

[451] First, the meaning of several technical terms in these paragraphs relating to the internal structure of the Victorian government have emerged as contentious in a recent High Court hearing.[508] The DPP argued that Crown Prosecutors:

- are not within para (a) (despite being within the relevant definition of 'public officials') because s. 106(1) of the *Public Administration Act 2004* provides that the Act 'does not apply to' a list of persons (including 'any Crown Prosecutor')
- are not within para (b) (despite being appointed under s. 31 of the *Public Prosecutions Act 1994*) because the position of Crown Prosecutor was not 'established' by statute

504 Ombudsman Victoria, Investigation into the use of excessive force in the Melbourne Custody Centre, November 2007, p. 8; Ombudsman Victoria, Ombudsman's Recommendations – Report on Their Implementation, February 2010, p. 25.

505 Submission 299 (Office of Police Integrity), pp. 4-5.

506 *Gray v DPP* [2008] VSC 4, [12]; *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646, [532]; *Homeground Services v Mohamed* (Residential Tenancies) [2009] VCAT 1131, [29]; *Director of Housing v Sudi* (Residential Tenancies) [2010] VCAT 328, [149]; *P J B v Melbourne Health & Anor* [2011] VSC 327, [359]; *DPP v W* (unreported, County Court of Victoria, 2 May 2011), [151]–[152]. These cases are discussed in the final section of this chapter.

507 See [545]-[566].

508 Submission 46 (Jeremy Rapke), p. 2. See *Momcilovic v The Queen & Ors* [2011] HCATrans 16. The DPP also argued that the juxtaposition of Charter s. 6(2)(c) and (4) implicitly excluded representatives of 'the Crown' from the obligations in Charter s. 38.

- are not within para (c) because they bring proceedings 'in the name of', rather than 'on behalf of', the Crown and DPP.

SARC makes no comment on the correctness of these arguments. However, Charter s. 4(1)(a)-(c)'s key technical terms appear to be open to reasonable dispute by experienced lawyers.

[452] Second, the definitions in paras (b) and (c) each turn on the concept of a 'function of a public nature', which is in turn regulated by Charter s. 4(2)-(3):

> *(2) In determining if a function is of a public nature the factors that may be taken into account include –*
>
> *(a) that the function is conferred on the entity by or under a statutory provision;*
>
> *(b) that the function is connected to or generally identified with functions of government;*
>
> *(c) that the function is of a regulatory nature;*
>
> *(d) that the entity is publicly funded to perform the function;*
>
> *(e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.*
>
> *(3) To avoid doubt –*
>
> *(a) the factors listed in subsection (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and*
>
> *(b) the fact that one or more of the factors set out in subsection (2) are present in relation to a function does not necessarily result in the function being of a public nature.*

The inquiry has received submissions arguing that this definition is unclear, for example in its application to disability service providers.[509] The question of whether or not some functions, such as tertiary education or publicly funded legal services, should be classified as 'public' functions is a controversial political question.

[453] Being a public authority requires compliance with a broad, complex and sometimes onerous obligation in Charter s. 38(1) and potentially exposes that body to legal proceedings for a breach of that obligation. Accordingly, SARC considers that it is crucial that all Victorian entities can ascertain without difficulty or doubt whether or not they are public authorities under Charter s. 4. Section 40A(3) of the *Human Rights Act 2004* (ACT) identifies a list of public functions for the purposes of its definition of 'functional' public authorities:

> *(a) the operation of detention places and correctional centres;*
>
> *(b) the provision of any of the following services:*
>
> *(i) gas, electricity and water supply;*
>
> *(ii) emergency services;*
>
> *(iii) public health services;*
>
> *(iv) public education;*
>
> *(v) public transport;*
>
> *(vi) public housing.*

509 Submission 282 (National Disability Services Victoria), p .4 and see Submission 95 (Victorian Bar), p. 15; Submission 262 (Victorian Council of Social Services), Victorian Community Sector: p. 10; Submission 292 (Catholic Social Services Victoria), pp. 22-3; Submission 324 (Victorian Government), pp. 64-5 but see Submission 295 (Mallesons Human Rights Group), pp. 36-8.

However, this is a non-exhaustive list and the remainder of s. 40A defines 'function of a public nature' in similar terms to Charter s. 4(2)–(3).

[454] SARC recommends that Charter s. 4 be replaced with a schedule that exhaustively lists all specific entities and functions that are subject to Charter s. 38(1). The schedule should be drafted in a manner that, wherever possible, avoids the sorts of definitional complexities presently being litigated in the High Court and lists of factors such as those in Charter s. 4(2)–4(3). In particular, Charter s. 4(1)(a)–(b) should be replaced with a schedule identifying every government agency, statutory entity or prerogative office that is subject to Charter s. 38(1), in the manner of Charter s. 4(1)(d)–(f). In addition, Charter s. 4(1)(c) should be replaced by a schedule identifying all functions (including functions outsourced to the private or community sectors) that must be carried out in compliance with Charter s. 38, in the manner of s. 40A(3) of the *Human Rights Act 2004* (ACT).

[455] While constructing an exhaustive list of public authorities and public functions may have been difficult when the Charter was first enacted, SARC observes that, after over three and a half years of compliance with Charter s. 38, the bodies and activities that are or should be subject to that obligation should now be sufficiently clear. In the case of continuing controversy or doubt (e.g. in the case of prosecutors and tertiary education), it is appropriate that these questions should be resolved by the Parliament rather than by public authorities themselves or by courts interpreting unclear definitions. When new regulatory entities or functions are created, it is appropriate that the question of whether or not they are bound by Charter s. 38(1) should be determined by the Parliament at the time it enacts the new regime (e.g. through consequential amendments to the schedule to the Charter).

[456] This recommendation is relevant to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[510]

Recommendation 22

What is a public authority?

If Charter s. 4 is retained, then SARC recommends that Charter s. 4(1)(a)–(g) and (2)–(5) be replaced by a schedule to the Charter containing an exhaustive list of:

(a) specific entities that must comply with Charter s. 38, and

(b) specific functions that must be carried out in compliance with Charter s. 38.

[457] This recommendation does not address Charter s. 4(1)(h) and (k) (provisions allowing particular entities or functions to be included or excluded from the definition of public authority by regulations) or the exclusions of some entities from the definition in Charter s. 4(1)(i)–(j). SARC observes that its recommendation may reduce or remove the need for inclusion or exemption regulations, such as those that presently exempt Victoria's three parole boards from the Charter.[511] The exemption for courts and tribunals in Charter s. 4(1)(j) will be addressed in the next section of this chapter.[512]

Obligations of public authorities

[458] Charter s. 38(1) imposes two obligations on public authorities:

> *Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.*

510 See Chapter 6, [687] and Recommendation 35.

511 *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009*. In June 2011, the Attorney-General referred the question of the legislative and administrative framework for adult parole, including statutory criteria to guide decision-making about parole, to the Sentencing Advisory Council.

512 See Recommendations 28 and 29.

Many of the submissions from public authorities and people who deal with them focused almost entirely on the 'procedural' obligation of public authorities 'to give proper consideration to a relevant human right'.[513] Victoria is the first jurisdiction to include this 'procedural' requirement in its human rights law and it has since been adopted in the ACT.[514] In relation to this obligation, the Supreme Court has held:[515]

> *The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.*

[459] By contrast, Charter s. 38(1)'s 'substantial' requirement for public authorities not 'to act in a way that is incompatible with human rights' is taken from the *Human Rights Act 1998* (UK).[516] Charter s. 3 defines 'act' to include 'a failure to act and a proposal to act'. Charter s. 38(1)'s operation is potentially limited by other provisions of the Charter, including:

- internal limits on relevant human rights in Part 2, for example Charter s. 13(a) only bars 'unlawful or arbitrary' interferences in privacy[517]
- arguably, Charter s. 7(2)'s provision that rights may be 'subject under law' to reasonable limits[518]
- the exceptions in Charter s. 38, which are:

> *(2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.*
>
> *(3) This section does not apply to an act or decision of a private nature.*
>
> *(4) Subsection (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.*

The exceptions in Charter s. 38(2) and (3) are both also derived from the UK statute.[519] VEOHRC has remarked that such legal rules 'may seem to marginalise human rights promotion as a somewhat technical exercise, removed from daily engagement with individuals and issues.'[520] The Victorian Bar's submission to the National Human Rights Consultation observed that having two largely overlapping obligations makes

513 Submission 46 (Jeremy Rapke), p. 2; Submission 95 (Victorian Bar), pp. 14-15; Submission 100 (Tenants Union of Victoria), pp. 8-9; Submission 151 (Council of Homeless Persons), p. 6; Submission 158 (Office of the Public Advocate), pp. 3-4; Submission 166 (Council on the Ageing), p. 5; Submission 258 (Victorian Aboriginal Legal Service), p. 44; Submission 263 (Human Rights Law Centre), pp. 21, 27-8; VEOHRC, *Making Progress*, April 2010, p. 41; Submission 323(St Kilda Legal Service), p. 3.

514 *Human Rights Act 2004* (ACT), s. 40B(1)(b).

515 *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310, [185].

516 *Human Rights Act 1998* (UK), s. 6(1).

517 See Submission 100 (Tenants Union of Victoria), p. 4.

518 See *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346, [108].

519 *Human Rights Act 1998* (UK), s. 6(2)(b), (5). On the uncertain effect of s. 6(2)(b), see *GC v The Commissioner of Police of the Metropolis* [2011] UKSC 21; [2011] 1 WLR 1230, [142].

520 VEOHRC, *Emerging Change*, April 2009, p. 36.

the meaning of both 'obscure'.[521] The Human Rights Law Centre argues that the substantive obligation adds to the procedural one, citing a recent Victorian Supreme Court judgment that remarked:[522]

> *A consideration by the person who did the act or made the decision will not be 'proper', however seriously and genuinely it was carried out, if the act or decision is incompatible with human rights in terms of s 7(2). In cases in which the issue legitimately arises, objectively and independently determining whether the act or decision is or is not compatible with human rights is the judicial function of the court. That function is not confined to, although it may involve, assessing whether adequate consideration was given to relevant rights (for example, it may be relevant to the weight to be given to the reasons of the public authority).*

However, this reasoning is open to question in light of the Court of Appeal's holding that routine consideration of Charter s. 7(2) by courts, tribunals and 'public officials' is contrary to the Parliament's intention.[523]

[460] SARC considers that it is essential that the obligations that the Charter imposes on public authorities are intelligible to both those authorities and the users of those authorities' services, without the necessity of detailed legal advice, knowledge of overseas regimes or the resolution of questions about the fundamental operation of the Charter by higher courts. SARC therefore recommends that Charter s. 38 be redrafted in plain language that is accessible to Victorian readers. One approach to simplifying Charter s. 38 would be to replace Charter s. 38(1)–(2) with a single requirement that all public authorities must, when making decisions, give proper consideration to all relevant human rights. This form of words has the further advantage of being expressed in a positive form, rather than the double negative wording of the existing Charter s. 38(1)–(2).

[461] This recommendation is relevant to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[524]

Recommendation 23

Conduct of public authorities

If Charter s. 38 is retained, then SARC recommends that it be redrafted to state the obligations of public authorities in plain language that is accessible to both lay employees of public authorities and lay users of public services without recourse to overseas precedents. For example, Charter s. 38(1)–(2) could be replaced with a single requirement that a public authority must, in making a decision, give proper consideration to any relevant human right.

4.4 Litigation and the roles and functioning of courts and tribunals

Relevant provisions of the Charter

[462] Charter s. 6(2)(b) states:

> *This Charter applies to – …*
>
> *(b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3.*

Part 2 of the Charter sets out human rights, including a number that directly affect courts and tribunals, such as the right to a fair hearing. Division 3 of Part 3 sets out a rule for the interpretation of statutory

521 Victorian Bar, Submission to the National Human Rights Consultation, p. 40 but see *P J B v Melbourne Health & Anor* [2011] VSC 327, [312].

522 Human Rights Law Centre, Supplementary Information, pp. 3-4, citing *P J B v Melbourne Health & Anor* [2011] VSC 327, [312].

523 *R v Momcilovic* [2010] VSCA 50, [110].

524 See Chapter 6, [687] and Recommendation 35.

provisions and includes rules for proceedings relating to the Charter, including referral to the Supreme Court, intervention by the Attorney-General and notice to the Attorney-General and VEOHRC. Part 4 contains a further rule for intervention by VEOHRC.

Courts and tribunals may fall within the definition of public authority (via Charter s. 4(1)(b) or (c)). However, Charter s. 4(1)(j) provides that the definition of public authority 'does not include … a court or tribunal except when it is acting in an administrative capacity.'

[463] The Charter's provisions with respect to interpretation and public authorities commenced on 1 January 2008 and therefore have been in effect for over three and a half years. However, this timing is complicated by other provisions, with Charter s. 6(2)(b) and Part 2 of the Charter commencing on 1 January 2007 and Charter s. 49(2) barring the application of the Charter in proceedings 'commenced … before' that date, even if they continue after the Charter's various commencement dates.

Discussion

[464] The functions and roles of courts and tribunals are largely played out in public. However, in contrast to the Parliament, only some of their activities are recorded and published. There are two main sources of evidence about the Charter's impact on courts and tribunals: their reasons for judgment and the experiences of participants in Victorian litigation.

Reasons for judgment

[465] Victorian courts' and tribunals' reasons for judgment are generally public documents. However, only High Court, Supreme Court and VCAT rulings are typically available online and the majority of decisions (notably in the Magistrates' Court and many procedural matters) are made without recorded reasons. In addition, a number of judgments are suppressed pursuant to statutory requirements or court orders (e.g. many matters involving sex offender supervision). While the government submission was able to identify 329 matters where the Charter had been 'raised in a proceeding at some point' (including 48 matters in the County Court),[525] other submissions identified 249 published reasons for judgment referring to the Charter (up to 15 June 2011), including 112 from the Supreme Court or Court of Appeal, 110 from VCAT and only four in the County Court.[526] The Human Rights Law Centre classified 97 judgments as involving either substantive consideration of the Charter or as otherwise consequential, while the Law Institute of Victoria and VEOHRC respectively characterised 19 and 12 cases as ones where the Charter was determinative of the outcome of the case.[527] The three submissions described these judgments as covering a variety of different categories of proceedings and a variety of different Charter rights, with consequential decisions occurring mostly in VCAT and most often raising the rights in Charter ss. 8 (equality), 13 (privacy and reputation)[528] and 24 (fair hearings).[529] While some submissions described the jurisprudence as developing in a routine and appropriate manner,[530] others noted its limited scope[531] and

525 Submission 324 (Victorian Government), p. 25.
526 Submission 247 (Law Institute of Victoria), pp. 29-30 and note 96; Submission 265 (Human Rights Law Centre), p. 32. See also Submission 278 (VEOHRC), p. 162.
527 Submission 265 (Human Rights Law Centre), p. 33; Submission 247 (Law Institute of Victoria), p. 31; Submission 278 (VEOHRC), p. 162.
528 See Submission 97 (Office of the Victorian Privacy Commissioner), p. 5, identifying 27 cases raising Charter s. 13(a).
529 Submission 247 (Law Institute of Victoria), Appendix 2; Submission 265 (Human Rights Law Centre), pp. 33-5; Submission 278 (VEOHRC), p. 162.
530 Submission 95 (Victorian Bar), pp. 4-6; Submission 97 (Office of the Victorian Privacy Commissioner), p. 7; Submission 145 (Penny Harris), p. 1; Submission 165 (Michael Power), p. 2; Submission 245 (International Commission of Jurists), pp. 29-30; Submission 247 (Law Institute of Vitoria), pp. 38-9; Submission 257 (Public Interest Clearing House), pp. 8-10; Submission 268 (Neave J), p. 7; SARC, Transcript of Public Hearings, 18 July 2011, VEOHRC, p. 8.
531 Submission 176 (Associate of Employees with Disability), p. 5; Submission 258 (Victorian Aboriginal Legal Service), pp. 45-6.

some characterised particular decisions as frivolous, unpredictable or perverse.[532] According to the government submission, '[t]here has been a general increase in the volume of Charter litigation from the time the court functions commenced on 1 January 2008 to the present'.[533]

[466] Charter s. 32 may have had a significant effect on courts' and tribunals' interpretations of Victorian statutory provisions in 14 judgments, relating to provisions in the *Coroners Act 2008*,[534] *Corrections Act 1986*,[535] *Criminal Procedure Act 2009*,[536] *Equal Opportunity Act 1995*,[537] *Guardianship and Administration Act 1986*,[538] *Major Crime (Investigative Powers) Act 2004*,[539] *Residential Tenancies Act 1997*,[540] *Road Safety Act 1986*,[541] *Serious Sex Offenders Monitoring Act 2005*,[542] *Summary Offences Act 1966*,[543] *Surveillance Devices Act 1999*[544] and *Victorian Civil and Administrative Tribunal Act 1998*.[545] However, only four of the judgments expressed Charter s. 32 to have been determinative of the chosen interpretation and, of those, one was a minority judgment that was retrospectively reversed by the Parliament, a second may have been implicitly overruled by the Court of Appeal and a third is presently under appeal.[546] In one case, the High Court's unanimous use of Charter s. 32 to narrowly read s. 42 of the *Sex Offenders Monitoring Act 2005* may have contributed to that provision surviving a constitutional challenge.[547]

Experiences of participants

[467] The experiences of participants in Victorian litigation, while often extending beyond the subject-matter of published judgments, will depend on the particular proceeding and perspective of each participant. The government submission identifies four government departments that have been parties to Charter litigation, predominantly relating to housing (48% of those cases) and corrections (35% of those cases).[548] The Charter 'significantly affected the length or complexity of the litigation in 22 cases' concerning government-managed housing, but there was 'only one case' where 'the submission relating to the Charter Act [was] successful, or a significant factor in the outcome of the case'.[549] In 2009, the Charter was raised in 18 proceedings relating to the *Serious Sex Offenders Monitoring Act 2005* and 'added

532 Submission 19 (Family Voice Australia), pp. 13-14, 19-21; Submission 133 (Institute of Public Affairs), p. 4; Submission 136 (Salt Shakers), pp. 3-4; Submission 190 (Church and Nation Committee), pp. 16-19; Submission 217 (Ad Hoc Interfaith Committee), p. 20; Submission 272 (Catholic Archdiocese of Melbourne), p. 19.

533 Submission 324 (Victorian Government), p. 29.

534 Clause 7(1) of Schedule 1. See *Ruling on Clause 7(1) of Schedule 1 of the Coroners Act 2008*, Coroners' Court of Victoria, 25 June 2010.

535 s. 47(1)(f). See *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310, [127].

536 s. 371. See *DPP v Pottinger* (unreported, County Court of Victoria, 26 October 2010), [26].

537 ss. 42, 49, 75(2) and 75. See *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor* (Anti-Discrimination) [2010] VCAT 1613, [38], [160], [174], [194], [260], [311]–[312]; and s. 83 and see*Lifestyle Communities Ltd (No. 3) (Anti-Discrimination)* [2009] VCAT 1869, [99]–[100].

538 s. 46. See *P J B v Melbourne Health & Anor* [2011] VSC 327, [286]–[287]. See also Supplementary Information (Joseph Santamaria), pp. 6, 10.

539 s. 39. See *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [167].

540 s. 250. See *Director of Housing v TK* (Residential Tenancies) [2010] VCAT 1839, [92].

541 s. 49(1)(e). See *DPP v Piscopo* [2010] VSC 498, [65], [88]; *DPP v Rukandin* [2010] VSC 499, [71, [93].

542 s. 11. See *R J E v Secretary to the Department of Justice* [2008] VSCA 265, [117]–[119]; and s. 42 and see *Hogan v Hinch* [2011] HCA 4, [29], [36], [78].

543 s. 17. See *Maher v Accused* (unreported, Children's Court of Victoria, 8 December 2010), p. 16.

544 s. 6(1). See *DPP v W* (unreported, County Court of Victoria, 2 May 2011), [103], [124], [137].

545 s. 120. See *Guss v Aldy Corporation Pty Ltd & Anor* (Civil Claims) [2008] VCAT 912, [34]–[36].

546 Respectively, the decisions in *R J E v Secretary to the Department of Justice* [2008] VSCA 265 (see [54]–[56] and the *Serious Sex Offenders Monitoring Amendment Act 2009*), *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (see *R v Momcilovic* [2010] VSCA 50, [76] and SARC, Transcript of Public Hearings, 19 July 2011, Victorian Bar, p. 3) and *DPP v W* (unreported, County Court of Victoria, 2 May 2011). The fourth case was *Guss v Aldy Corporation Pty Ltd & Anor* (Civil Claims) [2008] VCAT 912, [42].

547 *Hogan v Hinch* [2011] HCA 4, [41], [98].

548 Submission 324 (Victorian Government), p. 30.

549 Submission 324 (Victorian Government), p. 35.

significantly to the time taken to hear those matters', even though the Charter 'has not necessarily had an effect on the outcome of any of the decisions'.[550]

[468] Submissions from participants have yielded sharply divergent views on the impact of the Charter on litigation. The former Director of Public Prosecutions submitted that '[r]aising the Charter invariably added to the complexity and costs of the proceedings', citing two examples.[551] However, Victoria Legal Aid disputed one example and identified a third case where raising the Charter had prevented delay.[552] The submission from the Victorian Aboriginal Legal Service suggested there was a 'cultural resistance' to the Charter 'emanating from the judiciary' and that raising Charter arguments in the Magistrates' Court was perceived as disruptive, given that court's caseload.[553] The submission from the Magistrates' Court of Victoria confirms the Charter is rarely raised before magistrates and has had a 'minimal impact' on decision-making but attributes this to the consistency of relevant Victorian laws with the Charter's rights.[554]

[469] One broad measure of the significance of the Charter in litigation is the incidence of the use of the Charter's own mechanisms to identify and resolve significant cases involving human rights. In relation to Charter s. 33, which allows referral of matters from lower courts to the Supreme Court or Court of Appeal, there have been two reported referrals to date but both were rejected as inappropriate by the Court of Appeal.[555] In relation to Charter s. 35, which requires notices to the Attorney-General and VEOHRC in all Supreme Court and County Court matters involving the Charter, VEOHRC reports receiving 167 such notices to date.[556] In relation to Charter ss. 34 and 40, which permit the Attorney-General and VEOHRC to intervene in any Charter matter, VEOHRC (whose published guidelines state it will only intervene in matters that are 'significant' in one of a number of ways[557]), reports intervening in 30 matters,[558] while the Attorney-General also reports intervening in 30 proceedings,[559] including nine matters where both bodies intervened.[560]

[470] Several submissions assert the potential for the intervention and notice requirements in Charter ss. 34, 35 and 40 to deter Supreme and County Court litigants from raising Charter matters.[561] In its 2009 submission to the National Human Rights Consultation, the Victorian Bar remarked that interventions have had a 'disproportionate effect on individual applicants and plaintiffs, and on defendants in criminal proceedings' and have caused clients and lawyers to refrain from raising Charter arguments.[562] By contrast, its submission to this inquiry was that these provisions do not cause delay and the notice and intervention requirements serve, respectively, a 'useful' and 'critical' role.[563] A VEOHRC report noted '[s]takeholders from the legal sector responded that the notification requirement does sometimes discourage Charter arguments being raised';[564] however, VEOHRC submitted that the notice requirement

550 Submission 324 (Victorian Government), p. 32.
551 Submission 46 (Jeremy Rapke), pp. 2-4, citing *R v Momcilovic* [2010] VSCA 50 and an unnamed matter.
552 Letter from Victoria Legal Aid, 25 July 2011.
553 Submission 258 (Victorian Aboriginal Legal Service), p. 46.
554 Submission 150 (Magistrates' Court of Victoria), pp. 3-4.
555 See *De Simone v Bevnol Constructions & Developments Pty Ltd* [2009] VSCA 199, [14]–[23]; *De Simone v Bevnol Constructions and Developments Pty Ltd & Ors* [2010] VSCA 231, [35]–[41]. But see Submission 278 (VEOHRC), Appendix N, p. 8, describing an apparently successful referral in an ongoing matter.
556 Submission 278 (VEOHRC), p. 174.
557 See VEOHRC, 'The Commission's intervention power under the Charter' at <http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&layout=item&id=1196&Itemid=714#Intervention%20guidelines>.
558 Submission 278 (VEOHRC), p. 174.
559 Submission 324 (Victorian Government), p. 42.
560 Submission 4 (VEOHRC), p. 174.
561 Submission 6 (Howard Leigh), pp. 3-4; Submission 158 (Office of the Public Advocate), p. 2; Submission 171 (Victoria Legal Aid), p. 6; Submission 245 (International Commission of Jurists), p. 30.
562 Victorian Bar, Submission to the National Human Rights Consultation, pp. 40-1.
563 Submission 95 (Victorian Bar), pp. 8-9.
564 Submission 278 (VEOHRC), Appendix L, p. 7.

allows it to educate litigants who raise weak Charter arguments.[565] In one early case, Bongiorno J argued that Charter s. 35 needs amendment to allow a waiver of the notice requirement in urgent matters;[566] however, VEOHRC suggests the problem of delay is not caused by Charter s. 35 (which merely requires notice and does not bar a court from continuing to hear a Charter matter) but rather by the Supreme Court's practice note on Charter s. 35, which threatens adjournments and costs unless 14 days' notice is given.[567] The Chief Justice's submission remarks that the intention of the practice note was 'to avoid delays and unnecessary costs'.[568]

Summary

[471] SARC considers that the Charter has only played a role in a small fraction of court and tribunal decisions and played no significant role in the majority of those. Although the Charter has been applied in the interpretation of a number of statutory provisions, it has not generally had a determinative influence. There is evidence that the Charter may have caused delay (especially in sex offender supervision and housing cases), frustration and (in the case of Charter ss. 34, 35 and 40) the deterrence of rights-based arguments in some cases. However, there is also evidence (discussed in the previous section) that the Charter may have led to negotiated outcomes instead of litigation or changes to public authority practices in some matters.[569] SARC notes that, in addition to the general difficulty of identifying effects of the Charter outlined at the beginning of this chapter, the three-and-a-half-year period of the Charter's potential application in courts and tribunals may be too short to meaningfully assess the potential effect of the Charter on courts and tribunals, given timelines of litigation and the cumulative nature of jurisprudence.

Interpretation of legislation

Interpretation compatible with human rights

[472] Charter s. 32(1) provides:

> *So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.*

In *R v Momcilovic*, the Court of Appeal ruled that Charter s. 32(1) is an ordinary rule of interpretation, which applies from the outset to all instances of statutory interpretation in Victoria and is subject to traditional constraints on interpretation, such as fidelity to a statute's words and context.[570] The Court of Appeal added that Charter s. 32(1)'s effect is similar to the common law's 'principle of legality' (which typically requires clear statutory words to overturn common law rights)[571] but differs because the rights are set out in Part 2 of the Charter.[572] In addition, the court ruled that the application of Charter s. 32(1) does not involve any reference to the test for reasonable limits on rights in Charter s. 7(2).[573] The inquiry has received submissions that courts may or should interpret Charter s. 32(1) consistently with UK decisions on the similarly worded s. 3(1) of the *Human Rights Act 1998* (UK). The House of Lords has held that UK courts may interpret statutory provisions inconsistently with their words or purpose so as to

565 Submission 278 (VEOHRC), p. 177
566 *R v Benbrika & Ors (Ruling No. 20)* [2008] VSC 80, [18].
567 Submission 278 (VEOHRC), p. 176 and Appendix L, p. 8. See Supreme Court of Victoria, *Practice Note No. 3 of 2008*.
568 Submission 1 (Warren CJ), p. 2.
569 See [443]-[448].
570 *R v Momcilovic* [2010] VSCA 50, [101]–[102].
571 See Chapter 6, [596]-[599].
572 *R v Momcilovic* [2010] VSCA 50, [103]–[104].
573 *R v Momcilovic* [2010] VSCA 50, [105]–[107].

achieve compatibility with human rights, so long as the reading is consistent with the 'fundamental features' of the regulatory scheme.[574]

[473] SARC makes no comment about the correctness of courts' rulings on the meaning of the present Charter s. 32(1). However, SARC observes that, if the Court of Appeal's view is correct, then Charter s. 32 appears to have generated lengthy and complex legal disputes about its meaning, while adding very little to the existing common law on statutory interpretation. Joseph Santamaria QC observed, in relation to the recent decision of the Supreme Court in *P J B v Melbourne Health (Patrick's case)*, where Bell J discussed the application of Charter s. 32 to the *Guardianship and Administration Act 1986*,[575] that the same decision could have been reached on the basis of the common law principle of legality (discussed in detail in Chapter 6)[576] or the application of the statutory interpretation principles contained in the legislation in question.[577] He remarked:[578]

> *In some ways, the Guardianship and Administration Act 1986, considered in Patrick's case, points the way in which Parliament can assume the protection of human rights in the context of delegation of powers. That Act itself contains precisely drawn provisions which are to govern its interpretation and, thus, the just exercise of the powers it creates. Perhaps, the Charter Act could be amended to require Parliament itself, in every piece of legislation it enacts, similarly to formulate such principles as are appropriate to ensure that human rights will be respected in the administration of the legislation.*

Accordingly, if the Charter is retained, then SARC recommends that consideration be given to the continuing necessity of Charter s. 32(1).

[474] SARC also observes that the present text of Charter s. 32(1) sheds very little light on these significant disputes about the provision's meaning, which instead turn largely on whether or not the Victorian Parliament intended that Charter s. 32(1) operate consistently with rulings of an overseas domestic jurisdiction under a statute that aims to ensure compliance with a regional treaty that is supervised by a supranational court. SARC considers that, no matter how the High Court resolves the meaning of the existing Charter s. 32(1), the correct approach should be determined by Victoria's Parliament and set out expressly and clearly in the Charter. SARC also considers that, in accordance with the judgment of the Court of Appeal, Charter s. 32 should be limited to traditional approaches to interpretation.[579] Accordingly, SARC recommends that, if Charter s. 32 is retained, Charter s. 32(1) be redrafted in a manner that both clarifies that it is limited to traditional approaches to interpretation and makes its meaning accessible to local users without the need to consider either overseas or High Court judgments.[580]

[475] Since 1984, all statutory interpretation in Victoria has been subject to the following rule set out in s. 35 of the *Interpretation of Legislation Act 1984*:

> *In the interpretation of a provision of an Act or subordinate instrument –*
>
> *(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate*

574 Submission 19 (Family Voice Australia), pp. 13-14; Submission 95 (Victorian Bar), p. 11; Submission 119 (Julie Debeljak), p. 21 ; Submission 190 (Church and Nation Committee), pp. 11-12, 13-15; Submission 285 (Castan Centre for Human Rights Law), pp. 13-14; Submission 306 (Graham Connoley), pp. 3-4 and see *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

575 *P J B v Melbourne Health & Anor* [2011] VSC 327, [239]-[242], [273]-[287].

576 See Chapter 6, [596]-[599].

577 Supplementary Information (Joseph Santamaria), .pp . 10-11, referring to the *Guardianship and Administration Act 1986*, s. 4(2).

578 Supplementary Information (Jospeh Santamaria), p. 14.

579 Compare *European Convention on Human Rights Act 2003* (Ireland), s. 2(1), which provides that: 'In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.'

580 See Submission 299 (Office of Police Integrity), p. 7.

> *instrument) shall be preferred to a construction that would not promote that purpose or object; …*

If the Court of Appeal's ruling on the meaning of Charter s. 32(1) was preferred, then Charter s. 32(1) could be redrafted similarly to s. 35(a), by replacing sub-s. (1) with a requirement that, in the interpretation of a provision of an Act or subordinate instrument, a construction that would not limit a human right shall be preferred to a construction that would limit a human right.[581] This formulation would (consistently with the Court of Appeal's reading) make it clear that Charter s. 32(1) is an traditional rule of interpretation and that courts and others are not required to engage in a Charter s. 7(2) analysis when interpreting Victorian legislation.

[476] This recommendation is relevant to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[582]

Recommendation 24

Interpretation of legislation

If the Charter is retained, then SARC recommends that consideration be given to whether Charter s. 32 is necessary, in light of common law principles of statutory interpretation. If Charter s. 32 is retained, then sub-s. (1) should be redrafted in a manner that both clarifies that it is limited to traditional approaches to interpretation and makes its meaning accessible to local users, without undue recourse to overseas judgments. For example, sub-s. (1) could be drafted (similarly to s. 35(a) of the Interpretation of Legislation Act 1984) to provide that, in the interpretation of the provision of an Act or a subordinate instrument, a construction that would not limit a human right shall be preferred to a construction that would limit a human right.

Interpretations that promote the purpose of statutory provisions

[477] The relationship between the existing Charter s. 32(1) and s. 35(a) of the *Interpretation of Legislation Act 1984* is unclear. The Court of Appeal has suggested that differences between the wording of the opening of Charter s. 32(1) and the language of s. 35(a) mean that the relevant 'purpose' to be considered when interpreting a statutory provision may differ between the two rules.[583] Also, the hierarchy of the two rules is unclear, because 'purpose or object' under s. 35(a) may be taken to include the purpose of human rights compatibility set out in the Charter or in documents required to be produced under the Act. SARC observes that s. 35(a) is central to ensuring parliamentary sovereignty in Victoria, as it requires that courts defer to the Parliament's intentions when interpreting the Parliament's legislation.

[478] Accordingly, SARC recommends that, if it is retained, Charter s. 32(1) should be made expressly subject to s. 35(a). This formulation will dispense with the need for the 'consistently with their purpose' language in Charter s. 32(1) and will ensure that the purpose requirement will be consistent across both provisions. While a similar approach in the *Human Rights Act 2004* (ACT) was recently abandoned, s. 35(a) is more flexible than the ACT's equivalent provision, which requires interpretations that 'best achieve' the legislature's purpose.[584]

[479] This recommendation is relevant to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[585]

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581 See Australian Human Rights Bill 1985 (introduced into the Commonwealth Parliament by the federal Labor government), cl. 10.

582 See Chapter 6, [687] and Recommendation 35.

583 *R v Momcilovic* [2010] VSCA 50, [75]–[76].

584 *Legislation Act 2001* (ACT), s. 139 and see Department of Justice and Community Safety, *Twelve-Month Review – Report*, June 2006, p. 27

585 See Chapter 6, [687] and Recommendation 35.

Recommendation 25

Relationship between the Interpretation of Legislation Act 1984 and the Charter

If Charter s. 32 is retained, then SARC recommends that the operation of sub-s. (1) be expressly made subject to s. 35(a) of the Interpretation of Legislation Act 1984.

[480] Neither compatibility documents nor SARC reports represent the Parliament's views, but are instead the views of the member introducing the Bill or a parliamentary committee. SARC does not consider it necessary to express this position in legislation, as it follows from ordinary statutory interpretation principles. Moreover, Charter s. 28(4) makes this position clear in the case of statements of compatibility by specifying that they are 'not binding on any court or tribunal'. However, Charter s. 28(4) does not extend to other documents that might contain opinions about compatibility, including human rights certificates, SARC reports and (if Recommendation 11 is adopted) explanatory memoranda. SARC therefore recommends that Charter s. 28(4) be amended to extend to these additional documents.

[481] SARC notes that it is appropriate for courts and tribunals to have regard to statements of compatibility, explanatory memoranda or SARC reports in many ways, including taking account of discussions of the intended operation or effect of particular provisions of a Bill when determining the purpose or object of Victorian legislation.[586] For example, the statement of compatibility for the Equal Opportunity Amendment Bill 2011 discusses an exception for school dress standards 'if the educational authority administering the school has taken into account the views of the school community in setting the standard'[587] as follows:

> *It may be argued that this has the potential to unreasonably limit rights such as freedom of expression (section 15) by preventing individuals from expressing their opinions and beliefs. However, I consider the provision represents an appropriate balance to enable the right of a school community to set standards of dress, appearance and behaviour for students attending the school. For the provision to apply, the educational authority must have taken into account the views of the school community. The provision would not be satisfied if the authority only took account of the views of one sector of the community and ignored the contrary views of other sectors of the community.*

[482] SARC considers that it is appropriate for courts and tribunals to rely on this statement to determine that the exception's purpose is to require an education authority to consult with all sectors of the school community (and therefore that the exception is unavailable if the school does not consult with parents of minority students). However, on some views, it may not appropriate to rely on this statement to reason that the exception's purpose is only to permit reasonable limits on students' freedom of expression (and therefore that the authority is barred from having regard to 'irrational' views in the school community). SARC observes it may be difficult to make such distinctions where opinions about the intended effect of statutory provisions are expressed compendiously with opinions about compatibility. Accordingly, SARC recommends that drafters of statements of compatibility, human rights certificates, explanatory memoranda and ministerial correspondence (published in SARC reports) be encouraged to clearly distinguish between these two types of opinions.

[483] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[588]

586 *Interpretation of Legislation Act 1984*, s. 35(b)(iii)-(iv).
587 Equal Opportunity Amendment Bill 2011, cl. 11, amending s. 42 of the *Equal Opportunity Act 2010*.
588 See Chapter 6, [687] and Recommendation 35.

Recommendation 26

Relevance of opinions about compatibility

If Division 1 of Part 3 is retained, then SARC recommends that Charter s. 28(4) be amended so that it also applies to human rights certificates, explanatory memoranda and SARC reports. In addition, drafters of these documents should be encouraged to clearly distinguish between opinions as to the intended or likely effect of new laws and opinions about the compatibility of those laws with human rights.

Considering international law and foreign judgments when interpreting legislation

[484] Charter s. 32(2) provides:

> *International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.*

Several submissions expressed concern that this provision may be understood as making the meaning of Victorian laws subject to overseas rulings or permitting Victorian litigants and courts to 'cherry pick' from decisions from hundreds of countries.[589] Victorian Supreme Court decisions to date have taken differing approaches to Charter s. 32(2), with one judge ruling that it is limited to judgments from jurisdictions with similar constitutional arrangements to Victoria,[590] while others are willing to consider any overseas decision, including communications of the United Nations Human Rights Committee.[591] Although Charter s. 32(2) is expressed in permissive form, it may create the perception that reference to overseas decisions is a precondition to asserting a claim under the Charter.[592] SARC makes no comment about the correctness of these rulings.

[485] SARC considers that the use of international law, and the judgments of domestic, foreign and international courts, in Victorian courts and tribunals should be determined by Victoria's general law of statutory interpretation (set out in the common law and the *Interpretation of Legislation Act 1984*) rather than by a special rule for Charter matters. Accordingly, SARC recommends that Charter s. 32(2) be repealed. To avoid doubt, the amending statute or explanatory memorandum should expressly state that the repeal of Charter s. 32(2) is not intended to affect existing Victorian common or statutory law on the relevance of non-Victorian judgments or laws to the interpretation of Victorian statutory provisions.

[486] This recommendation is relevant to both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[593]

Recommendation 27

Use of international law and the judgments of domestic, foreign and international courts

If Charter s. 32 is retained, then SARC recommends that sub-s. (2) be repealed. To avoid doubt, the amending statute or explanatory memorandum should expressly state that the repeal of Charter s. 32(2) is not intended to affect existing common or statutory law on the relevance of non-Victorian judgments or laws to the interpretation of Victorian statutory provisions.

589 Submission (Family Voice Australia), pp. 18-19; Submission 119 (Australian Family Association), p. 7; Submission 133 (Institute of Public Affairs), pp. 4–6; Submission 190 (Church and Nation Committee), pp. 15–16; Submission 217 (Ad Hoc Interfaith Committee), p. 20; Submission 265 (Peter Quinn); Submission 306 (Graham Connoley), pp. 5–7; Supplementary Information (Joseph Santamaria), p. 12

590 *WBM v Chief Commissioner of Police* [2010] VSC 219, [49].

591 E.g. *P J B v Melbourne Health & Anor* [2011] VSC 327, [79].

592 E.g. *Carwoode Pty Ltd v Cardinia SC* (Red Dot) [2008] VCAT 1334, [234].

593 See Chapter 6, [687] and Recommendation 35.

Application of the Charter to courts and tribunals

[487] Charter s. 4(1)(j) restricts Charter s. 38(1)'s application to courts and tribunals to when those bodies are 'acting in an administrative capacity'. Victorian decisions to date have held that Charter s. 4(1)(j) distinguishes between an 'exercise of an administrative power, as against a judicial power' in the sense used in constitutional law.[594]

[488] SARC makes no comment on the correctness of Victorian courts' interpretations of Charter s. 4(1)(j). However, SARC observes that the distinction between administrative and judicial power is an exceptionally difficult one to draw.[595] In commenting on constitutional jurisprudence about the separation of judicial power, on the one hand, and legislative and administrative power, on the other, the Federal Court has remarked:[596]

> *It has in fact proved very difficult, virtually impossible, to arrive at criteria which will distinguish in all cases the three concepts I have mentioned. They at times overlap: 'The borderland in which judicial and administrative functions overlap is a wide one, and the boundary is the more difficult to define in the case of a body such as the appellant board, the greater part of whose functions are beyond doubt in the administrative sphere'. Sometimes the category into which an act or function will be placed will be decided in part on historical considerations or on the source of power or the nature of the body to which it is given.*

The effect of Charter s. 4(1)(j) is to require lower courts and tribunals, and practitioners working within them, to apply such distinctions routinely. Exemption of the judicial functions of courts and tribunals from Charter s. 38(1) does not appear to fulfil the purpose of Charter s. 4(1)(j) as stated by the Human Rights Consultation Committee, which was to avoid the Charter's application to Australia's common law.[597] The law applicable to many of the judicial functions of modern courts and, especially, tribunals is predominantly derived from statutes rather than the common law.

[489] SARC recommends that Charter s. 4(1)(j) be redrafted to simply exempt courts from the operation of Charter s. 38(1) in all of their functions. In courts' exercise of statutory powers, Charter s. 32(1) achieves most, if not all, of the effect of Charter s. 38. All courts' non-judicial staff are subject to the *Public Administration Act 2004's* provision for a 'public service value' of promoting and respecting the rights in the Charter.[598] To the extent that the Parliament considers that courts should give consideration to or otherwise be bound by the human rights in the Charter, specific provision to this effect could be made by legislation, similarly to the existing obligation for courts to consider international human rights when determining whether illegally or improperly obtained evidence should be excluded.[599]

[490] This recommendation is relevant to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[600]

Recommendation 28

Are courts public authorities?

If Charter s. 38 is retained, then SARC recommends Charter s. 4(1)(j) be amended by removing the words 'except when it is acting in an administrative capacity'.

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594 *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346, [122].

595 See Submission 171 (Victoria Legal Aid), p. 6.

596 *Evans v Freimann* (1981) 53 FLR 229, 235–6, quoting *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134, 148.

597 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 59.

598 s. 7(1)(g) and see Submission 150 (Magistrates' Court of Victoria), p. 2.

599 *Evidence Act 2008*, s. 138(3)(f).

600 See Chapter 6, [687] and Recommendation 35.

[491] The position of tribunals is different. Tribunals greatly vary in the experience of their members, the functions they perform, the impact of their decisions and the degree of discretion in their decision-making.[601] As already noted, tribunals rarely, if ever, develop the common law of Australia.[602] Also, the term 'tribunal' is not defined in the Charter and its scope is unclear.[603] SARC therefore recommends that Charter s. 4 be amended to identify an exhaustive list of tribunals and boards that are bound by Charter s. 38(1). In the case of tribunals with multiple roles or that operate as courts in some circumstances, for example VCAT,[604] it may also be necessary to identify specific functions that are or are not subject to Charter s. 38(1).[605]

[492] This recommendation is relevant to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[606]

Recommendation 29

Are tribunals public authorities?

If Charter s. 38 is retained, then SARC recommends that:

(a) Charter s. 4(1)(j) be amended by removing the words 'or tribunal', and

(b) Charter s. 4 be amended, consistently with Recommendation 22, to provide for a schedule containing an exhaustive list of specific tribunals or specific functions of tribunals that are subject to Charter s. 38.

[493] Some Victorian courts have held that Charter s. 6(2)(b) means that courts and tribunals are 'bound' by some or all of the rights in Part 2 of the Charter.[607]

In the first case where this argument arose, King J remarked:[608]

> *This may be what Parliament intended, but as indicated after reading all of the materials, including the Law Reform Commission Reports, the explanatory memorandum, and numerous overseas authorities, I am not convinced that is what Parliament intended to be the result of the combination of ss. 6, 24 and 25 of the Charter. It is unnecessary for me to determine that issue, but I draw the Parliament's attention to this possible interpretation of the legislation.*

SARC makes no comment on the correctness of these rulings. However, this reading of Charter s. 6(2)(b) may negate the distinctions drawn in Charter s. 4(1)(j) and allow the Charter to change the common law.[609] Also, any effects of Charter s. 6(2)(b) in this regard are unclear, both in terms of the rights in Part 2 that are relevant and what it means for a court or tribunal to have 'functions' under them. SARC considers that any such consequences should be expressly provided for in Part 3 of the Charter. SARC therefore recommends that the reference to Part 2 of the Charter in Charter s. 6(2)(b) be removed.

[494] This recommendation is relevant to the both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[610]

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601 *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646, [304]

602 See ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years Of Operation*, May 2009, pp. 17–18.

603 *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646, [305]–[306].

604 See *Victorian Civil and Administrative Tribunal Rules 2008*, s. 2.03; *Victorian Civil and Administrative Tribunal Act 1998*, ss. 10(5), 11(6), 40.

605 *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646, [332]

606 See Chapter 6, [687] and Recommendation 35.

607 *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646, [254]; *De Simone v Bevnol Constructions & Developments Pty Ltd* [2009] VSCA 199, [52].

608 *R v Williams* [2007] VSC 2, [55].

609 See Submission 285 (Castan Centre for Human Rights), pp. 13–14; Submission 324 (Victorian Government), pp. 65–7.

610 See Chapter 6, [687] and Recommendation 35.

Recommendation 30

Application of the Charter to courts and tribunals

If Charter s. 6(2)(b) is retained, then SARC recommends that the words 'Part 2 and' be deleted.

4.5 The availability to Victorians of accessible, just and timely remedies for infringements of rights

Relevant provisions of the Charter

[495] There are three provisions of the Charter that are available to people who claim to have had their Charter rights infringed.

[496] First, Charter s. 36(2) provides that:

> *Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.*

This provision is available to parties to legal proceedings who fail in their attempt to have the Supreme Court interpret a statutory provision under Charter s. 32 in a way that is compatible with Charter rights. Charter s. 37 requires the Minister administering the statutory provision to prepare a written response to the declaration within six months of receiving it and to lay the response before each House of Parliament and publish it in the Government Gazette.

[497] Second, sub-s. (1) of Charter s. 39 (entitled 'Legal proceedings') provides that:

> *If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.*

This provision may be available to anyone who can establish that a public authority breached Charter s. 38. However, Charter s. 39(3) provides that such a person is 'not entitled to damages because of a breach of this Charter'.

[498] Third, s. 13(1A) of the *Ombudsman Act 1973* provides that the Ombudsman's principal functions:

> *include the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities.*

People who are 'affected by' decisions, acts, refusals or failures to act, formed proposals or intentions, or recommendations that are 'incompatible with' their Charter rights may complain to the Ombudsman who may respond by investigating it.[611] If the Ombudsman upholds the complaint, he or she may report to the 'principal officer of the appropriate authority' on steps that should be taken and make recommendations, and if they are not followed, forward the report and recommendations to the Governor in Council (or mayor of a Council) and the Parliament.[612] Any investigations are limited to the Ombudsman's 'jurisdiction', which is subject to exclusions for the office of the Governor, courts, bodies presided over by judges or lawyers, Crown lawyers, the DPP, trustees, the Victorian Electoral Commission, the Auditor-General, Audit Victoria, Councils or Councillors and (with some exceptions) Victoria Police.[613]

611 *Ombudsman Act 1973*, ss. 2, 14.
612 *Ombudsman Act 1973*, s. 23.
613 *Ombudsman Act 1973*, s. 13(3), (3A).

[499] Charter ss. 36 and 39 commenced on 1 January 2008 and therefore have been operational for over three and a half years. Section 13(1A) of the *Ombudsman Act 1973* commenced on 1 January 2007 and therefore has been in operation for over four and a half years.

Discussion

[500] Reliefs or remedies for infringements of Charter rights that flow from court or tribunal proceedings are generally issued in public. By contrast, the Ombudsman conducts investigations in private, but information about those investigations may be published in the Ombudsman's reports to the Parliament.[614]

Declarations of inconsistent interpretation

[501] There has been only one occasion to date where a Victorian court has given notice of its intention to issue a declaration of inconsistent interpretation. In *R v Momcilovic*, the Court of Appeal held that s. 5 of the *Drugs, Poisons and Controlled Substances Act 198*3, which deems a person to possess drugs that are in places he or she uses, enjoys or controls unless he or she 'satisfies the court to the contrary', 'cannot be interpreted consistently with' the Charter's right 'to be presumed innocent until proved guilty according to law'.[615] Due to the High Court appeal, no declaration has been forwarded to date to the responsible Minister (the Attorney-General).[616] However, the previous Attorney-General responded to the Court of Appeal judgment in the media by noting that the deemed possession provision would be considered in an ongoing review of Victoria's drug law.[617]

Proceedings against public authorities

[502] There have been six legal proceedings against public authorities where a court or tribunal has found that a public authority breached Charter s. 38.

- In 2008, the Supreme Court held that 'the Crown', by failing to ensure that a remandee would be brought to trial in less time than the likely length of his sentence if convicted, breached the remandee's right under Charter s. 21(5)(b) to be brought to trial without unreasonable delay. Remarking that the 'only remedy' for such a breach was bail, the court (citing delay as a 'particular' factor) bailed the defendant 'with strict conditions'.[618]
- In 2009, VCAT held that the Mental Health Review Board breached a mentally ill patient's right under Charter s. 24(1) to a fair hearing in any civil proceeding by failing to conduct reviews of two treatment orders within a reasonable time.[619] As a result, VCAT's order declared that the Board had breached the patient's human right to a fair hearing.[620]
- In two cases in 2010, VCAT found that the Director of Housing and one of its contractees, Homeground Services, in applying to VCAT for a possession order, breached the respondent's right under Charter s. 13(a) against arbitrary interferences in his or her home. As a result, VCAT dismissed the applications on the basis that the unlawfulness deprived VCAT of jurisdiction to grant them.[621]

614 *Ombudsman Act 1973*, ss. 17(2), 25.
615 *R v Momcilovic* [2010] VSCA 50, [154]–[157].
616 Charter s. 36(6).
617 M Iaria and C Best, 'Drug law at odds with human rights rule', *Herald Sun*, 18 March 2010.
618 *Gray v DPP* [2008] VSC 4, [10]–[12], [18]–[19].
619 *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646, [532].
620 *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646, [826]–[828] and see s. 124, *Victorian Civil and Administrative Tribunal Act 1998*.
621 *Homeground Services v Mohamed* (Residential Tenancies) [2009] VCAT 1131, [29]; *Director of Housing v Sudi* (Residential Tenancies) [2010] VCAT 328, [149].

- In 2011, the County Court held that Victoria Police, in arranging the use of a listening device to record a private conversation without a warrant, breached the Charter right of a party to that conversation not to have his privacy unlawfully or arbitrarily interfered with.[622] As a result, the court considered whether a transcript of the recording should be excluded from the party's criminal trial, but declined to do so because of the evidence's importance in that trial and the widespread belief in Victoria police that no warrant was legally required.[623]
- Most recently, the Supreme Court held that VCAT, in appointing an administrator for a mentally ill home-owner for reasons other than to protect his property or financial interests, breached the home-owner's rights under Charter ss. 8(3) (equal protection), 12 (movement) and 13(a) (privacy and home).[624] As a result, the court overturned the appointment and dismissed the application for an administrator.[625]

The Ombudsman's annual reports do not identify how many of the roughly 10,000 complaints to the Ombudsman that are 'within jurisdiction' every year involve the Charter, instead providing six examples of such complaints and their outcomes.[626] The reports state 'many of the complaints … received' in 2007–08 'related to the Charter'[627] and the 'key rights at issue for complainants' in 2008/2009 were Charter ss. 8 (equality), 12 (movement) and 21 (liberty),[628] while the Ombudsman reported to VEOHRC that the 'most common human rights issues raised in complaints' in 2010 included those rights and Charter s. 17 (families and children).[629]

Accessible, just and timely remedies

[503] Declarations of inconsistent interpretation are only available from the Supreme Court and VCAT's powers to determine whether or not a public authority has breached Charter s. 38 and to refuse to dismiss applications found to have been made in breach of human rights have been the subject of a lengthy dispute before the Court of Appeal.[630] Charter s. 33's provision for referral of matters from lower courts to the Supreme Court has been little used in reported judgments and the Court of Appeal has discouraged the raising of Charter arguments in interlocutory appeals, due to their complexity.[631] The Ombudsman's submission states that:[632]

> *The services of my office are free to all Victorians. I have implemented a number of initiatives to assist Victorians to access the services of my office, including the availability of interpreter services.*

[504] In three of the seven cases where breaches of the Charter were found, the remedy given to the claimant had no effect on the outcome of the proceedings.[633] Also, the Supreme Court's grant of bail as a remedy for Charter breaches and VCAT's grant of a mere declaration as a remedy for breach of the right to a fair hearing by the Mental Health Review Board have both been brought into question by subsequent

622 *DPP v W* (unreported, County Court of Victoria, 2 May 2011), [150]–[151].
623 *DPP v W* (unreported, County Court of Victoria, 2 May 2011), [208]–[209] and see *Evidence Act 2008*, s. 138.
624 *P J B v Melbourne Health & Anor* [2011] VSC 327, [359].
625 *P J B v Melbourne Health & Anor* [2011] VSC 327, [361] and see *Victorian Civil and Administrative Tribunal Act 1998*, s. 148(7).
626 Ombudsman Victoria, *Annual Report 2007/2008*, September 2008, pp. 31–3; Ombudsman Victoria, *Annual Report 2008/2009*, September 2009, pp. 51–3 SARC, but see Transcript of Public Hearings, 18 July 2011, VEOHRC, p. 6, stating that the Ombudsman has reported to VEOHRC that the number of 'charter complaints' is 'very small'. See also Submission 278 (VEOHRC), p. 187.
627 Ombudsman Victoria, *Annual Report 2007/2008*, September 2008, p. 31.
628 Ombudsman Victoria, *Annual Report 2008/2009*, September 2009, p. 51.
629 VEOHRC, *Talking Rights: Compilation Report*, May 2011, p. 139.
630 In the appeal from *Director of Housing v Sudi* (Residential Tenancies) [2010] VCAT 328.
631 *Wells v The Queen (No. 2)* [2010] VSCA 294 [39], [48].
632 Submission 65 (Ombudsman Victoria), p. 2.
633 I.e. the decisions in *Momcilovic*, *Kracke* and *W* and see Submission 163 (Australian Lawyers' Association), p. 12.

Court of Appeal decisions.[634] The correctness of the four of the remaining five remedies decisions is the subject of higher court appeals.[635]

[505] Five of the seven legal proceedings granting remedies to date have involved hearings in multiple courts and tribunals, due to the need to resolve foundational issues concerning the Charter.[636] In Momcilovic's case, the Court of Appeal, recognising that, because her appeal had become 'an important test case' on the Charter, she 'has been at large, and has been living with the uncertainty of her future, for considerably longer than would have been the case had her appeal been dealt with in the conventional way', suspended what remained of her sentence.[637]

Summary

[506] SARC considers that the Charter's provisions for remedies in legal proceedings have been difficult to access and rarely used and that there is little evidence about the extent or nature of Ombudsman investigations into Charter compatibility. The utility of the Charter's remedies provisions in legal proceedings may change once higher courts resolve foundational issues about the operation of the Charter.

Declarations of inconsistent interpretation

[507] Two issues about the operation of Charter s. 36 have arisen in the sole matter to date where a declaration of inconsistent interpretation has been issued.

[508] The first issue relates to the Court of Appeal's remark that '[t]he government party seeking to make good a justification case under s. 7(2) will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision'.[638] Applying this observation, the Court of Appeal held that the failure of the Crown or the Attorney-General to present such evidence in relation to s. 5 of the *Drugs, Poisons and Controlled Substances Act 1983* was an 'obstacle' to their argument that no declaration of inconsistent interpretation should be made.[639] SARC makes no comment about the correctness of these holdings, which may be reviewed in the High Court. However, the Court of Appeal's ruling raises potentially difficult questions about the process for adducing such evidence, its nature and the role of other parties in questioning it. In the High Court, the Crown disputed the Court of Appeal's reliance on a 'concession' made by the Chief Crown Prosecutor and argued that a requirement to produce evidence about the impact of a proof conviction was 'an absolute nonsense' in light of jury secrecy laws.'[640]

[509] The second issue that emerged in the High Court is the possible unconstitutionality of Charter s. 36(2) in some proceedings, due to the requirement that courts exercising 'federal judicial power' must only do so in a 'matter', that is, a dispute that resolves rights.[641] This constitutional issue arose in *Momcilovic*

634 In relation to *Gray*, see *Barbaro v DPP* (Cth) & Anor [2009] VSCA 26, [40]–[41]. In relation to *Kracke*, see *R v Momcilovic* [2010] VSCA 50, [76], [106] and see *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646, [672], [784]–[785].

635 *Momcilvoic* has been appealed to the High Court, while *Sudi* (also implicating *Mohamed*) and *W* have been appealed to the Court of Appeal.

636 In *Momcilovic*, the Court of Appeals hearings took two days, with a decision nine months later, while proceedings in the High Court took a further year from the grant of special leave, including four hearing days before the Full Court. In *Kracke*, after an initial hearing before the Mental Health Review Board, there were seven days of VCAT hearings and a decision five months later. In *Sudi*, there were three days of VCAT hearings and a judgment six months later, as well as a over nine months of deliberations in the Court of Appeal. In *W*, there were five days of hearings in the County Court, with a judgment eight months later, and the matter has been reserved in the Court of Appeal since June. In *PJB*, there were proceedings in both VCAT and the Supreme Court, although neither involved lengthy hearings or deliberations.

637 *R v Momcilovic* [2010] VSCA 50, [199]–[200]

638 *R v Momcilovic* [2010] VSCA 50, [146].

639 *R v Momcilovic* [2010] VSCA 50, [142].

640 *Momcilovic v The Queen & Ors* [2011] HCATrans 16, p. 126.

641 Section 75 of the federal Constitution.

because of the chance event that the defendant moved to Queensland before she was indicted, with the result that her prosecution for a breach of Victorian law was nevertheless within federal jurisdiction as a matter 'between a State and a resident of another State'.[642] SARC makes no comment on these constitutional arguments. However, such questions about the constitutionality of Charter s. 36(2) greatly detract from its utility as an accessible and timely remedy.

[510] While each of the above matters may be resolved satisfactorily by the High Court, it is also possible that they may not be the subject of a clear majority ruling (or, indeed, any ruling). Accordingly, SARC recommends that consideration be given to alternatives to Charter s. 36(2) that lack these difficulties. In discussing practical barriers to a declaration remedy for federal legislation, the National Human Rights Consultation Committee remarked:[643]

> *In view of these problems, the Committee proposes that, if declarations of incompatibility cannot practically and fairly be restricted to the High Court, there be no provision for formal declarations of incompatibility by a court. Rather, the parties to the proceedings, and perhaps the Australian Human Rights Commission, could be given the power to notify the Joint Committee on Human Rights of the outcome of litigation and the court's reasoning indicating non-compliance of a Commonwealth law with the Human Rights Act. It would then be a matter for members of parliament themselves to trigger the processes of the Joint Committee, which could seek the Attorney-General's response.*

SARC considers that an independent non-judicial body in Victoria that may be suited to this role is VEOHRC, which presently has the following functions under Charter s. 41:

> *(a) to present to the Attorney-General an annual report that examines –*
>
> *(i) the operation of this Charter, including its interaction with other statutory provisions and the common law; and*
>
> *(ii) all declarations of inconsistent interpretation made during the relevant year; and*
>
> *(iii) all override declarations made during the relevant year; …*

In light of VEOHRC's existing functions, it would be straightforward to require VEOHRC to inform a parliamentary committee (such as SARC) of any occasions where the Supreme Court was unable to interpret a statutory provision consistently with a human right. The involvement of a parliamentary committee may make it inappropriate to retain the requirement in Charter s. 37 that obliges the Minister responsible for the statute in question to publish a written response within six months.[644]

[511] This recommendation is relevant to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[645]

Recommendation 31

Inconsistent interpretation

If Charter s. 36 is retained, then SARC recommends that consideration should be given to amending it to give an independent non-judicial body (such as VEOHRC) the functions of identifying statutory provisions that the Supreme Court has interpreted in a way that limits a human right and forwarding those provisions to a parliamentary committee (such as SARC) for reporting to the Parliament, as well as to the Minister responsible for the statutory provision.

642 *Momcilovic v The Queen & Ors* [2011] HCATrans 17, p. 214 and see s. 75(iv) of the federal Constitution.

643 National Human Rights Consultation, *Report*, September 2009 p. 375 and see A. Mason et al, 'Constitutional validity of an Australian Human Rights Act', 22 April 2009, available at <http://www.hreoc.gov.au/letstalkaboutrights/roundtable.html>, [6].

644 SARC, Transcript of Public Hearings, 21 July 2011, Carlo Carli, p. 4.

645 See Chapter 6, [687] and Recommendation 35.

Reliefs and remedies

[512] The inquiry received numerous submissions arguing that Charter s. 39(1) is unclear, unworkable or impractical.[646] Charter s. 39(1) provides:

> *If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.*

One of Charter s. 39's drafters has acknowledged its lack of 'clear language' and its 'awkward wording'.[647] Legal views differ as to the nature of the precondition that Charter s. 39 imposes on Charter remedies, for example whether or not it requires the claimant to have commenced or have standing to commence an action under non-Charter law.[648] Charter s. 39(1) does not identify which bodies may grant Charter remedies, a matter recently under consideration by the Court of Appeal in relation to VCAT's decisions on tenancy matters. Even if this question is resolved in relation to some aspects of residential tenancies law, it may remain controversial for myriad other types of matters where breaches of Charter s. 38 may be relevant.

[513] In Chapter Three, SARC considered and rejected a suggestion made in a number of submissions that Charter s. 39 should be replaced by a provision permitting courts and tribunals to provide any remedy for breaches of Charter s. 38 that they consider to be just and appropriate.[649] As SARC outlined, such a provision, although plainer in form than the current Charter s. 39, nevertheless shares nearly all of the uncertainties of the existing provision, including questions of which bodies may provide which remedies, as well as the additional uncertainty involved in determinations of what is just and appropriate.[650] The apparent breadth of such remedies is misleading, as their utility is limited by their vagueness and uncertainty. As the United States Supreme Court has famously observed: 'Liberty finds no refuge in a jurisprudence of doubt'.[651] Rather, SARC agrees with the Human Rights Consultation Committee's original view on remedies for breaches of Charter s. 38 that '[i]t would be better to set out clearly in the Charter that those … avenues are available than to allow it to develop in an ad hoc way over time'.[652]

[514] SARC recommends that Charter s. 39 be replaced by a provision barring the provision of remedies or reliefs for breaches of Charter s. 38 other than remedies expressly provided for such breaches in a Victorian statute. One such remedy is currently set out in s. 13(1A) of the *Ombudsman Act 1973*. SARC recommends that further remedies, if any, should be provided by way of express amendment to existing remedies statutes in Victorian law, for example by providing that:

- a breach of Charter s. 38 is a ground for judicial review under the common law and the *Administrative Decisions Act 1978*
- a breach of Charter s. 38 is an 'impropriety' for the purposes of s. 138 of the *Evidence Act 2008*

646 Submission 95 (Victorian Bar), p. 17; Submission 110 (Peninsula Community Legal Centre), pp. 3–4, 6; Submission 114 (Julie Debeljak), pp. 7–8; Submission 127 (Top End Women's Legal Centre), p. 2; Submission 163 (Australian Lawyers' Association), p. 8; Submission 165 (Michael Power); Submission 171 (Victoria Legal Aid), pp. 3–4; Submission 173 (Women's Health Victoria), p. 6; Submission 247 (Law Institute of Victoria), p. 19; Submission 257 (PILCH), p. 12; Submission 263 (Human Rights Law Centre), p. 45; Submission 278 (VEOHRC), pp. 110–1.

647 G. Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' [2006] *Melbourne University Law Review* 27, notes 75 and 93.

648 P Tate, 'A Practical Introduction to the *Charter of Human Rights and Responsibilities*', speech delivered at the Seminar Program of the Victorian Government's Solicitor's Office, Melbourne, 29 March 2007; A Pound and K Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008), p. 250.

649 See Recommendation 8.

650 See [344]-[345].

651 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

652 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 125.

- VCAT may decline to make a possession order where a notice to vacate was given in breach of Charter s. 38

The questions of what preconditions should exist before such a remedy can apply and which court, tribunal or other body may provide them can be resolved by reference to existing law on such provisions or express amendment to them.

[515] This recommendation is relevant to the first of the two options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[653]

Recommendation 32

Reliefs and remedies

If Charter s. 38 is retained, then SARC recommends that:

(a) Charter s. 39 be repealed and replaced by a provision that states that, except where a statute expressly provides otherwise, nothing in Charter s. 38 creates in any person any legal right, gives rise to any civil cause of action or affects the rights or liabilities of a public authority, and

(b) if any existing relief or remedy in Victorian law is to be made available for a breach of Charter s. 38, it should be provided for by an express amendment to the statute that provides for that relief or remedy.

Ombudsman investigations

[516] The Ombudsman's role under the Charter is determined by the interaction between the following two subsections of s. 13 of the *Ombudsman Act 1973*:

> *(1) The principal function of the Ombudsman shall be to enquire into or investigate any administrative action taken in any Government Department or Public Statutory Body to which this Act applies or by any member of staff of a municipal council.*
>
> *(1A) The functions of the Ombudsman under subsection (1) include the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities.*

The Ombudsman's submission remarks:[654]

> *A further matter for consideration by the Inquiry is the extent of my jurisdiction to deal with complaints related to the Charter. The Charter imposes responsibilities on a broader range of bodies than my traditional jurisdiction under the provisions of the Ombudsman's Act. In my view this indicates Parliament's intention to broaden my jurisdiction so that I am able to investigate or enquire into the compatibility of administrative actions with the Charter. However, my interpretation has not yet been tested and may be subject to challenge.*

SARC makes no comment on the correctness of the Ombudsman's view about the effect of s. 13(1A).[655] However, SARC agrees with the following comment by the Ombudsman:[656]

> *Unless Parliament brings certainty to this matter it is foreseeable that the extent of my jurisdiction will ultimately be resolved through time consuming and expensive litigation. I do not consider that this would be in the public interest.*

653 See Chapter 6, [687] and Recommendation 35.
654 Submission 65 (Ombudsman Victoria), p. 2.
655 See Submission 263 (Human Rights Law Centre), p. 45; Submission 278 (VEOHRC), pp. 187-8.
656 Submission 65 (Ombudsman Victoria), pp. 2–3.

Accordingly, consistently with Recommendation 22, SARC recommends that s. 13(1A) be amended to expressly specify the range of bodies that the Ombudsman can investigate to determine whether any administrative action is incompatible with a human right.

[517] This recommendation is relevant to the both of the options for reform or improvement of the Charter recommended by SARC for consideration at the conclusion of this Report.[657]

Recommendation 33

Jurisdiction of the Ombudsman

If s. 13(1A) of the Ombudsman Act 1973 is retained, then SARC recommends that it be amended so as to specify the range of bodies that can be subject to an enquiry or investigation with respect to human rights.

657 See Chapter 6, [687] and Recommendation 35.

5
The Benefits and Costs of the Charter

Introduction

[518] The third term of reference requires SARC to inquire into the overall benefits and costs of the Charter.

[519] This chapter sets out:

- SARC's approach to assessing benefits and costs
- the benefits associated with the Charter
- the costs associated with the Charter.

[520] This chapter does not cover the potential costs of any amendments to the Charter, including repealing the current exemption for the parole boards that would require them to comply with the Charter. The cost issues raised by the parole boards are addressed in Chapter 4.[658]

5.1 SARC's approach to assessing benefits and costs

[521] SARC notes there is no established methodology for assessing the benefits and costs of the Charter, although work has been done on developing a framework for assessing aspects of human rights protections, such as human rights scrutiny by Parliaments.[659] While there have been a number of reviews of the operation of human rights instruments in other jurisdictions, none of these have included analyses of costs and benefits from an economic perspective.[660]

[522] The issues paper[661] prepared by Deloitte Access Economics for VEOHRC discusses a number of considerations in relation to assessing the benefits and costs of the Charter. These are:

- the intangible and subjective nature of many impacts, particularly benefits[662]

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658 Chapter 4, [441].

659 See C Evans and S Evans, 'Messages from the Front Line: Parliamentarians' Perspectives on Rights Protection' in T Campbell, K D Ewing and A Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford University Press, 2011, pp. 329-46 and the references cited in footnote 4.

660 Department of Justice and Community Safety, *Twelve-Month Review – Report*, June 2006; ACT Human Rights Act Research Project, *The Human Rights Act (ACT): The First Five Years of its Operation*, May 2009; Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006; Equality and Human Rights Commission, *Human Rights Inquiry*, June 2009.

661 Deloitte Access Economics, *Impacts of the Victorian Charter of Human Rights and Responsibilities: Some Economic Perspectives*, Issues Paper, June 2011 ('Access Economics Issues Paper').

662 Access Economics Issues Paper, p. 3.

- the difficulty of attributing benefits and costs to the Charter[663]
- the point of time at which benefits and costs accrue[664]
- the uncertainty of future costs and benefits of the Charter.[665]

[523] SARC notes many submissions it received suggested different methodologies for measuring costs and benefits[666] and categorised costs and benefits[667] in different ways. It also notes that it does not have full information about the benefits and costs of the Charter. For example, the Victorian government submission notes a number of costs that are not included in its submission, such as most of the information in relation to the cost of staff time involved in Charter implementation tasks and activities.[668] Chapter 4 also notes the absence of submissions from key statutory authorities.[669]

[524] Finally, SARC observes that assessing the benefits and costs of the Charter is a different exercise to assessing whether the Charter is the most efficient and effective way of delivering human rights outcomes. As the government submission notes, 'the true cost of a program is its opportunity cost – the potential benefits given up by spending on the program rather than on some other program'.[670] SARC considers that the question of whether greater human rights protections could be achieved through alternate means is beyond the scope of the terms of reference for this review.

[525] In light of these methodological issues, SARC's approach is to set out in narrative form the evidence received in relation to benefits and costs, including conflicting claims, and to provide comments on the strength or otherwise of particular claims based on the information in submissions and conclusions it has drawn.

[526] On the grounds that much of the information required to properly assess the benefits and costs of the Charter is unavailable and the lack of a uniform approach to the evidence that has been submitted to the inquiry, SARC does not consider it is in a position to reach a conclusion about whether the benefits of the Charter outweigh the costs.

[527] SARC notes VEOHRC's recommendation that the government develop a framework for any future assessment of the benefits and costs of the Charter.[671] SARC considers a framework for assessing benefits and costs would assist in resolving the methodological issues identified in this chapter and make the basis of any future assessment transparent. The framework could be developed by the government in consultation with relevant stakeholders and publicised in advance of any future assessment of the Charter.

[528] SARC considers that any framework should include:

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663 Access Economics Issues Paper, p. 4. Submission 83 (PILCH Homeless Persons' Legal Clinic). The difficulties of identifying the cause and effect of the Charter is discussed in Chapter 4, [353]-[354] and [446].

664 Access Economics Issues Paper, pp. 6-7.

665 Access Economics Issues Paper, pp. 6-7.

666 E.g. Submission 83 (PILCH Homeless Persons' Legal Clinic), p. 53; Submission 151 (Council to Homeless Persons), p. 9; Submission 106 (Salvation Army), p. 2; Submission 129 (headspace), p. 5; Submission 51 (Community Information Victoria), p. 2. All these submissions suggest calculating benefits by reference to costs saved through improved services and outcomes.

667 E.g. the government's submission identified benefits by reference to claimed benefits in the Human Rights Consultation Committee's 2005 report, the Charter of Human Rights and Responsibilities Bill second reading speech and the VEOHRC's Charter reports, in particular VEOHRC, *First Steps Forward*, April 2008, pp. 6-7 (Submission 324 (Victorian Government), para 249. See also Submission 125 (Rob Watts), pp. 11 and 13), while the Access Economics Issues Paper identified benefits by reference to the actual realisation of human rights (p. 4).

668 Submission 324 (Victorian Government), p. 44.

669 Chapter 4, [442].

670 Submission 324 (Victorian Government), para 179.

671 Submission 278 (VEOHRC), p. 193 (Recommendation 37).

- the indicators to be used in assessing benefits and costs
- the data sources relevant to each indicator
- the timeframe for assessing progress against each indicator
- how benefits and costs are to be quantified or valued
- how benefits and costs are to be assessed.

[529] This recommendation is relevant to the both of the options for reform or improvement of the Charter that are recommended by SARC for consideration at the conclusion of this Report.[672]

Recommendation 34

Development of a framework for assessing benefits and costs

SARC recommends that the government develop a framework for assessing the benefits and costs of the regime for protecting and upholding human rights in Victoria.

5.2 Benefits

[530] The benefits in this section are set out according to the areas of operation of the Charter to facilitate the link between Chapter 4 and this chapter. It covers:

- drafting of laws
- SARC's scrutiny function, and parliamentary debate
- service provision
- increasing respect for rights within the community.

Drafting of laws

[531] Many submissions identified the requirement for the government to consider human rights when drafting proposed laws as a key benefit of the Charter, on the basis that through consideration of human rights at the 'front end', breaches of human rights at the 'back end' are less likely to occur.[673]

[532] In Chapter 4, SARC found that there was evidence of the existence of processes for human rights assessment of new statutory provisions.[674] In addition to these new processes, the government submission notes that while individual rights were already taken into account in the drafting of proposed legislation by the government and parliamentary counsel, the Charter has 'increased the focus on rights concerns' and 'provided [parliamentary counsel with] a legislative basis for raising rights issues'.[675] The government submission also noted the significant training and other capacity development efforts directed towards officers responsible for drafting Bills,[676] including the support provided by the Human Rights Unit.[677]

[533] In relation to the effect of these processes on the substance of proposed statutory provisions in Victoria, SARC found that the Charter has had some impact on a number of statutory provisions and may

672 See Chapter 6, [687] and Recommendation 35.

673 Submission 263 (Human Rights Law Centre), p. 17; Submission 257 (PILCH Homeless Persons' Legal Clinic), p. 5; Submission 145 (International Commission of Jurists), p. 25.

674 Chapter 4, [364].

675 Submission 324 (Victorian Government), para 37. The Office of the Chief Parliamentary Counsel is responsible for drafting Bills upon instruction from departmental officers.

676 Submission 324 (Victorian Government), paras 18-29.

677 Submission 324 (Victorian Government), para 33.

have had a significant impact in a number of instances, but that it is not possible to identify the actual effect of these processes on any particular statutory provision.[678]

[534] SARC considers that human rights impact assessment processes, the training and support provided to officers responsible for drafting Bills and the strengthening of the 'check and balance' provided by parliamentary counsel has led to an increased awareness of human rights issues among officers responsible for drafting Bills and consequently is likely to have improved the overall compatibility of proposed laws, although it is not able to determine the extent to which this has occurred.

Stakeholders' consultation in the development of proposed laws

[535] VEOHRC's submission states that an aspect of assessing the human rights impact of new laws has been greater community engagement and consultation during the legislative development process.[679] This statement is based on the reports of government departments to VEOHRC[680] and reports of community consultation in statements of compatibility.[681]

[536] Chapter 4 notes a number of public processes in relation to law reform proposals where human rights have been expressly referred to and a number of submissions from advocacy organisations that describe using the Charter to successfully advocate for more human rights-compliant laws and as a framework for articulating their concerns.[682] SARC considers that this evidence shows how the Charter has been used in discussions about law reform, but that it does not provide evidence that the Charter has led to an increase in stakeholder engagement in law reform processes.[683] SARC also notes the results from the VEOHRC's 2010 survey of 89 organisations and individuals that 29% of organisations and 7% of individuals agreed or strongly agreed that the Charter had increased opportunities for community participation in government, around half were not sure and 27% of organisations and 37% of individuals disagreed or strongly disagreed.[684]

Reviews prompted by the Charter

[537] Some submissions also asserted that the Charter was a catalyst for or a major contributor to the decision to review some laws, including the *Mental Health Act 1986* and the *Guardianship and Administration Act 1986*.[685] SARC notes that the community consultation paper for the *Mental Health Act* review identifies the Charter as one of the developments prompting the review[686] and that the terms of reference for the *Guardianship and Administration Act* review require the Law Reform Commission to have

678 Chapter 4, [365].

679 Submission 278 (VEOHRC), pp. 128, 134. This refers to government Bills, not local laws. In relation to local laws, VEOHRC has acknowledged community consultation is part of standard procedure for many councils when they are developing new laws. VEOHRC, *Talking Rights: 2010 Compilation Report*, April 2011, p. 61.

680 Submission 278 (VEOHRC), pp. 128 and 134.

681 In its report for 2010, VEOHRC noted 'in 2010, there was also a marked increase in statements of compatibility reporting on community consultation in the development of legislation'. VEOHRC, *Talking Rights: 2010 Compilation Report*, April 2011, p. 36.

682 Chapter 4, [362] and [386].

683 The government submission does not provide information about the impact of the Charter on the level of stakeholder consultation in the legislative development process.

684 VEOHRC, *Talking Rights: 2010 Compilation Report*, April 2011, p. 14.

685 Submission 278 (VEOHRC), p. 133; Submission 263 (Human Rights Law Centre), para 40; Submission 83 (PILCH Homeless Persons' Legal Clinic), p. 34; Submission 262 (VCOSS), p. 14; Submission 111 (City of Darebin), p. 10; Submission 228 (Psychiatric Disability Services), p. 4.

686 *Review of the Mental Health Act 1986 – Consultation Paper*, December 2008, available at <http://www.health.vic.gov.au/mentalhealth/mhactreview/consult2008.pdf>, pp. 10–11.

regard to the Charter, among other things, in conducting the review.[687] However, SARC also notes that the government submission states that six 'high priority' laws, including the *Mental Health Act* and the *Drugs Poisons and Controlled Substances Act 1981*, were deferred from the initial audit of existing legislation conducted in 2007 because of existing reviews.[688]

[538] On this basis, SARC considers that while the Charter has contributed to framing these review processes, it is not able to conclude that it was the catalyst for the decision to conduct the reviews, at least in the case of the *Mental Health Act* and the *Drugs Poisons and Controlled Substances Act*.

SARC's scrutiny function and parliamentary debate

[539] SARC's scrutiny function[689] provides an extra and independent check on the compatibility of Bills and statutory provisions with human rights.[690]

[540] Chapter 4 noted the apparent increase in the number of Bills in relation to which SARC has raised human rights issues, from 36% of all Bills in 2003 to 48% of all Bills since the commencement of the Charter.[691]

[541] Chapter 4 also noted that many submissions considered the transparency provided by statements of compatibility to be valuable,[692] even where there may be disagreement about the assessment of compatibility for a given Bill. As Law Institute Victoria submitted, 'statements of compatibility provide a basis upon which government can be held to account for decisions that, without them, would otherwise be considered internally within government without public scrutiny'.[693]

[542] Chapter 4 also set out the evidence in relation to debates about human rights in Parliament[694] and amendments to provisions and administrative procedures on the basis of issues raised in statement of compatibility or SARC's reports and ministerial correspondence.[695]

[543] Chapter 4 concluded that the combination of the requirement to table statements of compatibility and SARC's reports (including ministerial responses to correspondence from SARC) has resulted in a large quantity of information being made available to Parliament concerning the possible human rights impact of proposed Bills and has informed debate on those Bills, while the *Subordinate Legislation Act 1994* has led to significant information about the human rights impact of regulations being made available to SARC in its scrutiny of regulations role.[696]

[544] On the basis of this evidence, SARC considers that the scrutiny mechanisms in the Charter and the *Subordinate Legislation Act* have generally increased the transparency of the government's consideration of the human rights issues engaged by a proposed law and has facilitated debate both in Parliament and in the broader community, in some cases, about whether any proposed limitations are reasonable. SARC considers that this has provided a benefit to Parliament and to the wider community.

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687 The terms of reference for the review are available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Current+Projects/Guardianship/>.

688 Submission 324 (Victorian Government), para 11.

689 *Parliamentary Committees Act 2003,* s. 17 (a)(viii); *Subordinate Legislation Act 1994*, s. 21(1)(ha) and Charter, s. 30.

690 Since its inception, one of SARC's functions has been to report on the human rights implications of Bills. In effect, the Charter has provided a framework for the consideration of human rights issues by SARC.

691 Chapter 4, [382].

692 Chapter 4, [386].

693 Submission 247 (Law Institute of Victoria), para 107.

694 Chapter 4, [384].

695 Chapter 4, [387].

696 Chapter 4, [388].

Service provision

[545] The evidence to this review in relation to service provision covered:

- reports of reviews of policies and procedures by public authorities
- reports of substantive changes to the way in which services are provided
- perceptions of service users and their advocates about systemic improvements to services
- the use of the Charter by advocates to address specific service issues.

[546] SARC made a number of comments in Chapter 4 in relation to the reliability of the information provided about the impact of the Charter on service provision arising from the difficulties associated with attributing particular impacts to the Charter,[697] the barriers to communicating the impact of the Charter on service provision faced by public authorities[698] and the people who deal with them,[699] and the difficulty of generalising impacts beyond individual case studies.[700]

Reviews of policies and procedures

[547] The requirement in section 38 to make decisions and act compatibly with human rights prompted public authorities to review their policies and procedures, including local laws and to develop tools to assist them to assess the human rights compatibility of new policies and procedures. Chapter 4 notes the evidence in relation to these activities.[701]

Government and statutory authorities

[548] As well as reviews of policies and procedures by government noted in Chapter 4,[702] Victoria Police provided comprehensive evidence through supplementary materials made available to SARC at the public hearings of its corporate and practice audit processes which are mapped to international human rights practice standards and reference the Charter and other relevant rights laws and policies (such as the *Victims Charter Act 2006*). While noting in evidence that Victoria Police had always taken an approach that aligned with the values in the Charter,[703] Victoria Police stated that the Charter had provided 'greater emphasis on human rights issues and accountability throughout the organisation', 'a platform from which Victoria Police could work towards the OECD standards for policing in democratic societies' and 'greater emphasis on victims' rights'.[704] The service delivery outcomes resulting from these policies and procedures are discussed below. Justice Kevin Bell, Supreme Court judge and previous President of VCAT also noted the Charter had been used to inform the review of VCAT.[705]

Local government

[549] SARC notes a number of submissions, particularly from local councils, indicating that the process of conducting reviews and developing human rights impact assessment tools has been beneficial, even if the review did not necessarily lead to substantial changes to policies and local laws or the provision of services. In these cases, the process was considered useful in focusing attention on the human rights impacts of

697 Chapter 4, [353-354].
698 Chapter 4, [438].
699 Chapter 4, [443].
700 Chapter 4, [446].
701 Chapter 4, [439-441] and [447].
702 Chapter 4, [439].
703 Transcript of Public Hearings, 19 July 2011, Deputy Commissioner Walshe, p. 8.
704 Submission 170 (Victoria Police), p. 3.
705 Submission 66 (Hon. Kevin Bell J), p. 3.

policies and procedures and providing support and a framework for existing and future initiatives. For example, councils stated that even though in many cases human rights were considered prior to the commencement of the Charter, the Charter:

- enhances existing policies and procedures by ensuring human rights considerations are at 'the centre of decision-making'[706]
- 'provides important support and enhances council's role in educating people about human rights standards and incorporating these standards into the delivery of public services'[707]
- has led to more transparent and accountable decision-making through 'the requirement to capture [evidence of the compatibility of policies and processes with the Charter] as well as record thinking and discussions within council's corporate information management processes'[708]
- 'is useful for providing council with an additional tool to design, monitor, implement, review and justify council activities'[709]
- 'has raised the profile of human rights and ensured that rights are formally considered in council decision-making'[710]
- 'ensures that the rights of the community are at the forefront of planning and decision-making'[711]
- is contributing to 'building a culture of human rights, whereby rights are taken more seriously and considered more systematically'[712]
- 'is a guide for all staff to consider human rights and move towards a shared understanding of rights in the local community'.[713]

[550] SARC acknowledges the generally shared perception among local councils that made submissions to this review that review processes and the development of human rights impact assessment tools have been useful.[714] However, it also notes that only 13 out of 79 councils made submissions and that those who did are more likely to be engaged with the Charter than those who did not. Further, SARC considers that the extent of the benefit derived from such processes will depend on the extent to which staff at all levels of the organisation have been involved in them and are aware of them. For example, an outsourced review process or a review conducted at the corporate level is less likely to engage an organisation in thinking about how their services impact on rights, than a process that involves input from all levels of the organisation. In this regard, SARC notes the project evaluation of the 'From Compliance to Culture' project appended to the submission of the Victorian Local Governance Association (VLGA) that 'usually a legal firm' was engaged to conduct the review of local laws.[715]

Community sector organisations

[551] In relation to policy review by community sector organisations (CSOs) who are public authorities, SARC notes VCOSS' reports of surveys conducted in 2008 and 2010 on the implementation of the Charter

706 Submission 289 (City of Greater Geelong), p. 2.
707 Submission 288 (City of Moreland), p. 3.
708 Submission 111 (City of Darebin), p. 10.
709 Submission 188 (City of Port Phillip), p. 2.
710 Submission 207 (City of Stonnington), p. 2.
711 Submission 112 (Manningham City Council), p. 2.
712 Submission 214 (City of Wyndham), p. 2.
713 Submission 52 (City of Yarra), p. 2.
714 The views of the five small rural and regional shires who participated in the project of the Victorian Local Governance Association on the barriers to Charter implementation are discussed later in this chapter.
715 Submission 204 (VLGA), Appendix A, 'From Compliance to Culture Project Evaluation', p. 4.

by CSOs.[716] The 2008 report states that 'a common response [to whether changes had been made to policies] was that no changes needed to be made because, without extensive research, the respondent felt their policies and procedures already encompassed all aspects of human rights under the Charter',[717] but that 'nevertheless, a significant number of organisations had begun to make systemic or specific changes to organisational policy'.[718] The 2010 report noted that 'many community sector organisations had already begun to adopt a rights oriented approach to their service delivery and advocacy prior to the enactment of the Charter'.[719] The 2010 report noted that where this was the case, 'in many situations the Charter had further encouraged many of these organisations to implement and strengthen a human rights based approach across all policy and practice areas' and 'had … emphasised the importance, legitimacy and improved outcomes which are achieved by adopting a human rights framework'.[720] Of the 75 organisations that responded to the 2010 survey, 38% indicated that their organisations had made, or were planning to make, changes to organisational policies and procedures, while 35% were unsure whether this had occurred.[721] The 2010 report also notes that CSOs 'that had not adopted a rights based approach in their work prior to the enactment of the Charter reported that it provided an impetus for change to policy and practice'.[722]

[552] Only a small number of CSOs who made submissions to this review commented on their own implementation of the Charter as public authorities:[723]

- Community Connections Ltd stated that adopting a human rights framework 'better enables us to understand society's expectations and deliver more sustainable services that are respectful of the inherent dignity of individuals'.[724]
- Victoria Legal Aid stated in evidence at the public hearings that following a review of its policies and procedures for Charter compatibility, it had changed the way in which it made decisions in relation to requests for providing independent children lawyers from a system based on quotas to one based on consideration of the effect on individuals.[725]
- The Federation of Community Legal Centres submission noted it had developed a guide for community legal centres (CLCs) on compliance with the Charter and surveyed CLCs about its utility. Half of the 20 respondents reported using the guide. Of those respondents, 90% responded that it had assisted in improving the CLC's service delivery.[726]
- The Eastern Community Legal Centre submission contained the results of a survey of local community and government service providers conducted in May 2011. The results showed that 91% of respondents were aware of the Charter, but that only 20.5% had taken steps to implement it in their own organisation. Most of this implementation focused on reviews of policies and procedures.[727]

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716 VCOSS, *Using the Charter in Policy and Practice: Ways in Which Community Sector Organisations Are Responding to the The Victorian Charter of Human Rights and Responsibilities*, July 2008 ('VCOSS 2008 Report') and Submission 262 (VCOSS), Appendix A, *Victorian Community Sector: Engaging with and Implementing a Human Rights Framework*, December 2010 ('VCOSS 2010 Report').

717 VCOSS 2008 Report, p. 7.

718 No data is provided in the VCOSS 2008 Report as to the percentage of respondents represented by these narrative categorisations.

719 VCOSS 2010 Report, p. 8.

720 VCOSS 2010 Report, p. 8.

721 VCOSS 2010 Report, p. 9. Response percentages were not provided in the VCOSS 2008 Report.

722 VCOSS 2010 Report, p. 9.

723 It is noted that not all CSOs that made submissions are public authorities, and that many CSOs are unsure about their status as public authorities. See Chapter 4, [451].

724 Submission 149 (Community Connections), p. 8.

725 Transcript of Public Hearings, 19 July 2011, Mr Warner, Victoria Legal Aid, 19 July 2011, p. 8.

726 Submission 205 (Federation of Community Legal Centres), p. 18.

727 Submission 131 (Eastern Community Legal Centre), p. 9.

- Good Shepherd stated that the Charter had triggered a process of internal review and development, including incorporating human rights into a number of internal agency polices and procedures.[728]
- Hanover Welfare Services stated that 'the Charter had reinforced … the need for considered policies and procedures in those areas of … activity that might infringe the rights of clients'.[729]
- The Centre for Excellence in Child and Family Welfare noted that a small number of member organisations had incorporated the provisions of the Charter as a resource in their internal planning and policy documents.[730]

Reports of substantive changes to service provision

[553] In Chapter 4, SARC drew a distinction between compliance activities, which include review of policies and procedures, and substantive changes to service provision as a consequence of revised policies and procedures.

Government and statutory authorities

[554] SARC considers that the changes made to certain policies by government departments, either as a result of the initial review, or in response to SARC reports, may have substantive effect on the way in which services are delivered in those areas. These include changes made to the Department of Education and Early Childhood Development's school reference guide, Victoria Police's audit of police cells and persons in custody review,[731] and changes to aspects of prison system policies. Examples of the latter include the removal of random strip searches from the schedule of women's prisons,[732] changes to the Mothers and Children Policy and programs in prisons,[733] and changes to the strip searches procedure for visitors.[734]

Local government

[555] Some local councils provided examples of changes to the way in which services were delivered as a consequence of the policy review. For example, Municipal Association of Victoria stated that complaints processes within many local councils had been streamlined to make them more accessible[735] and noted that the City of Whittlesea had changed its meeting procedure to make participation in council meetings more accessible for people who are unable to write.[736] As noted in Chapter 4,[737] examples of changes to local laws were attributed to existing frameworks as well as the Charter. On the basis of this, Chapter 4 concluded that compliance has largely been achieved through pre-existing community engagement programs.[738]

Community sector organisations

[556] While little evidence was provided in relation to service delivery by CSOs, VCOSS' 2008 publication highlights four case studies where the provision of services had been altered to better protect the rights of clients.[739] The 2010 survey reported that 36% of respondents indicated their organisations had made

728 Submission 232 (Good Shepherd), p. 9.
729 Submission 277 (Hanover Welfare Services), p. 5.
730 Submission 230 (Centre for Excellence in Child and Family Welfare), p. 6.
731 Submission 170 (Victoria Police), p. 3.
732 Submission 324 (Victorian Government), para 66.
733 Submission 324 (Victorian Government), para 68.
734 SARC, *Annual Review 2009, Regulations 2009*, p. 60, concerning procedures for strip searches of prison visitors.
735 Transcript of Public Hearings, 19 July 2011, Ms Black, Municipal Association of Victoria, p. 6.
736 Transcript of Public Hearings, 19 July 2011, Ms Black, Municipal Association of Victoria, p. 3.
737 Chapter 4, [364].
738 Chapter 4, [449].
739 VCOSS 2008 Report, p. 15-16.

changes to their services as a result of the Charter and that 37% were unsure whether this had occurred.[740] However, no examples were provided in the 2010 report of changes to service provision prompted by the Charter. The Centre for Excellence in Child and Family Welfare stated that no member organisations had reported needing to alter their own practice as a result of the Charter.[741] SARC also notes the evidence of VCOSS in the public hearings that 'there are a range of other significant client enhancement processes happening in the state', aside from the Charter that have resulted in an increased focus on human rights.[742]

The use of the Charter by advocates to address service issues

[557] Chapter 4 noted submissions from advocacy organisations stating they had observed a positive change in the behaviour of public authorities, and the results of VEOHRC's survey that indicated that 47% or organisations and 33% of individuals agreed or strongly agreed that the Charter has had a positive impact on the provision of service delivery by public authorities.[743] Chapter 4 also sets out the methodological concerns associated with the evidence of the impact of the Charter on service provision provided by advocates, including the necessarily subjective nature of the evidence and the difficulties with attributing the impetus for certain behaviours and actions to the Charter.[744] SARC also notes that the 2010 VCOSS report finding that in around one-third of respondent organisations, 'only some staff' (23% of respondents) or 'not many' staff (8% of respondents) are aware of the Charter,[745] and two submissions suggested that there was little evidence of Charter awareness by front-line service delivers.[746] With these caveats, this section sets out the service provision benefits claimed by advocates.

[558] Most of the submissions noting positive changes in the service delivery of public authorities described case studies in which an individual or advocacy group had used the Charter to negotiate a better outcome for clients. A few submissions from advocates noted systemic changes in service provision by public authorities.

[559] SARC acknowledges that while successful advocacy can lead to systemic change, this is not a given. Examples of systemic changes reported in submissions are:

- changes made by the Bushfire Royal Commission process to increase the participation of victims[747]
- changes to Department of Human Services' (DHS) policy on disability support to recognise Asperger's Syndrome as a disability[748]
- changes made by a disability service provider following a human rights impact assessment to facilitate access by clients to voting[749]
- the initiation of monitoring and recording of possible human rights issues in the execution of warrants by sheriffs[750]

740 VCOSS 2010 Report, p. 9.

741 Submission 230 (Centre for Excellence in Child and Family Welfare), p. 6.

742 Transcript of Public Hearings, 22 July 2011, Ms Smith, VCOSS, p. 2.

743 Chapter 4, [443]-[445].

744 Chapter 4, [446].

745 VCOSS 2010 Report, p. 7. There were no figures provided in relation to the level of awareness of respondent organisations in the 2008 survey.

746 Submission 149 (Community Connections), p. 10; Submission 256 (Uniting Church in Australia, Synod of Victoria and Tasmania), p. 11.

747 Submission 205 (Federation of Community Legal Centres), p. 19.

748 Submission 263 (Human Rights Law Centre), p. 23. VEOHRC also refer to this case study, noting the costs associated with failure to effectively support children with Asperger's Syndrome. See Submission 278 (VEOHRC), p. 202.

749 Submission 263 (Human Rights Law Centre), p. 25.

750 Submission 263 (Human Rights Law Centre), p. 25.

- changes in the policies and practices of the Office of Housing within DHS and the transitional housing and community housing service sectors.[751]

[560] SARC considers that the latter evidence in relation to service provision changes in the housing sector provides the strongest evidence of the Charter's impact on systemic changes to service provision, as the information provided by both the government[752] and other service providers[753] and service users largely aligns. However, it is noted that while the Charter may have assisted individuals to avoid homelessness, it has not decreased homelessness, as it has no bearing on the systemic causes of homelessness such as the shortage of available housing and housing affordability.[754]

[561] Most of the submissions by individuals or advocacy groups in relation to the impact of the Charter on service provision presented case studies where the Charter had been used to facilitate better service provision for individual clients. Many of these submissions stated that the Charter had been used as an additional advocacy tool to engage service providers in conversation about service delivery or to challenge decisions.[755]

[562] A number of organisations, including the Office of the Public Advocate, stated that the Charter had assisted them to facilitate better service provision for some clients (particularly those with complex needs who require a range of services provided or regulated by different government Departments) through using the Charter to focus service providers' attention on the outcomes for individual clients. These submissions focused on, among other things, the utility of the 'language of human rights' to improve engagement with public authorities across different sectors.[756] For example, the Public Advocate, Ms Colleen Pearce, stated in her evidence at the public hearings that:[757]

> *Where the charter has played an important role for us is in establishing a common language. Our advocacy has not changed under the charter. What has changed is how that is presented and how that is understood by others in the community, and that, for us, is really significant … When we have that common language for our advocacy, what we are seeing is that in fact we get more traction from people, particularly from the large government departments, because by and large that is where we have the most significant issues in obtaining access to services.*

[563] When questioned by SARC as to whether the Charter should be needed to ensure services are delivered effectively, Ms Pearce responded:[758]

> *The reality is that that is not always the case, and our biggest struggle, I think, in the provision of services for people with a disability is that whole siloed approach to the delivery of services. It is also cutting across the different service systems … because they are set up for their own particular purposes. It is enormously difficult to cut through that to ensure that the benefits for the individuals are in fact achieved. That would be our struggle absolutely on a daily basis. As I said earlier, one of the benefits of the charter is the language that it gives us and the shared understanding, so that we can in fact say to departments or to individuals in services, 'We think this breaches the person's individual human rights'. Then there is a recognition and we get traction. Otherwise we are back to where we started from, and that is with this siloed approach to the delivery of services. Many of the*

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751 Submission 83 (PILCH Homeless Persons' Legal Clinic), pp. 8-9; Submission 281 (Grampian Region Homelessness Network), p. 5; Submission 284 (Tenants' Union of Victoria), p. 11.

752 Submission 324 (Victorian Government), paras 72-3.

753 Submission 277 (Hanover Welfare Services), p. 5.

754 Transcript of Public Hearings, 20 July 2011, Mr Keenan, Hanover Welfare Services, and Mr Farrell, PILCH Homeless Persons' Legal Clinic, pp. 10-11.

755 See references cited in Chapter 4, [444].

756 Submission 158 (Office of the Public Advocate), p. 5; Submission 83 (PILCH Homeless Persons' Legal Clinic), pp. 45-7; Submission 149 (Community Connections), p. 9.

757 Transcript of Public Hearings, 20 July 2011, Ms Pearce, Public Advocate, p. 3.

758 Transcript of Public Hearings, 20 July 2011, Ms Pearce, Public Advocate p. 7.

people that we see just fall between the cracks and do not get access to the services that they should.

[564] This evidence suggests there may be disconnects between service sectors that result in less than optimum outcomes for some clients. While SARC acknowledges the benefits to individual clients where the Charter has been used to plug service system gaps in this way, it is concerned that such gaps exist.

[565] SARC notes the evidence provided by VCOSS and others in relation to the complex regulatory regime for providers of social services[759] and the progress towards streamlining these through the development of the 'One DHS' standards. While SARC notes that the primary impetus for the development of the 'One DHS' standards is to alleviate the regulatory burden on service providers, it also notes the focus on clients' rights in these standards and considers that this initiative may assist in facilitating better outcomes for clients across service sectors, through allowing service providers to shift their focus from burdensome compliance requirements to outcomes. It is arguable that a better, simpler and clearer regulatory focus on the expected outcomes from service providers on the one hand and the rights and standards that clients can anticipate and expect on the other, as articulated in the 'One DHS' standards and other service charters,[760] could lead to better outcomes for the community than a list of broad rights as encompassed in the Charter. The creation of such an environment, some argue, renders the Charter redundant.

[566] A number of legal centres, Victoria Legal Aid and the Bar Council submitted that the Charter had assisted them to negotiate outcomes on behalf of clients and avoid litigation.[761] In these cases, SARC considers this to be a benefit to those individuals involved and to the legal system by avoiding the costs of litigation.

Increase respect for rights within the community

[567] A number of submissions claimed that the Charter had increased respect for human rights in the community.[762] However, information in other submissions, including VEOHRC's submission, indicate that there is a low level of awareness in the community about the Charter.[763] For example, the Colmar Brunton research into community perceptions of the Charter commissioned by VEOHRC for its 2010 report targeted organisations and individuals. The research found that 75% of organisations, but only 48% of individuals, thought that there was a development of, and growing interest in, a community dialogue about human rights in Victoria.[764] The Australian Centre for Human Rights Education's (ACHRE) survey of 1014 Victorians and 1099 Australians from other states found that 69% of Victorian respondents knew 'nothing at all' or 'very little' about the Charter.[765] ACHRE states that 'the figures for Victoria do not differ significantly from those across Australia'.[766] The relatively low level of community awareness of the Charter is supported by

759 Transcript of Public Hearings, 22 July 2011, Ms Smith, VCOSS, p. 2 and pp. 7-8; Submission 149 (Community Connections), pp. 5-7; Submission 83 (PILCH Homeless Persons' Legal Clinic), pp. 43-4.

760 Department of Health, *A Charter Supporting People in Care Relationships*, available at <http://www.carersvic.org.au/web-assets/victorian-government/charter-supporting-care-ralationships/>; Department of Community Services, *Charter for Children In Out-of-Home Care*, available at <http://www.dhs.vic.gov.au/__data/assets/pdf_file/0008/577565/charter_for_children_in_out-of-home_care.pdf>, Part 2, *Victims Charter Act 2006.*

761 Submission 83 (PILCH Homeless Persons' Legal Clinic), pp. 54-5; Submission 95 (Bar Council), p. 6; Submission 100 (Tenants' Union of Victoria), p. 2, pp. 11-12, Transcript of Public Hearings, 19 July 2011, Ms Horsfield, Victoria Legal Aid, pp. 3-5.

762 Submission 247 (Law Institute of Victoria), p. 157; Submission 205 (Federation of Community Legal Centres), p. 27.

763 Submission 292 (Catholic Social Services), p. 9.

764 VEOHRC, *Talking Rights: 2010 Compilation Report*, April 2011, p. 142.

765 Submission 276 (Australian Centre for Human Rights Education, RMIT), p. 13.

766 Submission 276 (Australian Centre for Human Rights Education, RMIT), p. 13.

submissions from local government,[767] many of which advocate for further funding for human rights community engagement and education.[768]

[568] In light of this evidence, SARC does not consider there is sufficient information to indicate that the Charter has helped increase respect in the Victorian community for people's rights.

5.3 Costs

[569] Costs associated with the Charter may be direct (i.e. costs expended on goods or services related to the Charter) or indirect (i.e. costs associated with the time taken to perform Charter-related tasks). These costs will accrue to public authorities as duty-holders under the Charter. However, SARC also received submissions indicating that there may be cost implications for the broader community, if, for example the Charter contributes to delays in the court system or if Charter compliance requirements consume the resources of public authorities that could be spent on delivering services. These are referred to as 'system costs' for the purposes of this report. Some submissions criticised the Charter on various bases, including privileging the rights of 'criminals' over victims and creating uncertainty in the application of the law. These are described under the heading of 'other costs'.

Costs to government

[570] The government submission provides detailed cost information about Charter implementation within government departments, although, as noted in the introduction of this chapter,[769] there are a number of costs that are not included. For this reason, this report simply highlights certain aspects of the cost information in the government submission.

[571] The government submission reports that over the five financial years from 2006–07 to 2010–11, the total expenditure on Charter implementation across government was $13,488,750. This includes:

- Charter implementation funding for certain departments and agencies (Corrections Victoria, Department of Human Services[770] and Victoria Police)
- the Human Rights Unit within the Department of Justice
- funding for VEOHRC's Charter-related work
- grants provided by the Department of Justice for Charter education and legal advice
- other identified human rights staff in the Victorian Public Service
- Charter-related training and the development of resources
- legal advice obtained for the initial audit of legislation in preparation for the introduction of the Charter
- legal advice on the drafting of statutory provisions or general legal advice in relation to the Charter
- legal advice obtained for the preparation of statements of compatibility
- Charter-related litigation involving the Department of Justice, DHS and Victoria Police.

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767 Submission 204 (VLGA), *Report on Human Rights and Local Governments Symposium* (2010), pp. 9-10 and *Report on Local Government and Community Ownership of Human Rights in Small Rural and Regional Municipalitie*s, p. 8; Submission 111 (City of Darebin), p. 10.

768 Submission 202 (Brimbank City Council), p. 3; Submission 111 (City of Darebin), p. 10; Submission 161 (Whitehorse City Council), p. 3.

769 Chapter 5, [523].

770 It is noted that in 2006–07, DHS included both the human services and health portfolios.

[572] On a year-by-year basis, the expenditure is as follows:[771]

	2006–07	2007–08	2008–09	2009–10	2010–11	Total
DHS, Corrections Victoria and Victoria Police Charter Act Implementation	$1,394,000	$1,155,000	$0	$0	$0	$2,549,000
HRU	$654,352	$783,537	$533,134	$731,310	$702,852	$3,405,185
VEOHRC	$500,000	$775,000	$656,000	$688,000	$707,000	$3,326,000
Grants	$0	$175,112	$195,000	$445,000	$156,250	$971,362
Identified Human Rights Positions	$0	$95,654	$197,048	$297,921	$163,756	$754,379
Audit of legislation and policy	$165,824	$400,576	$60,076	$0	$0	$626,476
Training and development of resources	$0	$19,500	$102,520	$23,695	$14,950	$160,665
Drafting statutory provisions and legal advice	$20,048	$65,677	$96,624	$27,058	$63,564	$272,971
Development of SoCs	$0	$86,504	$98,195	$110,872	$174,768	$470,339
Litigation	$0	$39,556	$165,213	$387,609	$359,995	$952,373
Total	**$2,734,224**	**$3,596,116**	**$2,103,810**	**$2,711,465**	**$2,343,135**	**$13,488,750**

[573] The government submission states that in the 2006-07 Budget, $6.7 million was allocated over four years for Charter implementation. Of this allocation, the Department of Justice received $1.6 million to establish the Human Rights Unit; VEOHRC received $2.3 million over three years for its reporting, monitoring and education functions under the Charter; and Corrections Victoria, DHS and Victoria Police received $2.6 million over two years, mainly for policy review and training. There was also a $200,000 capital allocation.[772]

[574] An additional $668,000 was provided to the Department of Justice and VEOHRC on an ongoing basis.[773] In 2009–10, an additional $83,000 was provided on an ongoing basis for VEOHRC's Charter Act reporting, review and intervention functions, bringing the total ongoing funding for that function to $485,000 per annum. At the same time, $203,000 was provided on an ongoing basis for human rights education. VEOHRC's Charter-related expenditure from 2006–07 to date is $3,326,000.[774] The total expenditure on the Human Rights Unit from 2006–07 to date is $3,405,185.[775]

[575] The government submission states that a total of $626,476 was spent over three years on legal advice in relation to the audit of legislation.[776] It is noted that this figure represents the cost of legal advice only and does not include the time officers spent in conducting this audit.[777]

[576] The government submission states that a total of $470,339 was spent over five years on getting legal advice for preparing statements of compatibility (SoCs).[778] This does not include the time officers

771 Submission 324 (Victorian Government), p. 61, Table 14.

772 Submission 324 (Victorian Government), para 183.

773 Submission 324 (Victorian Government), para 183.

774 Submission 324 (Victorian Government), para 198 and p. 51, Table 3.

775 Submission 324 (Victorian Government), p. 49, Table 2.

776 Submission 324 (Victorian Government), p. 55, Table 8.

777 Submission 324 (Victorian Government), paras 218-9.

778 Submission 324 (Victorian Government), p. 59, Table 12.

spent in preparing statements of compatibility. Based on a sample six-month period where statements of compatibility were analysed by complexity,[779] the government submission calculates the cost of preparing statements of compatibility for low-complexity Bills as $257, medium-complexity Bills as $451 and high-complexity Bills as $2,566.[780]

[577] The government submission states that $952,373 has been spent on legal advice relating to Charter litigation. Of this, $426,097 or 45%, was incurred for legal advice in relation to interventions by the Attorney-General under Charter s. 34, including preliminary advice about whether to intervene in a proceeding.[781] This does not include the time taken for lawyers within departments to prepare for Charter cases.[782]

Costs to other public authorities

[578] No figures were provided by other public authorities, including statutory bodies, local councils and community sector organisations, about the direct costs of implementing the Charter. In addition, as noted in Chapter 4, a number of key public authorities, such as educational providers, suppliers of electricity, gas and water, public transport operators and tribunals, did not make submissions to this review.[783]

[579] However, SARC notes that the VLGA submission and local councils mentioned costs associated with review of policies and procedures, local laws, compliance reporting and training.[784] One local council noted that it employed one officer at 0.5 FTE in a 'human rights portfolio'.[785] The report on a project identifying barriers to Charter implementation in small rural and regional shires appended to the VLGA submission identified cost as a major barrier. The costs identified in this regard were attendance at information and training sessions which were usually held in Melbourne and general implementation costs.[786]

[580] SARC further notes that VLGA, Municipal Association of Victoria and a number of councils called for extra support and resources for Charter implementation generally[787] and for community education and engagement specifically[788] in their submissions. VLGA's small rural and regional shires project report noted that there was a 'perception and anger [among the councils involved in the project] that the State Government has imposed obligations on local government with respect to the Charter without recognising the need to increase capacity to meet these obligations or providing resources to assist it to do so'.[789]

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779 Submission 324 (Victorian Government), para 227 and Appendix A.

780 Submission 324 (Victorian Government), p. 58, Table 10.

781 Submission 324 (Victorian Government), paras 240-1.

782 Submission 324 (Victorian Government), para 244.

783 Chapter 4, [442].

784 Submission 204 (VLGA), pp. 5-6; Submission 207 (City of Stonnington), pp. 2-3; Submission 161 (City of Whitehorse), p. 3. It is noted that other local councils who made submissions to the review stated that costs were minimal and manageable (Submission 192 (Municipal Association of Victoria), p. 5; Transcript of Public Hearings, 19 July 2011, Mr Rowe, Municipal Association of Victoria, pp. 2, 4 and 6; Submission 112 (Manningham City Council), p. 2; Submission 200 (City of Greater Dandenong), p. 1), there were no costs (Submission 188 (City of Port Phillip), p. 18), or did not provide information on costs (Submission 111 (City of Darebin); Submission 52 (City of Yarra); Submission 143 (City of Hume); Submission 214 (Wyndham City Council); Submission 289 (City of Greater Geelong); Submission 191 (Yarra Ranges Council); Submission 202 (Brimbank City Council).

785 Submission 288 (City of Moreland), p. 1.

786 Submission 204 (VLGA), p. 6 and *Report on Local Government and Community Ownership of Human Rights in Small Rural and Regional Municipalitie*s, pp. 7-8 and 9.

787 Submission 204 (VLGA), p. 7; Submission 192 (Municipal Association of Victoria), p. 5; Submission 111 (City of Darebin), p. 11; Submission 52 (City of Yarra), p. 6; Submission 143 (City of Hume), p. 7.

788 See above footnote.

789 Submission 204 (VLGA), *Report on Local Government and Community Ownership of Human Rights in Small Rural and Regional Municipalitie*s, p. 9.

SARC considers that these calls for additional resources indicate that there may be additional costs for local councils that are not reflected in the submissions.

[581] There was no information about costs from community sector organisations that are public authorities. However, SARC notes that the VCOSS 2010 Report appended to its submission suggested a reason for low levels of awareness of the Charter may be that 'many organisations had been unable to incorporate the Charter into their work due to limited resourcing and/or a lack of training'.[790] The report further notes that 'ongoing resources and training to assist organisations to assess [community sector organisations'] "public authority" status is needed'.[791] This suggests that there may be costs associated with Charter implementation that are not reflected in the submissions of community sector organisations.

Costs to SARC

[582] Since August 2007, SARC has engaged a consultant to assist with its scrutiny functions at the equivalent of VPS 5 level. Overall, the Charter has not led to a significant increase in time spent considering Bills and regulations, as the Charter has merely added to the long-standing rights analyses conducted by SARC.[792] As mentioned in Chapter 4, there has been a small rise (12%) in the number of Bills in relation to which human rights issues have been raised by SARC since the commencement of the Charter.[793] SARC also notes that it has incurred costs associated with conducting this review, namely the cost of engaging three consultants, the time of SARC members in attending public hearings and deliberative meetings, and the costs of administrative support, including one staff member at 0.5FTE for four months, organising the public hearings, website maintenance and publishing this report. The total cost to SARC of conducting this review has been approximately $130,000.

System costs

[583] One of the concerns voiced during the human rights consultation in 2005 and again during this review is that the Charter would be a 'lawyers' picnic', that is, that there would be a flood of Charter-related litigation. As noted in Chapter 4, SARC considers that the volume of Charter related litigation has been very small, though it is increasing.[794] Chapter 4 also outlined the evidence received regarding the impact of the Charter on the length and complexity of litigation.[795]

[584] SARC also notes the evidence of the Bar Council stating that 'consideration of Charter questions in litigation have frequently been resource intensive'[796] and that to date barristers had provided significant pro-bono services in 'meritorious' cases.[797] To alleviate the burden on unpaid barristers, the Bar Council submission seeks the establishment of a public fund to facilitate the future representation of disadvantaged clients in Charter cases.[798] SARC further notes, that any litigation has a system cost, in that, in additional to legal costs, it takes up court time. While there is no evidence that the cost has been significant to date, SARC considers that Charter litigation has resulted in system cost.

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790 Submission 262 (VCOSS), 2010 Report, p. 9.

791 Submission 262 (VCOSS), VCOSS 2010 Report p. 10.

792 Version 11 of the *Parliamentary Committees Act 2003* incorporated the changes to SARC's functions upon enactment of the Charter. The description of SARC's functions prior to the enactment of the Charter may be found in s. 17 of earlier versions of that Act.

793 Chapter 4, [382].

794 Chapter 4, [471].

795 Chapter 4, [467] and [470].

796 Submission 95 (Bar Council), p. 6.

797 Submission 95 (Bar Council), p. 17.

798 Submission 95 (Bar Council), p. 19.

[585] However, SARC also notes the evidence of Victoria Legal Aid that litigation of rights issues can provide a cost saving where it results in changes to policies that affect many people.[799] An example of such a policy change following litigation are changes made to the procedures of the Mental Health Review Board as a result of the *Kracke* decision.[800]

Other costs

Privileging the rights of criminals over victims

[586] Some submission argued that the Charter privileges the rights of criminals over victims. For example, the Institute of Public Affairs stated 'the Charter goes into great detail stipulating the rights for the criminally accused [but] there is no mention for any rights for victims of crime'.[801] In a similar vein, the Police Association expressed the view that the Charter was not balanced, as it provided rights to those accused of criminal offences, but did not provide protection to police accused of breaches of rights.[802]

[587] However, a number of other submissions and evidence at the public hearings disagreed with the proposition that the Charter is a 'criminal's Charter'[803] or that it does not provide adequate protection to victims. For example, the Federation of Community Legal Centres countered this argument by providing examples of its use of the Charter in advocacy work to argue for the broadening of the categories of relationships to be covered under family violence protection legislation and to raise concerns about victims of violence in situations of home detention.[804] Victoria Police also disagreed that the Charter did not protect members accused of breaching human rights.[805]

Creating uncertainty in the law

[588] Many submissions criticising the Charter argued that the cause of action provisions (s. 38 together with s. 39) and interpretative provision (s. 32) of the Charter have created, and have the potential to create, uncertainty in the law, because of the broad drafting of the rights in the Charter. These submissions argue that subjecting the meaning of such broadly drafted rights to judicial interpretation puts too much power in the hands of the judiciary and effectively undermines parliamentary sovereignty.[806] Many organisations also expressed concern about the application of the 'reasonable limitations' provision in s. 7(2) in litigation as a way of privileging some rights over others.[807]

[589] Many submissions supporting the cause of action provisions and the interpretative provision argue that this is not the case.[808] For example, it was argued that while the matter is still pending final resolution in the High Court, the Court of Appeal's interpretation of the scope of s. 32 in the *Momcilovic* case was

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799 Transcript of Public Hearings, 19 July 2011, Mr Warner, Victoria Legal Aid, p. 7. See also Submission 247 (Law Institute of Victoria), p. 41.

800 Submission 324 (Victorian Government), para 75; Submission 296 (Mental Health Legal Centre), p. 14. See also Submission 299 (Office of Police Integrity), p. 7, describing the policy and procedural implications for OPI of a Charter case concerning the use of surveillance devices.

801 Submission 133 (Institute of Public Affairs), p. 6.

802 Submission 236 (Police Association), pp. 1-2.

803 Submission 278 (VEOHRC), p. 19; Submission 285 (Castan Centre for Human Rights Law), pp. 19-21.

804 Transcript of Public Hearings, 20 July 2011, Mr de Kretser, Federation of Community Legal Centres, p. 6.

805 Transcript of Public Hearings, 19 July 2011, Deputy Commissioner Walshe, Victoria Police, pp. 6-4.

806 Submission 19 (FamilyVoice Australia), pp. 13-17; Submission 217 (Ad hoc Interfaith Committee), Appendix 5; Submission 287 (Joseph Santamaria QC), pp. 11-16; Submission 133 (Institute of Public Affairs), p. 2, submission 190 (Presbyterian Church), pp. 13-15; Submission 320 (Catholic Archdiocese of Sydney), pp. 3-4.

807 Submission 272 (Catholic Archdiocese of Melbourne), p. 17; Submission 275 (Catholic Lawyers Association), pp. 7-10.

808 Submission 241 (Liberty Victoria), paras 50-60; Submission 205 (Federation of Community Legal Centres), p. 22; Submission 263 (Human Rights Law Centre), paras 92-104; Submission 278 (VEOHRC), p. 169; Submission 168 (Australian Lawyers Alliance), p. 3.

conservative.[809] It was also argued that while the Charter, like other laws, provides some limited scope in the application of most laws for judges to make value judgments, judges are required to follow the law and apply precedent.[810]

5.4 Conclusion

[590] On the basis of the information available, SARC considers that significant resources have been expended as a result of the Charter. However, SARC also considers the Charter has delivered some benefits, as discussed in this chapter. As noted in the introduction to this chapter, the total cost of the Charter is not known, as full cost information is not available in relation to some government expenditure, local councils and many other public authorities, including statutory authorities who have not made submissions to this inquiry.

[591] SARC considers that the Charter may have generated some cost savings, by facilitating resolution of complaints by advocates pre-litigation. However, SARC considers that this needs to be balanced against the cost of litigation to date and the likely future litigation costs, taking into account the significant Charter questions that may emerge in the future and the trend indicating increasing litigation.

[809] Submission 286 (Hon. Marcia Neave J), para 19; Submission 295 (Mallesons Human Rights Law Group), p. 30.

[810] Submission 286 (Hon. Marcia Neave J), paras 21-23; Submission 278 (VEOHRC), p. 170; Submission 249 (Law Council of Australia), p. 3; Submission 285 (Castan Centre for Human Rights Law), p. 22.

6
Options for Reform or Improvement

Introduction

[592] The inquiry's fourth term of reference requires that SARC report on options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria. This chapter sets out SARC's findings on what options should be considered and its recommendation for which option is preferable.

[593] The report's final chapter builds on the earlier chapters. Chapter 3 addressed the particular options for reform or improvement mandated for consideration at the inquiry by Charter s. 44(2). Those options were examined on the assumption that the existing Charter would remain in place. This chapter re-examines some of these options as an adjunct to proposed reforms of the Charter. Chapter 4 proposed a large number of reforms based on SARC's examination of the Charter's impact in its first four years. The reform options in this chapter incorporate those recommendations. Chapter 5's discussion of the overall costs and benefits of the Charter inform the case for SARC's preferred reform option.

6.1 The regimes for protecting and upholding rights and responsibilities in Australia

[594] Unlike the inquiry's other terms of reference, the final term of reference is not limited to the Charter, but is also concerned with other regimes for protecting and upholding human rights. This section briefly reviews the various regimes that exist or have been proposed in Australia.

Human rights protections in existing laws

Common law

[595] The common law is a body of legal rules set out and developed in court decisions and originating from the same period as the Magna Carta. It includes the law of equity, a flexible set of remedies developed in England's Court of Chancery that is designed to prevent strict legal rules from operating unfairly. Although derived from English traditions, Australia's common law is now regarded as a national body of law that is separate from the common law of England and other Commonwealth countries. There is only one body of common law in Australia, but each Australian Parliament can (subject to constitutional constraints) abolish or replace any part of the common law with a statutory scheme. Many parts of the common law can be regarded as directed to upholding particular rights, such as personal security or property rights. However, there are two parts of the common law that provide general protection for a body of rights: the common law principles of statutory interpretation and the remedy of judicial review.

Statutory interpretation

[596] Australian courts and tribunals interpret statutory provisions by paying primary attention to the words themselves, their statutory context and the apparent purpose of the statutory scheme.[811] If these matters still leave room for disputes about meaning, then courts and tribunals rely on principles derived largely from the common law that are well known to parliamentary drafters. In 1908, the High Court endorsed the following common law rule described in an English textbook:[812]

> *One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by implication; or, in other words, beyond the immediate scope and object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.*

While it is now common for Australian Parliaments to overturn parts of the common law, this rule still has force in Australia for those parts of the common law that set out a 'fundamental right, freedom or immunity'.[813]

[597] In a recent, well-regarded lecture, the then Chief Justice of New South Wales described this rule as the 'common law bill of rights'.[814] His paper listed, as instances of the broader rule, Australian court holdings identifying 'rebuttable presumptions' that Australian Parliaments do not intend:[815]

- *To retrospectively change rights and obligations;*
- *To infringe personal liberty;*
- *To interfere with freedom of movement;*
- *To interfere with freedom of speech;*
- *To alter criminal law practices based on the principle of a fair trial;*
- *To restrict access to the courts;*
- *To permit an appeal from an acquittal;*
- *To interfere with the course of justice;*
- *To abrogate legal professional privilege;*
- *To exclude the right to claim self-incrimination;*
- *To extend the scope of a penal statute;*
- *To deny procedural fairness to persons affected by the exercise of public power;*
- *To give executive immunities a wide application;*
- *To interfere with vested property rights;*
- *To authorise the commission of a tort;*

811 *Project Blue Sky v ABA* [1998] HCA 28; 194 CLR 355, [69].

812 *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277, 304, quoting P B Maxwell and J A Theobald, *On the Interpretation of Statutes*, 4th edn, Sweet & Maxwell, 1905, p. 122.

813 *Coco v R* [1994] HCA 15; (1994) 179 CLR 427, 438

814 J Spigelman, 'The Common Law Bill of Rights: First Lecture in the 2008 McPherson Lectures on Statutory Interpretation and Human Rights', University of Queensland, Brisbane, 10 March 2008.

815 At pp. 23-24.

- *To alienate property without compensation;*
- *To disregard common law protection of personal reputation; and*
- *To interfere with equality of religion.*

Chief Justice Spigelman noted that '[t]his common law bill of rights overlaps with but is not identical to, the list of human rights specified in international human rights instruments, which have been given legislative force in some jurisdictions.'[816] For example, the common law protections for legal professional privilege and restrictions on executive privileges are not reflected in international human rights treaties, while the *ICCPR's* protections for privacy and cultural rights are not protected by the common law. The Chief Justice also noted that, as the common law continues to develop, the list may expand to cover further rights.

[598] These principles have often been relied on to resolve major disputes about the meaning of statutes in Australia. For example, in 1908, the High Court relied on 'the right of every British subject born in Australia, and whose home is in Australia, to remain in, depart from, or re-enter Australia as and when he thought fit' to rule that a federal statute barring 'immigration' unless the incoming person passes a dictation test does not apply to a person born in Australia who was raised overseas.[817] In 1994, the High Court ruled that a statute permitting a judge to 'authorize the use of listening devices' did not allow police officers to enter a person's home without consent to install them, citing the 'fundamental common law right' against trespass.[818] Contemporary Australian courts now refer to the rule as the 'principle of legality', with the High Court relying on that principle this year to hold that a Queensland provision that a court hearing a Crown appeal against sentence 'may in its unfettered discretion vary the sentence' is limited to situations where the sentencing judge made an error, consistently with the common law on double jeopardy and finality of sentences.[819] The court noted that the rule is not affected by modern statutory provisions requiring courts to prefer constructions that promote the purpose or object of statutes, because '[a]scertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory', including the principle of legality.[820]

[599] The sole requirement of the principle of legality is that the Parliament must express itself clearly if wishes to overturn a common law right. As the High Court observed in 1994, 'curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights'.[821]

Judicial review

[600] Under the common law, Australia's superior courts have the power to review executive actions and make orders invalidating unlawful regulations, quashing unlawful decisions, barring future unlawful acts, requiring the executive to comply with legal duties and making declarations about the lawfulness or otherwise of executive conduct. The regime for judicial review as a whole protects a number of particular rights, including the rights to a fair hearing and against a variety of arbitrary or unlawful interferences.

[601] As well, judicial review can in some instances uphold a range of human rights. By scrutinising whether executive action has gone beyond the bounds of applicable statues, judicial review can provide support to the principle of legality. For example, in 2008, the Federal Court held that regulations barring the 'annoyance' of World Youth Day participants were invalid, because the enabling legislation did not

816 At p. 24.
817 *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277.
818 *Coco v R* [1994] HCA 15; (1994) 179 CLR 427.
819 *Lacey v Attorney-General of Queensland* [2011] HCA 10, [20].
820 *Lacey v Attorney-General of Queensland* [2011] HCA 10, [43]–[46].
821 *Coco v R* [1994] HCA 15; (1994) 179 CLR 427, 438.

clearly state that the regulations could limit the right to freedom of expression.[822] As well, because decisions can be reviewed on the ground that the decision-maker failed to take account of a relevant consideration or that the decision-maker failed to give notice that a decision may be contrary to a legitimate expectation, judicial review may extend to the question of whether or not a decision was contrary to a human right. For example, in 1995, the High Court overturned a deportation decision on the basis that the deportee was not warned that the decision would be made in a way that contradicted the *Convention on the Rights of the Child*.[823]

Constitutional law

[602] Victoria's *Constitution Act 1975*, like other state Constitutions, is an ordinary statute that can be altered or repealed by a majority of members present in each House for the relevant vote. However, it also contains a number of 'entrenched' provisions that can only be changed by either a referendum, a special majority (of 60% of members of each House of Parliament) or an absolute majority (over 50% of all members, present or not). Those provisions preserve:

- the bicameral structure of the Parliament and the way it is elected;[824]
- the existence and tenure of councils;[825]
- the existence and jurisdiction of the Supreme Court of Victoria and the tenure of its judges;[826]
- the independence of the Auditor-General, the Ombudsman, the Electoral Commissioner and the Director of Public Prosecutions.[827]

[603] By contrast, Australia's federal Constitution is a statute of the Imperial Parliament that was endorsed at Australia's federation by referendum in each state. It can only be altered by a referendum that gains the support of a majority of voters and a majority of states.[828] The federal Constitution contains a set of express rights protections. Many of these protections (with respect to voting, against deprivations of property, requiring jury trials and regulating relations between the government and religion) are limited to protections from federal laws and have been narrowly interpreted. However, the federal Constitution also prevents Victoria's Parliament from limiting the constitutional rights:

- to 'absolutely free … intercourse' between Victoria and other states;[829]
- against discrimination on the basis of residency;[830]
- to freedom of political communication.[831]

[604] As well, Chapter Three of the Constitution, which provides for a unified Australian judiciary, has been interpreted by the High Court as preserving Australians' entitlement to judicial review and appeals from some decisions by state bodies and as barring state Parliaments from giving functions to state Supreme Courts that are incompatible with their exercise of judicial power.[832]

822 *Evans v State of New South Wales* [2008] FCAFC 130.
823 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; (1995) 183 CLR 273.
824 *Constitution Act 1975*, s. 18(1B)(a)-(e).
825 *Constitution Act 1975*, s. 18(1B)(j).
826 *Constitution Act 1975*, ss. 18(1B)(k),(l), (2)(fb), 85(5).
827 *Constitution Act 1975*, s. 18(1B)(l), (n), (o).
828 *Commonwealth of Australia Constitution Act 1900* (UK), s. 9, cl. 128.
829 *Commonwealth of Australia Constitution Act 1900* (UK), s. 9, cl. 92.
830 *Commonwealth of Australian Constitution Act 1900* (UK), s. 9, cl. 117.
831 *Lange v ABC* [1997] HCA 25; 189 CLR 520; *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579.
832 See *Commonwealth of Australian Constitution Act 1900* (UK), s. 9, Chapter 3 and, e.g. *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51.

Statute law

[605] Most statutes could be broadly described as aimed at upholding one or more human rights. A number of Australian statutes are expressly aimed at protecting particular human rights, including:

- the *Ombudsman Act 1973*, which provides for inquiries into whether administrative action 'was unreasonable unjust oppressive or improperly discriminatory' or 'wrong'
- the *Equal Opportunity Act 2010*, which provides for legal protection against discrimination on the basis of a defined set of attributes
- the *Information Privacy Act 2000* and the *Health Records Act 2001*, which provide legal protection against government interferences in privacy
- equivalent Commonwealth legislation, which in some instances overrides contrary Victorian legislation[833]
- the *Human Rights (Sexual Conduct) Act 1994* (Cth), which bars any acts under a law that breach art. 17 of the *ICCPR* (the right to privacy) with respect to sexual conduct between consenting adults.

Bills or Charters of Rights

[606] An alternative legal movement that is distinct from the common law and the type of Constitutions and statutes enacted in Australia is the incorporation of written lists of human rights into foundational or otherwise significant laws. Although each jurisdiction takes its own approach, there are two broad overseas models that have influenced Australian considerations of such laws.

Constitutional Bills of Rights

[607] The best known but (in Australia) least influential contemporary model is the inclusion of a list of rights in a Constitution, alongside other foundational rules regulating a nation's government. The most famous example is the United States' Bill of Rights, a series of amendments added to that country's Constitution, later augmented in the aftermath of the Civil War. Such lists of rights have since become a feature of the vast majority of national Constitutions, with South Africa the most noteworthy recent example. The most significant feature of such laws is the power of a court to declare legislation invalid if it contradicts the rights listed in the Constitution, at least in some circumstances. The role of the United States' Supreme Court in interpreting that nation's Bill of Rights has led to intense public scrutiny of its decisions and pressure for lengthy questioning of new judicial nominees. Similar attention and controversy has lately attached to the membership of the South African Constitutional Court.[834]

Statutory human rights Charters

[608] Although many former colonies incorporated rights into their Constitutions upon or approaching independence, England and its developed colonies were an exception. Instead, a distinct approach developed in the last century, initially in Canada. The first example was the *Saskatchewan Bill of Rights Act 1947*, which was enacted as an ordinary statute and therefore could be repealed by the Saskatchewan Parliament at any time. The Saskatchewan Bill is similar to (and indeed pioneered) modern equal opportunity laws in purporting to invalidate laws that contradicted its list of rights, while permitting the Parliament to expressly preserve some laws from that effect. The model was later adopted at a national level in the *Canadian Bill of Rights Act 1960*, although its slow application by the courts led to it being

833 *Racial Discrimination Act 1975* (Cth); *Ombudsman Act 1976* (Cth); *Sex Discrimination Act 1984* (Cth); *Privacy Act 1988* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

834 See *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* [2011] ZACC 23.

superseded by Canada's adoption of a constitutional Charter in 1982. Even that constitutional model retains a key element of the statutory regime: the ability for any Canadian Parliament to declare that a law applies notwithstanding the Charter, which has been applied on a small number of occasions by several provincial Parliaments.[835]

[609] Key examples of current statutory Bills of Rights are:

- the *New Zealand Bill of Rights Act 1990*, adopted in that country as a domestic implementation of the *ICCPR* as an alternative to a proposal to adopt a constitutional Bill of Rights
- the *Hong Kong Bill of Rights Ordinance 1991*, enacted as a prelude to Hong Kong's handover to China and now entrenched as part of the quasi-constitutional 'basic law' regulating its separate legal system within China
- the *Human Rights Act 1998* (UK), adopted as a domestic measure to avoid repeated cases against the United Kingdom in the European Court of Human Rights due to that country's accession to the *European Convention on the Protection of Human Rights and Fundamental Freedoms*.

The *Human Rights Act 2004* (ACT) and the Charter are both variations of this model.

Previous considerations of Bills or Charters of Rights in Australia

[610] The inquiry's terms of reference permit SARC to take account of relevant earlier reports and inquiries into the protection of human rights and responsibilities in Australia. The question of reforming or improving regimes for protecting and upholding rights has been considered in most Australian jurisdictions. The historical and recent consideration of human rights protection in Victoria was detailed in Chapters 1 and 2.[836] The remaining Australian inquiries and reports are briefly described in this section.

Commonwealth

[611] Early drafts of Australia's federal Constitution included a clause, based on the Fourteenth Amendment to the US Constitution, forbidding any state from denying 'to any person within its jurisdiction, the equal protection of laws'.[837] However, after a proposal by the Tasmanian Legislative Assembly to add a bar on depriving 'life, liberty or property without due process of law' was rejected (by 23 votes to 19), the 1898 Constitutional Convention struck the entire clause out of the draft.[838] Two subsequent referenda to extend the express protections in the Constitution – in 1944, to include freedom of speech and expression, and to extend religion rights to the states; and in 1988, to extend the Constitution's jury, property and religion rights to states and territories[839] – both failed, with the latter rejected by all states and over two-thirds of the population.[840] A proposal in the final report of the 1988 Constitutional Commission to include a new part in the Constitution similar to Canada's 1982 *Charter of Rights and Freedoms* was never acted upon.[841]

[612] The federal Parliament has considered enacting statutory rights protection on several occasions. Following the signing of the *ICCPR*, Attorney-General Lionel Murphy introduced the Human Rights Bill 1973,

835 *Constitution Act 1982* (Can), s. 33. See e.g. *Land Planning and Development Act 1982* (Yukon Territory), s. 39(1); *SGEU Dispute Settlement Act 1986* (Saskatchewan), s. 9; *An Act to Amend the Charter of the French Language 1988* (Quebec), s. 10; *Marriage Act 2000* (Alberta), s. 2.

836 See [8]-[9] and [32]-[38].

837 Constitution of Australia Bill 1891, Chapter 5, cl. 17; Constitution of Australia Bill 1897, cl. 110.

838 1898 Australasian Federation Conference, 8 February 1898, pp. 690-1.

839 *Constitution Alteration (Post-War Reconstruction and Democratic Rights) 1944* (Cth); *Constitution Alteration (Rights and Freedoms) 1988* (Cth).

840 Parliamentary Library, *Parliamentary Handbook of the Commonwealth of Australia* (42nd Parliament, 2008), pp. 396 and 408.

841 Constitutional Commission, *Final Report* (1988) setting out a draft Bill no. 17 for *An Act to alter the Constitution so as to guarantee certain rights and freedoms*.

which contained a provision that all Australian law that was inconsistent with a set of listed rights was without force or effect except for Acts that expressly provided otherwise.[842] A decade later, Attorney-General Lionel Bowen introduced the Australian Human Rights Bill 1985, which contained an interpretation rule requiring constructions of Commonwealth and Territory statutes that do not conflict with the listed rights to be preferred to other constructions, as well as a provision making contrary Commonwealth legislation inoperative in some circumstances.[843] Neither Bill passed.

[613] In 2008, the federal government commissioned a national human rights consultation. The resulting report recommended the adoption of a federal Human Rights Act based on the 'dialogue model', including provisions:[844]

- requiring statements of compatibility for all federal Bills and legislative instruments
- empowering a federal committee to review all Bills and legislative instruments for compliance with human rights
- empowering the High Court to make a declaration of incompatibility
- requiring federal public authorities to act compatibly with and give proper consideration to human rights
- for an independent cause of action against federal public authorities for 'breach of human rights' and empowering a court to provide the 'usual suite of remedies', including damages.

In the event that a federal Human Rights Act was not adopted, the report recommended a requirement for statements of compatibility for Bills and regulations; establishment of a Joint Committee on Human Rights; amending federal administrative law to make human rights a relevant consideration in government decision-making; and amending the federal interpretation law to require interpretation consistent with rights so far as is possible consistent with the law's purpose.

[614] In response, the federal government introduced the Human Rights (Parliamentary Scrutiny) Bill 2010, which requires:

- the establishment of a Joint Committee on Human Rights, with functions to examine and report to the Parliament on Bills, Acts and legislative instruments for compatibility with human rights[845]
- statements for Bills and legislative instruments assessing compatibility with human rights.[846]

The Senate Committee on Legal and Constitutional Affairs recommended the Bill's passage, but made a number of recommendations relating to the definition of human rights, the processes of the Joint Committee and the content and timing of statements of compatibility.[847] One minority report recommended inserting a new definition of human rights and omitting the requirement for statements of compatibility, arguing that there was a risk that such statements 'might be regarded as canonical, or conclusive' or pre-empt the Joint Committee's deliberations.[848]

842 Human Rights Bill 1973, cl. 5.
843 Australian Human Rights Bill 1985, cll. 10-15.
844 National Human Rights Consultation Committee, *National Human Rights Consultation*, September 2009, Chapter 15.
845 Human Rights (Parliamentary Scrutiny) Bill 2010, Part 2.
846 Human Rights (Parliamentary Scrutiny) Bill 2010, Part 3.
847 Senate Legal and Constitutional Committee, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Amendments) Bill 2010 [Provisions]*, January 2011.
848 Senate Legal and Constitutional Committee, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Amendments) Bill 2010 [Provisions]*, January 2011, p. 58.

Australian Capital Territory

[615] The then ACT Attorney-General Terry Connolly introduced a proposal for a statutory Bill of Rights into the ACT Legislative Assembly in 1995. It contained a requirement that the Attorney-General report to the Assembly on Bills that appear to be inconsistent with human rights and an interpretation clause that required preference to be given to meanings that are consistent with a defined list of rights.[849] The Bill did not pass.

[616] In 2002, the ACT government engaged in a community consultation. The resulting report recommended the enactment of a *Human Rights Act* aimed at creating a dialogue about rights protection between all branches of government.[850] The report's draft Bill contained provisions for pre-enactment scrutiny and various operative clauses modelled on the *Human Rights Act 1998* (UK). The ACT government subsequently introduced a bill into the Legislative Assembly with provisions:

- requiring that interpretations consistent with human rights are to be preferred as far as possible, subject to an existing requirement to prefer interpretations that best achieve the purpose of legislation[851]
- empowering the Supreme Court to issue declarations of incompatibility[852]
- requiring the Attorney-General to issue compatibility statements for all government Bills[853]
- requiring a committee nominated by the Speaker to report about human rights issues raised by all Bills.[854]

The Bill was enacted by 9 votes to 6.[855] Subsequently, a private members Bill protecting a defined list of 'civil responsibilities' was introduced in identical terms to the *Human Rights Act 2004* (ACT),[856] but was defeated 5 votes to 9.

[617] In 2006, a mandatory one-year review of the *Human Rights Act 2004* (ACT), conducted by the Department of Justice and Community Safety, recommended the continuation of the Act and the dialogue model, including further explanation of the compatibility of Bills with human rights.[857] The report also recommended strengthening the interpretation rule and examining options to require public authorities to comply with human rights and introduce a direct cause of action. The ACT Legislative Assembly subsequently amended the *Human Rights Act 2004* (ACT) to:

- replace the interpretation provision with one that is similar to Charter s. 32;[858]
- introduce a provision for obligations for public authorities that is similar to Charter s. 38;[859]
- provide for claims against public authorities for contravening their obligations and empowering the Supreme Court to 'grant the relief that it considers appropriate except damages'.[860]

849 Bill of Rights Bill 1995, cll. 5 and 6.
850 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, May 2003.
851 *Human Rights Act 2004* (ACT), s. 30.
852 *Human Rights Act 2004* (ACT), s. 32.
853 *Human Rights Act 2004* (ACT), s. 37.
854 *Human Rights Act 2004* (ACT), s. 38.
855 *Hansard*, Legislative Assembly, 2004: Week 2 (March), p. 586.
856 Charter of Responsibilities Bill 2004.
857 Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report*, June 2006.
858 *Human Rights Amendment Act 2007* (ACT), s. 5, amending s. 30.
859 *Human Rights Amendment Act 2007* (ACT), s. 7 inserting a new Part 5A.
860 *Human Rights Amendment Act 2007* (ACT), s. 7 inserting a new s. 40D.

In 2009, a mandatory five-year review, commissioned by the ACT government and written by Australian National University academics, recommended mild strengthening of the scrutiny and obligations regimes.[861] The ACT government has not yet responded to that review.

New South Wales

[618] In 2001, the then NSW Attorney-General Jeff Shaw referred the question of whether or not New South Wales should enact a Bill of Rights to the Legislative Council's Standing Committee on Law and Justice. The Standing Committee declined to recommend a Bill of Rights, in statutory form or otherwise, citing the need to preserve the existing relationship between the legislature and the judiciary, as well as the legal uncertainty that would likely result from such a statute. Instead, it recommended the establishment of a parliamentary scrutiny of Bills committee and the amendment of NSW's interpretation law to 'confirm the common law position' that judges may consult international laws and treaties in the case of ambiguity in a NSW statute.[862] A dissenting report supported these recommendations, but argued in favour of a statutory Bill of Rights.

[619] The NSW Premier at the time, Bob Carr, made a submission to the inquiry (which the Standing Committee took to be the government's position) arguing against a Bill of Rights, on the basis that it would be a fundamental shift in New South Wales's political tradition.[863] In response to the Committee's report, the NSW government introduced a Bill converting the NSW upper House's Regulation Review Committee into a Legislation Review Committee with a scrutiny of Bills function.[864] However, the NSW government rejected the Standing Committee's second recommendation relating to interpretation, arguing that it went beyond both the common law and the laws of other Australian jurisdictions.[865]

Northern Territory

[620] In 1987, the Northern Territory Legislative Assembly's Select Committee on Constitutional Development raised the possibility of including rights protections in a proposed Constitution to be adopted if the Territory was granted statehood.[866] In 1995, the same Committee canvassed options for rights protection in a discussion paper, including a statutory Bill of Rights, an entrenched statute, a non-entrenched constitutional provision and parliamentary scrutiny.[867] However, the draft Constitution produced by the Sessional Committee did not contain a Bill of Rights, with its final report noting that its members were 'unable to agree' on the issue.[868]

[621] The issue was further considered by the Assembly's Standing Committee on Legal and Constitutional Affairs, which noted that the issue of a Bill of Rights is likely to emerge during ongoing community consultations about statehood, including planned Constitutional Conventions in coming years.[869] The Standing Committee identified alternatives to a Bill of Rights, including new processes for parliamentary scrutiny, and a non-binding constitutional preamble or a federal human rights law. The

861 ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation*, May 2009.
862 Standing Committee on Law and Justice, *Report 17: A NSW Bill of Rights*, October 2001.
863 Standing Committee on Law and Justice, *Report 17: A NSW Bill of Rights*, October 2001, [1.4]. Extracts of the Premier's submission are available at <http://www.smh.com.au/articles/2002/12/04/1038950090160.html>.
864 Legislation Review Amendment Bill 2002.
865 B Carr, Letter to the Hon M R Egan MLC, 21 October 2002.
866 Select Committee on Constitutional Development, *Discussion Paper on a Proposed New Constitution for the Northern Territory,* 1987.
867 Sessional Committee on Constitutional Development, *Discussion Paper No. 8: A Northern Territory Bill of Rights?,* March 1995.
868 Sessional Committee on Constitutional Development, *Foundations for a Common Future*, November 1995, p. 5-12.
869 Standing Committee on Legal and Constitutional Affairs, *Towards Northern Territory Statehood: Issues for Consideration*, February 2010.

Standing Committee concluded that '[s]tatehood … must be achieved before consideration of a Bill of Rights' in the Territory, noting the need for certainty in any rights legislation.[870]

Queensland

[622] Australia's first proposal for legislative protection for rights was introduced into the Queensland Parliament by Premier Frank Nicklin in 1959, following a commitment by the Country-Liberal Party in its 1957 election campaign. The Bill (which protected rights for detainees and property holders), contained provisions invalidating contrary legislation and removing the Parliament's powers to enact contrary legislation without a referendum.[871] The Bill lapsed with the 1960 election and, although the Country-Liberal Party was re-elected, it was not revived.[872]

[623] In 1989, the Queensland government established an Electoral and Administrative Review Commission (EARC), whose functions included investigating matters arising out of the Fitzgerald Report. As Tony Fitzgerald QC had expressed concern about the lack of protections for civil liberties in Queensland, the EARC conducted an inquiry into a Queensland Bill of Rights.[873] It recommended adopting a Bill of Rights and produced a draft statute, including provisions overriding earlier and subsequent statutes unless they expressly declare otherwise; provisions for reports by the Attorney-General to the Parliament on inconsistent bills; and provisions for enforcement of civil rights in courts.[874]

[624] The question of a Queensland Bill of Rights was referred to the Parliament's Legal, Constitutional and Administrative Review Committee. Its 1998 report recommended against adopting a Bill of Rights in any form, citing concerns about the empowerment of the judiciary, legal uncertainty and costs.[875] Instead, it produced a booklet on existing rights protection in Queensland, urged further training on legislative standards and stated its concern that mechanisms be put in place to ensure that rights and liberties of individuals are considered in the local government law-making process (as well as by-laws by Aboriginal and Torres Strait Islander councils and public university councils). These conclusions (including the recommendation against a Bill of Rights) were endorsed by the Queensland government in 1999 and 2005.[876]

Tasmania

[625] The Tasmanian government referred the question of protecting human rights to the Tasmanian Law Reform Institute in 2006. The Institute's report recommended the enactment of a Tasmanian Charter of Human Rights, including provisions for reasoned statements of compatibility; a parliamentary human rights scrutiny committee; and obligations and interpretation rules similar to Victoria's Charter. The Institute also recommended that the Supreme Court be bound by the Charter; and that it be empowered to issue declarations of incompatibility for statutes (with a provision that the legislation becomes inoperative if the Parliament does not respond within a set period), declarations of invalidity for

870 Standing Committee on Legal and Constitutional Affairs, *Towards Northern Territory Statehood: Issues for Consideration*, February 2010, p. 37.

871 Constitution (Declaration of Rights) Bill 1959, cll. 13, 14, 15 and 18.

872 Electoral and Administrative Review Commission*, Issues Paper No. 20: Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, June 1992, p. 78.

873 Electoral and Administrative Review Commission*, Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, August 1993.

874 Draft Queensland Bill of Rights 1993, reprinted in Legislative Constitutional and Administrative Review Committee, *Report No. 12: The Preservation and Enhancement of Individuals' Rights and Freedoms in Queensland: Should Queensland Adopt a Bill of Rights?*, November 1998, Appendix F.

875 Legislative Constitutional and Administrative Review Committee, *Report No. 12: The Preservation and Enhancement of individuals' Rights and Freedoms in Queensland: Should Queensland Adopt a Bill of Rights?*, November 1998.

876 P Beattie, Letter to Clerk of the Parliament, 7 May 1999; Government's Final Response to the Legal, Constitutional and Administrative Review Committee's Report No. 12, 19 May 2005.

regulations and any remedies or reliefs that it considers appropriate for any breaches of the Charter by public authorities.[877]

[626] In 2010, the then Attorney-General Lara Giddings announced a new community consultation to consider the experiences of the ACT and Victoria since the Institute's report. The accompanying 'directions papers' proposed a Charter that lacked the Institute's suggestions for invalidity of legislation and a free-standing remedy for Charter breaches.[878] There has been no report from the consultation to date.

Western Australia

[627] The then Attorney-General Jim McGinty announced a community consultation on human rights in Western Australia in 2007. The announcement was accompanied by a draft Human Rights Bill, with provisions requiring statements of compatibility and obligations, interpretation and remedy rules similar to Victoria's Charter.[879] The resulting report endorsed the draft Bill with minor amendments, but also recommended that a parliamentary committee be given a role in scrutinising Bills for compatibility with human rights and that a mediation mechanism be created to resolve disputes between individuals and government agencies concerning human rights.[880] The Attorney-General subsequently announced that the issue of protection for rights should be pursued at the federal rather than state level.[881]

Summary

[628] Proposals for regimes for protecting human rights like those common in most contemporary nations have been a recurrent theme in Australia since before Federation. The issue is one that crosses party lines. For example, the first Australian Charter-like proposal was made by the Queensland Country-Liberal Party, which portrayed it as a bulwark against socialism, while former Labor Premier Bob Carr has been one of the most outspoken contemporary opponents of such regimes, citing (among other things) their potential to hinder left-wing policies by empowering conservative courts, minor parties in upper Houses and the wealthy.[882]

[629] The dominant theme across Australian history is that nearly all proposals for Bills of Rights have failed, whether in Cabinets, in the Parliaments or in referenda. In the last decade, all jurisdictions except South Australia gave detailed attention to this question. Of these, one state and one Territory adopted human rights laws, four states and one Territory rejected or deferred consideration of change, and the Commonwealth developed a new model whose statutory component focuses exclusively on the Parliament itself.

6.2 Threshold for particular reforms of the Charter

[630] This inquiry differs from nearly all previous ones in Australia, because it is a review of an existing law.[883] Before proceeding to consider the options for reform or improvement of that law, SARC will address a threshold question: whether any particular types of reform of the Charter should be excluded from consideration at this stage of the Charter's development.

877 Tasmanian Law Reform Institute, *Report No. 10: A Charter of Rights for Tasmania*, October 2007.
878 Tasmanian Government, *A Charter of Human Rights and Responsibilities for Tasmania*, October & November 2010.
879 Western Australia, *Draft Bill for Public Comment: Human Rights Bill 2007*, cll. 31, 33, 40 and 41.
880 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, November 2007.
881 J McGinty, Media Statement, 20 December 2007.
882 B Carr, 'Bill of Rights is the Wrong Call', *The Australian*, 9 May 2009.
883 The exception is the two mandatory reviews of the *Human Rights Act 2004* (ACT) in 2005 and 2009.

Amendments of provisions subject to pending court judgments

[631] The inquiry received some submissions suggesting that consideration of amendments to some provisions of the Charter be deferred pending certain court decisions.[884]

[632] Two especially significant higher court proceedings were mentioned. First, there is the High Court appeal from the Court of Appeal's judgment (including its declaration of inconsistent interpretation) in *R v Momcilovic*.[885] The case concerns fundamental issues of the operation of the interpretation provision in Charter s. 32(1) and the reasonable limits provision in Charter s. 7(2), as well as particular questions concerning the obligations of prosecutors and the right to be presumed innocent. Second, there is the appeal from VCAT's decision in *Director of Housing v Sudi*.[886] That decision concerned fundamental questions about the definition of public authority and the meaning of the obligations provision in Charter s. 38 and the remedies provision in Charter s. 39. The Court of Appeal's resolution of these matters may be appealed to the High Court.

[633] As well, there are at least four further Court of Appeal decisions that are reserved (*Director of Public Transport v XFJ*, involving equality rights and the interpretation rule; and DPP v W, involving the right to privacy, the interpretation and obligations rules and the remedy of exclusion of evidence) or awaiting hearing (*Cobaw Community Health Services v Christian Youth Camp*, involving equality and religion rights and the interpretation rule; and *Noone v Operation Smile*, involving freedom of expression, the interpretation rule and declarations of inconsistent interpretation).[887] The government submission identifies six further pending matters that are not on the public record (one involving the Charter and the *Serious Sex Offenders Detention and Supervision Act 2009* that is 'pending' in the Supreme Court, a second that is not described but is 'awaiting hearing' in the High Court, and four Federal Court matters that have raised the Charter in matters concerning education and discrimination).[888] VEOHRC's submission identifies as 'ongoing' a further four matters where there is no published judgment but VEOHRC has intervened (a VCAT housing matter, a Court of Appeal legal aid matter and two Supreme Court matters involving respectively police misconduct and imprisonment for unpaid fines).[889]

[634] SARC observes that the Parliament is not required to agree with any court rulings on the meaning of the Charter and, subject to any constitutional constraints, is free to amend the Charter to match its preferred position. Even in the event that a court clarifies a provision's meaning in a way that the Parliament agrees with, reform may still be desirable to ensure that users of the Charter can understand the effect of those provisions without needing to read a lengthy court judgment. SARC therefore considers that amendments to the Charter (including Charter ss. 4, 7(2), 32(1), 38(1) and 39(1)) be considered without waiting for further court decisions.

Amendments that permit the invalidation of a valid statute

[635] When the Victorian government announced a consultation on human rights protection in 2005, it stated its preference for a model that left the Parliament's power to enact legislation untouched:[890]

> *The Government does not wish to adopt a human rights model such as applies in the United States of America where the rights expressed in the constitutional Bill of Rights can be used to invalidate laws without recourse by the legislature. The Government believes that Parliament, as is currently*

884 E.g. Submission 295 (Mallesons Human Rights Law Group), p. 30.
885 *R v Momcilovic* [2010] VSCA 50.
886 *Director of Housing v Sudi* (Residential Tenancies) [2010] VCAT 328.
887 *Director of Public Transport v XFJ* [2010] VSC 319; *R v W* (unreported, County Court of Victoria, 2 May 2011); *Cobaw Community Health Service v Christian Youth Camps & Anors* [2010] VCAT 1613; *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) & Ors (No. 2)* [2011] VSC 153.
888 Submission 324 (Victorian Government), pp. 29, 33 and 36.
889 Submission 278 (VEOHRC), Appendix N, pp. 8, 12-13 and 13-14.
890 Victorian Government, 'Human Rights in Victoria: Statement of Intent', May 2005, p. 1.

> *provided for by the Victorian Constitution, should retain the final say, for which it can be held accountable by the people. Any model must operate within this constitutional framework.*

The Human Rights Consultation Committee's subsequent report adopted this approach, noting that any change from a statutory model to a constitutional one (as occurred in Canada) 'would be a matter for the people of Victoria and the Parliament to decide if such a suggestion arises in the future'.[891]

[636] The Human Rights Law Centre's submission included the following suggestion:[892]

> *In order to ensure an appropriate balance between Parliament and courts, section 32 of the Victorian Charter, which requires courts to interpret legislation compatibly with human rights, and section 36, which empowers the Supreme Court and Court of Appeal to make a declaration when a law cannot be interpreted compatibly with rights, should be repealed and replaced with a provision which states that:*
>
> *(a) by way of express provision, Parliament may enact legislation which is valid and operates notwithstanding any incompatibility with human rights;*
>
> *(b) absent such express provision, a law is not to be construed and applied in a way which abrogates, abridges or infringes human rights; and*
>
> *(c) any law which cannot be so construed and applied is invalid to the extent of that inconsistency.*
>
> *This approach would be faithful to the 'constitutional' balance and roles of Parliament and courts and would both strengthen the 'remedial' capacity of the interpretative provision and the requirement that courts give fidelity and primacy to Parliament's purpose. The requirement of an express provision that legislation is to operate notwithstanding any incompatibility with human rights in order for it to so operate would also enhance transparency and accountability in the legislative process.*

This suggestion was based on one made by former High Court justice Michael McHugh, who said that '[a] human rights legislative model on these lines would have only a minimal effect on parliamentary sovereignty.'[893]

[637] Such proposals are narrower than the rights protection regimes in jurisdictions such as the United States, as they preserve the Parliament's power to reject court decisions and preserve the operation of all statutes. However, they nevertheless require the Parliament to take a positive act to preserve the operation of a statute it has already validly enacted. For example, under the suggested reforms, if the Parliament passed a statute believing it to be compatible with human rights and a court subsequently declared otherwise, then the Parliament would have to enact an override declaration or else the statute would become inoperative. If the declaration was made at during a period when the government only controlled the lower House, then the Supreme Court and the upper House would together effectively have the power to repeal the statute. Of the recent Australian human rights consultations, only one – the inquiry by the Tasmanian Law Reform Institute[894] – recommended a provision that would repeal a validly enacted statute without a further Act and the Tasmanian government has since commenced a second consultation. SARC does not consider that a significant level of community support for such an option in Victoria presently exists.

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891 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 20.

892 Submission 263 (Human Rights Law Centre). p. 73.

893 M McHugh, 'A Human Rights Act, the Courts and the Constitution', speech delivered at the Australian Human Rights Commission, 5 August 2009, p. 36, available at <http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh_2009.html>.

894 Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10, October 2007, Recommendation 10 and [4.10.26].

Referrals to the 5th to 8th year review

[638] Some submissions to the inquiry recommended deferring consideration of some reforms to the Charter to the required 5th to 8th year review of the Charter's operation.[895] Charter s. 45 provides:

> *(1) The Attorney-General must cause a review to be made of the 5th to 8th years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2015.*
>
> *(2) A report under subsection (1) must include a recommendation as to whether any further review of this Charter is necessary.*

This provision lacks a section equivalent to Charter s. 44(2), which required consideration of four specific topics (all addressed in Chapter 3 pursuant to the inquiry's first term of reference).

[639] The matters listed in Charter s. 44(2) were all suggested by the Human Rights Consultation Committee in its report and are all directed towards possible additions to the Charter's protection regime. While SARC gave detailed consideration to the Charter s. 44(2) matters in Chapter 3, it observes that the review has largely been concerned with assessing the Charter's operation and the consideration of reforms to its existing mechanisms. SARC considers that any referral made in 2011 of matters that must be considered by 2015 risks imposing an inappropriate burden on the next inquiry and the people who make submissions to it. Accordingly, SARC will not recommend that any topics be mandated for consideration in any future review of the Charter.

6.3 SARC's recommendation on the options for reform or improvement of the regime for protecting and upholding human rights and responsibilities in Victoria

Relevant provisions

[640] The Charter's protection regime is set out in Part 3, titled 'Application of Human Rights in Victoria'. There are three relevant divisions.[896]

[641] Division 1, titled 'Scrutiny of new legislation' contains three sections:

- Charter s. 28, requiring statements of compatibility for Bills
- Charter s. 29, preserving the validity and effect of Acts for Bills where Charter s. 28 was not complied with
- Charter s. 30, requiring SARC reports on incompatibility of Bills.

[642] Division 3, titled 'Interpretation of laws' contains six sections:

- Charter s. 32, the Charter's rule on interpretation of statutory provisions
- Charter s. 33, allowing referral of lower court and tribunal Charter matters to the Supreme Court and Court of Appeal
- Charter s. 34, a right for the Attorney-General to intervene in all Charter proceedings.
- Charter s. 35, requiring notice to the Attorney-General and VEOHRC for Charter matters in the higher courts

895 E.g. Submission 278 (VEOHRC), pp. 177 and 233.

896 Division 2 consists of only one section, on override declarations, which is addressed in Chapter 4 at [428]-[433] and Recommendation 21

- Charter s. 36, permitting the Supreme Court to make declarations of inconsistent interpretation
- Charter s. 37, requiring ministers to make a written response to declarations of inconsistent interpretation.

[643] Division 4, titled 'Obligations of public authorities' consists of:

- Charter s. 38, setting out the obligations of public authorities when acting or making decisions
- Charter s. 39, on reliefs or remedies for acts or decisions of public authorities that are unlawful because of the Charter.

[644] Many of the above provisions were the subject of specific recommendations set out in Chapter 4 of this report, in the event of their retention in Victorian law. The options that are discussed below incorporate those recommendations where applicable. The relevance of each recommendation is identified in the relevant discussion in Chapter 4. To distinguish these reform models from the existing Charter, the remainder of this chapter will instead refer to various possible regimes for protecting and upholding rights and responsibilities in Victoria.

[645] Under the inquiry's fourth term of reference, SARC will make recommendations about the reform or improvement of Victoria's regime for protecting and upholding rights and responsibilities, based on a wider set of considerations that look beyond the period between the Charter's commencement and this inquiry. This section sets out three options for the future legal protection of human rights in Victoria before identifying SARC's view. Under all three option, the pre-existing regimes of protecting and upholding human rights in Victoria outlined at the start of this chapter (and discussed further under Option 3) remain unless modified.

The options

Option 1: That Part 3 be retained, with the modifications recommended in this Report

[646] Option 1 retains the core elements of the existing 'dialogue' model presently operating in Victoria and the ACT, including statements of compatibility, committee scrutiny, court proceedings and obligations of public authorities. Option 1 seeks to protect vulnerable, marginalised and disadvantaged people through dialogue and negotiation, and to provide real life solutions to them.

[647] In light of the recommendations set out in this Report, Option 1 differs from the existing Charter in significant ways, including:

- the potential inclusion of rights omitted from the *ICCPR;*[897]
- fewer and shorter statements of compatibility;[898]
- fewer gaps in the provisions for parliamentary scrutiny of new legislation;[899]
- redrafting of the provisions on reasonable limits and obligations of public authorities in plain, localised language;[900]
- revision of the interpretation provision to preserve traditional interpretation methods and the primacy of the purpose of statutory provisions;[901]

897 Chapter 3, Recommendation 1.
898 Chapter 4, Recommendations 11-13.
899 Chapter 4, Recommendations 14-20.
900 Chapter 4, Recommendations 13 and 23.
901 Chapter 4, Recommendations 24-27.

- replacement of the complex definition of public authorities with a statutory list of each body and function that is subject to obligations under the regime for protecting human rights;[902]
- transfer of the Supreme Court's role in making declarations of inconsistent interpretation to an independent non-judicial body, reporting to a parliamentary committee that in turn reports to the Parliament;[903]
- express identification of specific remedies, if any, to be made available for breaches of the provisions for obligations.[904]

These changes enhance both the Parliament's and the courts' current roles in the human rights scrutiny regime. As well, they will make the regime's legal rules easier to apply by lay people and less open to varying interpretations by courts and tribunals in the future.

[648] The extent of Option 1's application in courts depends on further reviews. In Chapter 4, SARC recommended that the continuing need for the regime's interpretation rule be examined and that, if it is retained, it be redrafted in a manner that ensures that it operates by way of ordinary methods of interpretation and is accessible to local users.[905] SARC also recommended that the regime's application to public authorities be determined expressly by the Parliament itself, in the form of statutory amendments to the regime itself (identifying any government entity or public function that is subject to the obligations provision) and to other statutes (identifying remedies for breaches of the obligations provision and the precise circumstances in which they may be granted).[906]

Option 2: That only Division 1 of Part 3 be retained, with the modifications recommended in this Report.

[649] Option 2 removes the extra-parliamentary aspects of the existing Charter, while retaining its operative provisions for statements of compatibility for new Bills and scrutiny by SARC. This regime is similar to one that is proposed to be adopted in the Commonwealth Parliament as the federal government's response to the National Human Rights Consultation, but incorporates the lessons learned from the existing Charter to date, including the modifications to the scrutiny regime recommended in Chapter 4[907] and the need to reconsider other provisions.[908]

[650] In Chapter 3, SARC recommended against adding economic, social and cultural rights to the existing Charter on the ground that those rights involve matters of resources and policy that are for the Parliament rather than the courts to determine.[909] Option 2, by removing the courts' role under the present regime, opens up further ways for protecting and upholding rights and responsibilities in Victoria. In particular, the grounds for parliamentary scrutiny could be broadened to more closely match the rights listed in the *ICCPR* and to add rights set out in other sources. Moreover, that scrutiny could be conducted by direct reference to a variety of external sources, including the common law, constitutional law and

902 Chapter 4, Recommendations 22, 28-30 and 33.
903 Chapter 4, Recommendation 31.
904 Chapter 4, Recommendation 32.
905 Chapter 4, Recommendation 24.
906 Chapter 4, Recommendations 22 and 32.
907 Chapter 4, Recommendations 9-20 and 26.
908 Chapter 3, Recommendation 1 (re-examination of rights omitted from the *ICCPR*); Chapter Four, Recommendations 21 (repeal of the override declaration), 24 (consideration of the necessity of Charter s. 32), 27 (repeal of Charter s. 32(2)), 30 (repeal of part of the Charter's application section) and 33 (clarification of the jurisdiction of the Ombudsman); Chapter Five, Recommendation 34 (framework to assess benefits and costs).
909 Chapter 3, Recommendation 2.

international human rights treaties, rather than a finite list of rights such as the one set out in Part 2 of the existing Charter.[910]

[651] Also in Chapter 3, SARC recommended against giving VEOHRC an informal dispute resolution or mediation function in relation to human rights, on the basis that such a function is inappropriate when those same rights might be legally enforceable in a court or tribunal.[911] However, this argument is inapplicable under Option 2, which does not impose any legal obligations on public authorities, much less enforceable ones. Therefore, as in the federal jurisdiction (where a dispute resolution function is given to the Australian Human Rights Commission in relation to human rights, but no further provision is made for enforcement), a parliamentary human rights regime leaves open the option for a low cost, timely, efficient and informal dispute resolution or mediation function in relation to human rights by an independent body such as VEOHRC.

[652] However, SARC notes that Option 2 need not be the same as the Commonwealth model, as Victoria differs from the Commonwealth in significant ways. First, Victoria has a lengthy history of rights scrutiny by a joint House committee.[912] Second, it has recent comprehensive experience of parliamentary scrutiny (including statements of compatibility) based on the human rights set out in Part 2 of the existing Charter. Third, Victoria is not a party to any international human rights treaties. Fourth, VEOHRC's human rights functions have only been in place for a relatively short period compared to the Australian Human Rights Commission.

Option 3: That the Charter be repealed

[653] Option 3 would restore Victoria's regime for the legal protection of human rights and responsibilities to the position that applied for the first 150 years of responsible government in Victoria and the one that continues to apply in all other Australian states and the Northern Territory.

[654] As detailed at the start of this chapter, the pre-existing regime for protecting and upholding rights and responsibilities in Victoria includes:

- the common law principle of legality, where courts will assume that legislation is not intended to limit fundamental rights protected at common law, unless the legislature uses clear words to indicate its contrary intention[913]
- the common and statutory law of judicial review and administrative law, including the invalidity of decisions and regulations that limit fundamental rights without express parliamentary permission and the requirement for decision-makers to consider human rights in some circumstances[914]
- the entrenched provisions of the *Constitution Act 1975*, including a bicameral legislature, the independence of judicial and constitutional officers and the protection of the jurisdiction of the Supreme Court[915]
- the rights set out in the federal Constitution, including the right to free movement among the states, the implied freedom of political communication and the bar on state courts being given functions that are incompatible with their constitutional role[916]

910 See Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth), cl. 13; Senate Legal and Constitutional Committee, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Amendments) Bill 2010 [Provisions]*, January 2011, p. 58.
911 Chapter 3, Recommendation 7.
912 See *Parliamentary Committees Act 2003*, s. 17(1)(a)(i), setting out a scrutiny ground for where a Bill 'trespasses unduly on rights or freedoms'.
913 See [596]-[599].
914 See [600]-[601].
915 See [602].
916 See [603]-[604].

- the operation of parliamentary processes, including SARC's long-standing role scrutinising Bills and regulations for undue trespasses on rights and freedoms[917]
- federal and state statutes providing specific protections for particular rights, for example the Commonwealth and Victorian equal opportunity regimes and privacy laws, as well as specific protections such as the Commonwealth's legislative enforcement of *ICCPR* privacy rights in relation to sexual conduct between consenting adults.[918]

As previously, these mechanisms can continue to develop in accordance with traditional political processes, familiar legal doctrines and similar reforms throughout the balance of Australia, without unnecessary uncertainty, controversy or costs.[919]

[655] Moreover, under all three options, human rights and responsibilities can be further protected or upheld through new legislative and administrative programs, both in particular sectors and through broader cross-sector initiatives such as 'One DHS', which provides a single set of standards for a range of service providers.[920] SARC observes that, in addition to the cost savings and reduction of bureaucratic burdens that those standards were intended to achieve, they may also have some of the 'silo-breaking' effect that submissions to the inquiry from stakeholders in particular sectors have identified as a positive outcome of the Charter.

SARC's recommendation

[656] The choice between the three options depends on the answer to two questions:

- Should a version of the present regime for protecting and upholding human rights continue to play a role in Victoria's Parliament?
- Should a version of the present regime for protecting and upholding human rights continue to play a role in Victoria's courts?

Each of these questions implicitly raises the role of the executive because, in accordance with the Westminster system, the executive is both accountable to Parliament and subject to the rule of law enforced by the courts.

[657] SARC observes that if the answer to both of the above questions is yes, then Option 1 is appropriate. If the answer to the first question is yes and the second question is no, then Option 2 is appropriate. If the answer to both questions is no, then Option 3 is appropriate. The discussion below sets out SARC's view in relation to each of these questions. In relation to issues where SARC has not reached a unanimous view, the discussion sets out the view of the majority of SARC members and the view of the minority of SARC members.

[658] SARC observes that each question involves the future of regimes for protecting human rights in Victoria. Accordingly, while the considerations of the effects, benefits and costs of the existing Charter to date outlined in Chapters 4 and 5 are relevant to SARC's consideration, its views are also based on two matters: the approach to protecting human rights presently taken in other jurisdictions and the potential effects of any Victorian regime in the future. The latter effects extend beyond the Parliament and the courts to all Victorians who are affected by decisions or potential decisions of those institutions, including providers and users of public services.

917 See Chapter 1, [7]-[14].
918 See [605].
919 See Submission 321 (Sir James Gobbo).
920 *Department of Human Services Standards*, June 2011.

Should a version of the present regime for protecting and upholding human rights continue to play a role in Victoria's Parliament?

[659] SARC's view is that a modified form of the current regime for protecting and upholding human rights should continue to apply in Victoria's Parliament, for the following reasons:

The approach taken outside Victoria

[660] In most of Australia, the Parliament is informed about the human rights impact of proposed legislation by scrutiny committees that assess legislation on a variety of traditional grounds, including variations on SARC's long-standing scrutiny ground of whether a proposed or new law 'trespasses unduly on rights or freedoms'.[921] By contrast, the main feature of the existing Charter system– the requirement of a reasoned statement of compatibility for all Bills (retained in modified form in both Options 1 and 2) – is presently unique, not only in Australia but indeed in comparable jurisdictions with Bills or Charters of Rights. As well, only the ACT's scrutiny committee shares SARC's current Charter function of reporting on the compatibility of proposed legislation with a statutory list of rights.

[661] Some submissions to the inquiry have argued that the present Victorian approach, by mandating assessment of human rights against a defined list, has led to instances of human rights analysis that trivialise particular rights or produce lengthy assessments that are disproportionate to the actual human rights impact of proposed legislation.[922] A further potential danger of this approach is that less or even no consideration may be given to rights omitted from the list of rights. However, SARC considers that the particular flaws of the statement of compatibility process identified in the submissions can be managed by adjustments to that process (in the manner outlined in Chapter 4 and further discussed below).[923] In combination with the Parliament's own processes for ensuring a full consideration of the merits of all legislation– notably its bicameral legislature and committee system, including SARC's long-standing scrutiny role – those reforms sufficiently alleviate the above concerns.

[662] A further potential consideration favouring a retention of a form of the existing Victorian approach is the Bill introduced into the Commonwealth Parliament for parliamentary human rights scrutiny that is partly modelled on Victoria's existing Charter.[924] SARC considers that, just as Victoria's legislation scrutiny system derives benefits in terms of consistency and some economies of scale from the presence of a similar scrutiny system in the Commonwealth Senate, so too may the introduction of a scheme of scrutiny similar to Division 1 of Part 3 of the existing Charter in the Commonwealth Parliament provide a further reason for the retention of such a scheme in the Victorian Parliament.

[663] A majority of SARC considers that, if Option 2 is adopted, then the case for retaining a form of the existing regime for protecting human rights in the Parliament may be strengthened in ways that SARC has found are unavailable under 'dialogue' models of human rights protection such as Option 1. That is because Option 2, by removing any role for courts from Victoria's future regime for protecting human rights, removes a barrier to including additional rights in the regime for parliamentary scrutiny. As the Commonwealth proposal shows, such a scrutiny model may include rights that are not suited to consideration by courts, such as ESC (economic, social and cultural) rights. Moreover, such a scrutiny model could also identify rights for consideration by reference to other sources, such as the common law, constitutional law, international treaties and domestic statutes, rather than through a finite list of rights set out in a single Victorian statute. This broadened regime for parliamentary human rights scrutiny will

921 *Parliamentary Committees Act 2003*, s. 17(1)(a)(i); *Subordinate Legislation Act 1994*, s. 21(1)(f).

922 Submission 19 (Family Voice), pp. 11-12; Submission 133 (Institute of Public Affairs), pp. 7-8; Submission 190 (Church and Nation Committee), pp. 9-10; Submission 263 (Human Rights Law Centre), pp. 11-12.

923 See [667]-[668].

924 Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth).

heighten the executive's accountability to the Parliament in accordance with the Westminster system, yielding benefits that flow-on to Victorians through improved service delivery.

[664] However, a minority of SARC considers that a broadening of rights considered by Parliament is of limited worth if Parliament does not expressly provide legally enforceable ways to determine whether the government and service providers have given proper consideration to them. As outlined in the next section of the discussion, the retention of a role for courts in the rights protection regime, as required by Option 1, is vital to ensure that the regime for parliamentary human rights scrutiny continues to deliver practical outcomes to Victorians.

Future effects in Victoria

[665] SARC observes that the primary consideration for whether or not a form of the existing statutory regime for protecting and upholding human rights should continue to play a role in the Parliament is such a scheme's likely impact in Victoria in the future.

[666] Based on the operation of the existing Charter in the Parliament to date, the case for retaining the present statement of compatibility regime is a modest one. In Chapter 4, SARC found that, while Division 3 of Part 1 had led to changes in how legislation is developed and to the information provided to the Parliament, the evidence of its impact was modest in terms of both parliamentary debates and changes to Victorian laws. Chapter 5 set out potential benefits of the existing Charter's role in the Parliament (including providing a framework for assessing the human rights impact of proposed legislation, increased transparency of government processes and its role in advocacy and consultations on laws.) It also set out the financial costs of that regime (including the costs of preparing statements of compatibility).

[667] However, on balance, SARC considers that the regime for statements of compatibility for new legislation should be retained. Although there are costs involved in the preparation of statements of compatibility for Bills, significant components of those costs (notably the initial training of development officers and the establishment of protocols and policies) have already been incurred. Accordingly, cost considerations provide less of a reason than they might otherwise have provided for continuing these processes in the future, particularly given the potential benefits in terms of transparency of processes.

[668] Moreover, the reforms to the statement of compatibility system SARC has recommended in Chapter 4 may increase the benefits of these processes to the Parliament and the community, by making those statements fewer, shorter and, therefore, more accessible and useful to members of Parliament.[925] Because those recommendations are framed around a distinction already drawn in statements of compatibility (between limiting and reasonably limiting a human right), the costs of implementing the new system are likely to be modest and may be offset by the costs savings of having fewer, shorter statements of compatibility.

[669] A minority of SARC's view is that, if Option 1 is adopted, then the Charter's role in parliamentary scrutiny may be more effective for two reasons. First, scrutiny and consideration of legislation by the Parliament (including SARC) is inevitably limited by its lack of time and resources to assess the full practical impact of proposed legislation; by contrast, when courts interpret a law and review decisions made under it, they have the evidence and capacity to conduct this additional human rights assessment, complementing the Parliament's use of the Charter. Second, if the developers of legislation are aware that the human rights impact of proposed legislation may eventually be reviewed by the courts, then they will engage in a long-term risk-assessment of the legislation's impact, rather than merely directing their efforts towards ensuring the passage of a law through the Parliament of the day. In short, Option 1, by providing a common regime for both parliamentary human rights scrutiny and enforceable obligations for public

925 See Recommendations 11-13.

authorities, promotes the Parliament's capacity to ensure that new laws deliver practical benefits to the suppliers and users of public services in Victoria.

[670] A majority of SARC's view is that, if Option 2 is adopted, then the regime for protecting human rights through parliamentary scrutiny may be more effective for two reasons. First, the removal of existing provisions for interpreting legislation compatibly with human rights and for obliging public authorities to consider human rights may mean that developers and drafters of legislation will respond to concerns about the human rights impact of legislation expressly within a statute or regulation, as they will not be able to rely on an external regime for protecting human rights to ameliorate that impact when the law is applied. Second, if the parliamentary scrutiny regime is unshackled from the rules that govern subsequent court proceedings, drafters of legislation may see less reason to seek external legal advice (e.g. from the Victorian Government Solicitor's Office) on the contents of statements of compatibility, avoiding both costs and delays in the consideration of human rights when legislation is being developed and drafted. In short, Option 2 replaces the existing Charter's limited 'dialogue' model with a stronger parliamentary scrutiny system based on a broader human rights framework that will yield concrete improvements in government services.

Summary

[671] SARC's view is that, on balance, a modified form of the existing regime for protecting human rights should continue to apply in the Parliament. That is, Division 1 of Part 3 should be retained, subject to the recommendations set out in Chapter 4. It follows that Option 3 should not be adopted.

Should a version of the present regime for protecting and upholding human rights continue to play a role in Victoria's courts?

[672] SARC does not have a unanimous view on this question. The views of the majority and minority are identified in the discussion below.

Discussion of the approach taken outside Victoria to protecting and upholding human rights

[673] As outlined earlier in this Chapter, Victoria and the ACT are the only Australian jurisdictions whose courts are required or empowered to consider a statutory list of rights. By contrast, such a role for courts is commonplace outside of Australia.

[674] A number of submissions to the inquiry argue that any decision by Victoria to modify the current regime for protecting human rights in Victoria's courts would set an unfortunate global precedent.[926] Former High Court Justice Michael Kirby argued:[927]

> *It would be a serious misfortune now if Victoria were to repeal or substantially modify the Charter or to reduce the beneficial role played in its implementation by the judiciary of Victoria. Any proposal to this effect should, in my respective submission, be rejected or at least postponed. To do otherwise would, I suggest, damage the reputation of Victoria as an innovative intellectual lead in the law in Australia and as an Australian State jurisdiction fully engaged with an important and widespread legal development. In this respect, a repeal or a major modification of the Charter would send an unfortunate signal to the world community concerning the engagement of the Victorian Parliament with the global law of human rights. Such a signal would be more serious and negative, in the case of Victoria, than in respect of the other Australian jurisdictions that have so far failed to enact a Charter or equivalent statute.*

926 Submission 168 (Australian Lawyers Association), p. 19; Submission 203 (Law Society of NSW), p. 1; Submission 263 (Human Rights Law Centre), p. 2.

927 Submission 326 (Michael Kirby), p. 2.

However, SARC considers that such arguments should not determine decisions in Victoria about the role of Victoria's courts in any future regime for protecting or upholding rights.

[675] The modification of rights protections in curial settings has a number of global precedents, even in the contemporary democracies.[928] Even if it is indeed true that Victoria would be 'one of the only jurisdictions'[929] to take the more dramatic step of major modifications or removal of the operative provisions for a Bill of Rights, that status would be merely a by-product of long-standing differences between Australia and most other nations, which protect rights in their Constitutions. In many nations, the decision to entrench rights protection was made in response to crises or as a result of referenda. In some, it is notorious that those provisions are honoured more in the breach than the observance, making the question of repeal irrelevant. In the two countries with constitutional arrangements like Australia's that have adopted rights statutes relatively recently, the United Kingdom and New Zealand, their decision to enact a justiciable rights statute was made to fulfil international obligations (including, in the case of the former, avoiding litigation before a supranational court). None of these circumstances apply in Victoria, where the existing Charter was adopted without a crisis or referendum, in a jurisdiction with an existing high level of rights protection and without any international obligations to fulfil. The most important civil disturbance in Victoria's history, the Eureka rebellion, sought to uphold (and arguably achieved) greater democratic and other electoral rights in the Victorian Parliament, rather than seeking enforceable human rights in Victoria's courts.[930] Rather, Victoria's Charter was developed through conventional law reform in a mature democracy. In that respect, Victoria's most relevant comparator is the ACT, which differs in size and the complexity of its government sector and court system. Moreover, none of the ACT, New Zealand or the United Kingdom benefit from the protections afforded by a democratically elected upper house.

[676] Second, the capacity of Victoria's Parliament to modify the regime for protecting and upholding rights is itself a feature of the scheme that Victoria chose to adopt in 2006 when it enacted the Charter as an ordinary statute. As discussed earlier in this chapter, the community consultation to introduce the existing Charter was premised on a rejection from the outset of models involving any form of entrenchment. The Consultation Committee confirmed this approach as well as the need for regular reviews that should contemplate alterations to the model:[931]

> *The Charter can only be the beginning of a journey towards the better protection of human rights in Victoria. As such, regular reviews are necessary to assess whether the Charter is working effectively and to ensure that it continues to reflect the values and aspirations of the Victorian community.*
>
> *There was general agreement amongst the people who mentioned this issue in submissions or spoke to us at consultations that a review is desirable. Many people, such as the Queer Greens, said that reviewing the Charter is important to preserve its flexibility:*
>
> > *We do not live in a static society. Therefore the rights which are considered important by the groups and individuals [a]ffected are also changing … Therefore a system of review needs to be put in place so that the Charter remains relevant and useful for our ever evolving society.*

Moreover, the Consultation Committee deliberately recommended a 'four-year' review to 'ensure that the review would not be within the same parliamentary cycle as the commencement of the Charter',[932] implying that the review would encompass a reconsideration of all aspects of the previous Parliament's work.

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928 E.g. *Sixteenth Amendment of the Constitution Act, 1996* (Ireland) (amending art. 40 (personal rights) to permit the refusal of bail for the purpose of preventing serious offences, overruling *People v O'Callaghan* [1966] 1 IR 501); *Basic Law for the Federal Republic of Germany*, art. 13(3)–(7) (inserted in 1998 to permit the placing of listening devices in some circumstances despite art. 13(1) providing that '[t]he home is inviolable').

929 Submission 263 (Human Rights Law Centre), p. 2.

930 See Ballarat Reform League Charter, available at <prov.vic.gov.au>, referring to 'the inalienable right of every citizen to have a voice in making the laws he is called upon to obey'.

931 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 135.

932 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 136.

[677] Accordingly, SARC considers that it is important to unequivocally disclaim the view that any decision of the Victorian Parliament with respect to the continuing applicability of the regime for human rights protection in Victoria's courts should be guided by concerns about how such a decision would be perceived internationally. Not only is any perception that Victoria would be setting a precedent inaccurate, but deference to it would contradict the basis upon which the Victorian community was consulted and the Victorian Parliament acted. Indeed, such arguments, if accepted, would also be heeded in other Australian jurisdictions. Indeed, one of the reasons given by the NSW Standing Committee on Law and Justice for rejecting a statutory bill of rights was the prospect that such a law:[933]

> *would become a fundamental piece of legislation, which future governments would find difficult to amend without being characterised as destroying human rights protections. A Bill of Rights creates expectations: to back away from these expectations defeats the purpose of bringing in the Bill.*

[678] As Michael Kirby pointed out:[934]

> *A distinctive and beneficial feature of the federal system of government, as it operates in Australia, lies in the possibility that it allows for experimentation and progress concerning (amongst other things) the boundaries of justice and the accessibility of the rule of law. The several Parliaments in the Commonwealth, and specifically the Victorian Parliament, should cherish the adoption of legislative innovations that lead the way for other Australian jurisdictions.*

Both Victoria's decision to adopt the existing Charter in 2006 and any decision it makes about the rights protection regime in the future should be seen in this light, whether the decision is to adopt Option 1 (which may be seen as a reform of the existing regime), Option 2 (which may be seen as a move towards the regime that has been proposed nationally) or Option 3 (which may be seen as a return to the rights protection approach that is followed in the balance of Australia). Any changes to Victoria's regime for protecting and upholding human rights should be determined by a consideration of the interests of the Victorian community, rather than by reference to whatever messages or signals are sent by such modifications.

Future effects in Victoria

[679] SARC considers that the primary consideration for whether a version of the existing regime for protecting and upholding human rights should continue to apply in Victoria's courts is the potential future impact of such a regime. SARC has not reached a unanimous view on this question.

[680] The operation of the present Charter in Victoria's courts and tribunals to date does not resolve the question before SARC. On the one hand, the inquiry has received little evidence of dramatic changes to the court system, such as significant increases or decreases in litigation, major shifts in legal rules (e.g. in favour of criminal defendants) or changes in the role or public perceptions of the judiciary.[935] On the other hand, the inquiry has received little evidence of substantive outcomes for litigants that can be attributed to the existing Charter, despite a number of major cases that have proceeded through lengthy hearings and multiple courts and tribunals.[936] The inquiry has received a range of evidence of the impact of the present Charter beyond the courts, as well as conflicting evidence on why the courts have only made minor use of the statute to date.[937] Some submissions have observed that a three-and-a-half year period is too short to reach conclusions on the present regime's operation in the courts.[938] At the same time, many submissions

933 Standing Committee on Law and Justice, *Report 17: A NSW Bill of Rights*, October 2001, [7.9].
934 Submission 326 (Michael Kirby), pp. 2-3.
935 See Chapter 4, [466]-471].
936 See Chapter 4, [501]-[506].
937 See Chapter 4, [438]-[439] and [469].
938 E.g. Submission 247 (Law Institute of Victoria, p. 20; Submission 326 (Michael Kirby), p. 4.

have urged changes to the statute's operative provisions to avoid uncertainty, adverse outcomes and barriers to their effectiveness.[939]

[681] As SARC explained in detail in Chapter 4, the present operation of the Charter in the courts is not sustainable.[940] The key Charter provisions that apply in the courts are subject to major uncertainties about their meaning and operation and require significant alterations before they can be considered workable and accessible.[941] Before any such work is done, it is vital to decide whether or not the continuing involvement of the courts will produce the best outcomes for citizens and the community and whether or not the risks of that continuing involvement are too great.

[682] A minority of SARC considers that the reforms proposed in Chapter 4 will allow the potential benefits of the role of the Charter in the courts to be attained without incurring these costs. From the outset, it is vital to note that the role of Australian courts has long included deciding cases that are unclear, complex and contentious, a matter well demonstrated by the High Court's recent decision (in the federal jurisdiction, which has no Charter) concerning the so-called 'Malaysian Solution'.[942] The answer to Chapter 4's finding that the current Charter's wording is ambiguous and thus leads to difficulties with interpretation by the courts is to give greater drafting clarity, not to remove the courts' role in the regime altogether. The present uncertainties of the Charter can be avoided or sufficiently reduced by replacing its complex provisions derived from overseas statutes with plain language provisions suited to application in Victoria and requiring the Parliament to expressly specify the scope and effect of the Charter's obligations on public authorities.[943] Any resulting contraction in the scope of the existing Charter's operation will be more than offset by its greater utility to both litigants and the wider community and will also shield the courts from the potential for undue political controversy. The absence of any evidence of 'villains' Charters' or 'lawyers' picnics' even under the considerable uncertainty of the Charter's first three and a half years demonstrates that the risk of continuing the courts' existing role under provisions that remove that uncertainty is negligible.[944] And, as happened in the case of sex offender monitoring laws and random weapons searches in 2009, the Parliament retains it role as the ultimate decision-maker on all matters involving human rights in Victoria, in accordance with the Charter's dialogue model.[945]

[683] Accordingly, the minority considers that the significant positive outcomes in litigation, negotiation and public authority decision-making identified in submissions to the inquiry will continue to benefit individual Victorians and the wider community in the future. Those submissions, discussed in Chapters 4 and 5, outline how public authorities have responded to the existing Charter with changes to policies and programs and how the raising of the statute in negotiations has led to reconsiderations of both individual decisions and rigid policies without the need for a court hearing.[946] These results have flowed through to individuals who would not otherwise have had their rights recognised or remedied, such as:

- Gary Kracke, who was denied several mandatory reviews of compulsory medical treatment orders while his case lingered in a bureaucratic black hole[947]
- relatives of deceased public housing tenants, who would otherwise have been forced by an inflexible residency requirement into months of homelessness[948]

939 E.g. Submission 95 (Victorian Bar), p. 17; Submission 114 (Julie Debeljak), pp. 7-8; Submission 163 (Australian Lawyers' Association), p. 8; Submission 171 (Victoria Legal Aid), pp. 3-4; Submission 247 (Law Institute of Victoria), p. 19; Submission 257 (PILCH), p. 12; Submission 263 (Human Rights Law Centre), p. 45; Submission 278 (VEOHRC), pp. 110-1.

940 See [450]-[461], [472]-[494] and [507]-[515].

941 See Recommendations 22-32.

942 *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

943 See Recommendations 13, 22-24, 28-29 and 32.

944 See Chapter 4, [466].

945 *Serious Sex Offenders Monitoring Amendment Act 2009*; *Summary Offences and Control of Weapons Amendment Act 2009*.

946 See [444]-[445] and [545]-[566].

947 *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646.

948 Submission 83 (PILCH Homeless Persons Legal Clinic), pp. 10-12; Submission 324 (Victorian Government), p. 21.

- a man with an intellectual disability who, although unfit to be tried, was held in prison for longer than the period he would have served if he had been convicted because of a lack of suitable shared accommodation, until the Office of the Public Advocate raised his Charter rights to equality and movement.[949]

As these examples demonstrate, the Charter's main effect is to make public authorities and the government more accountable to individuals. The Charter needs clear, legally enforceable remedies to function properly. The retention of the courts' role under the Charter is consistent with their function of ensuring that individuals are treated by the executive in accordance with the law as adopted by the Parliament. The community needs human rights upheld through public authorities accountable to the citizen and capable of redress through the courts. It is recognised that achieving human rights requires budgetary commitment. In light of the recommendation in Chapter 5, any future assessment of the impact of the courts' role on the Victorian community will have the advantage of a clear mechanism to measure its overall benefits and costs.[950]

[684] A majority of SARC considers that the risks of retaining a role for courts in the regime for protecting and upholding human rights far outweighs any potential benefits. Like the minority, the majority accepts the flaws in the existing Charter identified in Chapter 4 and that the changes recommended by SARC are improvements over the current regime. However, these significant reforms represent the bare minimum necessary to overcome the substantial difficulties that have arisen just in the first three and a half years of the statute's operation in the courts. The effects of any reforms of a statute such as the Charter must be uncertain. Given the inherent breadth and vagueness of human rights law and the inevitable temptation to argue for interpretations and outcomes that make significance changes to the legal status quo, it is all too likely that the next four years will see further legal uncertainty. At best, this will mean still more cases like *R v Momcilovic*, where minor matters proceed through years of appeals to resolve basic questions of the existing Charter, while offering little of substance even to successful litigants.[951] Such litigation complicates the tasks of public authorities and potentially distracts the courts from other legal issues that ought to have been considered from the outset. At worst, the regime may draw the courts into political controversies by requiring them to intrude into matters of policy and resources, such as the management of public housing, as well as galvanising claims that upset the balance of sensitive legal regimes, such as criminal justice. A number of submissions argue that the major costs of the courts' functions under such a regime are in the future, not only in terms of continuing uncertainty, but in the potential for adverse legal consequences and an increase in politically contentious legal disputes once the regime's operative provisions become a staple of court decision-making.[952] Given these risks, it is appropriate that the 'experiment' (to use Michael Kirby's term[953]) of giving courts a role in the human rights regime be stopped at an early stage, before its negative impacts become irrevocably entrenched in Victoria's legal system.

[685] Moreover, the majority considers that the benefits that are said to be worth all of these risks are all ones that Victoria's courts have been protecting since their inception and that are further protected by numerous other well-established parts of the Victorian legal system.[954] As former NSW Premier Bob Carr has observed, '[t]he common sense of the Australian people tells them they are free. And that a charter would increase litigation, not rights.'[955] Former Victorian Governor and Supreme Court judge Sir James Gobbo submitted:[956]

949 Submission 158 (Office of the Public Advocate), p. 6.
950 See Recommendation 34.
951 See Chapter 4, [503]-[505].
952 E.g. Submission 287 (Joseph Santamaria), pp. 23-7; Submission 320 (Catholic Archdiocese of Sydney), pp. 10-13.
953 Submission 326 (Michael Kirby), p. 2.
954 See [595]-[605].
955 B Carr, 'Bill of Rights is the Wrong Call', *The Australian*, 9 May 2009.
956 Submission 321 (Sir James Gobbo), p. 1.

> *The starting point for those seeking to add a Bill of Rights or Charter of Rights is to point to actual examples of injustices or wrongs or grievances which cry out for relief, which cannot be addressed under existing law or other remedies …*
>
> *The existing remedies for wrongs and grievances can be summarised as follows:*
>
> *a. The Common Law;*
>
> *b. The Constitution;*
>
> *c. Statute Law, including specific legislation, such as Racial of Sex Discrimination or Equal Opportunity Act;*
>
> *d. Recourse to extra-legal remedies, sometimes set up by Statute such as the Ombudsman Scheme or by Industry itself, such as the many Industry or Services Ombudsman Schemes …*
>
> *e. Recourse to the providers of services or goods;*
>
> *f. Recourse to consumer and voluntary community organisations; and*
>
> *g. Recourse to political representation.*
>
> *The list is not exhaustive but its width shows the existing ambit of what may fairly be described as the workings of democracy.*

If any of these mechanisms falls short in the future, it is appropriate that the solution be determined, as it is elsewhere in Australia, by the executive and legislature, rather than by giving the judiciary an unwanted role in interpreting and applying vague and controversial rights provisions. Option 2 enhances both the Parliament's human rights capacities and the rule of law in the courts in a flexible manner that permits the introduction of new and broader mechanisms for promoting human rights, such as the inclusion of further rights and the introduction of mechanisms for mediation. In doing so, it simultaneously protects parliamentary sovereignty, executive accountability and judicial independence.

Summary

[686] The view of a majority of SARC, Option 2 – the retention only of Division 1 of Part 3, subject to the recommendations in Chapters 3, 4 and 5 – should be adopted. That is, the existing Charter's role in the courts should end. The view of a minority of SARC is that Option 1 – the retention of Divisions 1, 3 and 4 of the Part 3, subject to the recommendations in Chapters 3, 4 and 5 – should be adopted. That is, the existing Charter's role in the courts should continue in a modified form.

SARC's recommendation

[687] SARC recommends that consideration be given to both of the options respectively favoured by a majority and minority of SARC in determining how to reform or improve Victoria's regime for protecting and upholding the human rights and responsibilities. Both options retain a modified form of the current Charter's provisions for parliamentary scrutiny. The choice between the two options concerns whether a form of the current Charter's provisions concerning proceedings and enforcement in courts and tribunals should also be retained. Both the majority and minority consider that, whichever option is selected, any retention of the current Charter's provisions should be subject to the relevant recommendations about those provisions set out in Chapters 3, 4 and 5 of this Report.

[688] SARC observes that both of the options referred to the Parliament for its consideration allow for variations in how they may be implemented. Option 1 makes Parliament responsible for specifying how courts should interpret its legislation compatibly with human rights, identifying which Victorian bodies are legally obliged to give proper consideration to human rights and constructing just and accessible remedies for citizens when such a body fails to do so. Option 2 has the increased flexibility that flows from removing the current role of the courts, including allowing a broader range of rights to be considered by the

Parliament and the adoption of additional non-court mechanisms for protecting and promoting human rights. Both options enable Parliament to provide avenues for people to seek a court or tribunal review of the governing legislation and public authorities' legal obligations.

[689] Moreover, both options are consistent with the continuation of existing mechanisms in Victorian law for protecting human rights (including those introduced or modified by the Charter) that operate exclusively outside of the Parliament and the courts, including the use of cross-sector standards such as 'One DHS', institutions such as the Ombudsman, the Director, Police Integrity and the Auditor-General, and specific statutes such as equal opportunity and privacy regimes.

Implementation of the Options

[690] A minority of SARC considers that Victoria's regime for protecting and upholding human rights should, under Option 1, continue to be set out in a single statute whose existence and contents are readily accessible to public servants, other service providers and all Victorians. In retaining a statute that allows human rights to be enforced beyond the parliamentary chamber, the Victorian Parliament provides its citizens (especially the most vulnerable and disadvantaged) with a mechanism to hold public authorities accountable. Therefore, Option 1 places responsibilities on public authorities to give consideration to human rights when making decisions.

[691] A majority of SARC considers that protecting and upholding human rights is the function of every law debated and enacted by Parliament. Accordingly, the Charter's name – 'The Charter of Human Rights and Responsibilities' – should be reconsidered under Option 2. In place of the word 'Charter' (which is ubiquitous in government programs), the legislation could be renamed along the lines of the Commonwealth's proposed law, the 'Human Rights (Parliamentary Scrutiny)' Act. In place of the limited reference to responsibilities in the provisions of the present Charter, Option 2's flexible scrutiny model permits the consideration of responsibilities alongside rights on a case-by-case basis.[957] In the alternative, consideration should be given to removing the word 'responsibilities' from the statute's title.

Conclusion

[692] SARC wishes to place on record that in much of its deliberation and in the vast majority of its recommendations there was much common ground. The debate remains not around the desire to protect and enhance human rights, but the meaning of these rights and the manner of their best protection under the Westminster system of government.

Recommendation 35

Options for reform or improvement of the regime for protecting and upholding the human rights and responsibilities of Victorians

SARC recommends that consideration be given to the following two options:

1. *That all of Part 3 of the Charter (application of human rights in Victoria) be retained, subject to the modifications recommended in this Report.*
2. *That only Division 1 of Part 3 of the Charter (scrutiny of new laws) be retained, with the modifications recommended in this Report, and that Divisions 3 (interpretation of laws) and Divisions 4 (obligations of public authorities) be repealed.*

A minority of SARC prefers the first option to the second, while a majority of SARC prefers the second option to the first.

957 See Charter s. 15(3). By contrast, see Charter of Responsibilities 2004 Bill (ACT); National Human Rights Consultation Committee, *National Human Rights Consultation*, May 2009, p. 355.

Appendices

A
Guidelines for Submissions

Inquiry into the Charter of Human Rights and Responsibilities

Terms of Reference

The Governor in Council requires the Scrutiny of Acts and Regulations Committee to inquire into, consider and report to the Parliament on the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') by considering the following issues:

- The matters referred to in section 44(2) of the Charter:
    - whether additional rights should be included in the Charter, including economic, social, cultural, children's, women's and self-determination rights
    - whether further provisions should be made regarding public authorities' compliance with the Charter, including regular auditing and further provision for remedies
- The effects of the Charter on:
    - the development and drafting of statutory provisions
    - the consideration of statutory provisions by Parliament
    - the provision of services, and the performance of other functions by, public authorities
    - litigation and the roles and functioning of courts and tribunals
    - the availability to Victorians of accessible, just and timely remedies for infringements of rights
- The overall benefits and costs of the Charter
- Options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria

This Guide is intended to assist organisations and individuals who wish to make a written submission and/or who would like to present evidence before the Committee at a public hearing.

Rights and responsibilities in the Charter

The Charter does not protect all human rights. Rather, it only protects the rights specifically listed in Part 2 of the Charter. These rights are mostly based on those in the *International Covenant on Civil and Political Rights*, but with some alterations, additions or omissions. The Charter does not contain a list of responsibilities, but some of its rights allow specific limits to be placed on them and section 7(2) provides for all rights to be subject to reasonable limits under law.

Section 44(2) of the Charter (one of the Terms of Reference of the Inquiry) requires consideration of whether additional rights should be included in the Charter. Potential rights that might be included are rights:

- in the *International Covenant on Economic, Social and Cultural Rights*: http://www.austlii.edu.au/au/other/dfat/treaties/1976/5.html
- in the *Convention on the Rights of the Child*: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1991/4.html
- in the *Convention on the Elimination of All Forms of Discrimination Against Women*: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1983/9.html
- to self-determination in Article 1 of the *International Covenant on Civil and Political Rights*: http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html

The Committee welcomes submissions on whether or not any of these rights, or any other rights, should be included in the Charter and, if so, how they should be protected.

The Committee notes that the Terms of Reference do not include consideration of whether or not:

- any current or proposed laws, policies or government acts are compatible with human rights
- any existing rights should be removed from the Charter.

Such matters should only be addressed in submissions to the extent that they fall within one of the Terms of Reference of the Inquiry.

Operation and effect of the Charter

The rights set out in Part 2 of the Charter have no legal operation on their own. Rather, they are given effect by other parts of the Charter and in other Victorian statutes. Part 3 sets out rules:

- requiring statements of human rights compatibility for all bills, human rights certificates for most regulations and reports on human rights compatibility by this Committee
- for interpreting Victorian laws in a way that is compatible with human rights and for court declarations where Victorian laws cannot be interpreted consistently with human rights
- obliging all Victorian public authorities to act and make decisions compatibly with human rights

A number of sections of the Charter provide for additional functions for some bodies (such as the Victorian Equal Opportunity and Human Rights Commission) and for a variety of rules setting out procedures for or placing restrictions on some aspects of the Charter's operation.

The Committee welcomes submissions on the effects of these rules, or of any other provisions of the Charter, on the development and consideration of legislation, the performance of public authorities, the roles of courts and tribunals and the availability of accessible, just and timely remedies for rights infringements.

The Committee also welcomes submissions on the overall costs and benefits of the Charter. These may include both economic and non-economic factors.

The Committee notes that the Terms of Reference do not include consideration of:

- the constitutionality of the Charter or any of its provisions
- the accuracy of any parliamentary statements or reports on compatibility or incompatibility
- the correctness or otherwise of any specific decision of a court or tribunal concerning the Charter

Such matters should only be addressed in submissions to the extent that they fall within one of the Terms of Reference of the Inquiry.

Reform or improvement of the Charter

The Charter is an ordinary statute and can be amended or repealed by an ordinary vote of Parliament.

Section 44(2) (one of the Terms of Reference of the Inquiry) requires consideration of particular reforms to the Charter's regime for public authorities. There are three main parts to this regime:

- Section 4 of the Charter defines public authorities to include most Victorian state employees, Victorian statutory agencies that perform public functions and other entities that perform public functions on behalf of Victoria. Some bodies (e.g. police, local governments and Ministers) are specifically included, while others (e.g. Parliament and, except in their administrative capacities, courts and tribunals) are specifically excluded.
- Section 38 of the Charter requires public authorities to act compatibly with and give proper consideration to all human rights. It is subject to exceptions for where a law leaves the public authority with no reasonable choice, for private acts and for some acts by religious bodies.
- Section 39 of the Charter permits a person to seek a relief or remedy (other than an award of damages) if a public authority breaches section 38 if that person could seek that same relief or remedy on a ground of unlawfulness arising under non-Charter law.

The Committee welcomes submissions on whether or not there should be regular mandatory auditing for public authorities to assess compliance with human rights and also whether further provision should be made for proceedings to seek reliefs or remedies for breaches of the Charter by a public authority.

The Committee also welcomes submissions on all options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria. The Committee notes that possible reform options include:

- the proposals in any of the other inquiries or reports listed below
- rights protection models adopted or proposed to be adopted in Australia, such as those in the *Human Rights Act 199*4 (ACT): http://www.austlii.edu.au/au/legis/act/consol_act/hra2004148/
  and the Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth):
  http://www.austlii.edu.au/au/legis/cth/bill/hrsb2010419/

The Committee notes that the Inquiry is concerned with the operation of the Charter. Reform proposals should therefore focus on amendments to the Charter or other statutes, rather than:

- constitutional reforms in Victoria or Australia
- funding and resources for bodies or programmes.

Such matters should only be addressed in submissions to the extent that they fall within one of the Terms of Reference of the Inquiry.

Previous inquiries and reports

The Terms of Reference ask the Committee to take note of, and make use of as it sees fit, the evidence and findings of, and government responses to, previous inquiries and reports concerning rights and responsibilities in Australia.

Previous inquiries and reports concerning human rights in Australia include:

- Human rights consultations in the ACT: http://acthra.anu.edu.au/articles/BORreport.pdf, Victoria: http://acthra.anu.edu.au/victoria/HumanRightsFinal_FULL.pdf, Tasmania: http://www.law.utas.edu.au/reform/docs/Human_Rights_A4_Final_10_Oct_2007_revised.pdf, Western Australia: http://acthra.anu.edu.au/articles/WAHuman_Rights_Final_Report.pdf and nationally: http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-TableofContents .

  (The ACT and Victorian consultations led to the enactment of the *Human Rights Act 2004* (ACT) and the Charter. The Tasmanian government is presently engaged in a second community consultation. The national consultation led to the introduction of the Human Rights (Parliamentary Scrutiny) Bill into the federal parliament.)

- ACT Government-commissioned reviews of the operation of the *Human Rights Act 2004* (ACT) in 2005 and 2009. http://acthra.anu.edu.au/Primary%20documents/twelve_month_review.pdf http://www.justice.act.gov.au/resources/attachments/report_HumanRightsAct_5YearReview_ANU_2009.pdf

- Other ACT and Victorian reviews. http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=itemlist&layout=generic&tag=Charter&task=tag&Itemid=659 http://acthra.anu.edu.au/PESCR/Final%20report/Final%20Report%20of%20the%20ACT%20ESCR%20Research%20Project_9%20December%202010.pdf

The Committee notes that the Terms of Reference of the current Inquiry differ from the terms of reference of these previous inquiries. The current Inquiry is into the operation of Victoria's Charter since its enactment, rather than broader questions concerning the adequacy or need for human rights protection across Australia. The latter matters should only be addressed in submissions to the extent that they fall within one of the Terms of Reference of the Inquiry.

Submissions

The Committee welcomes written submissions addressing one, multiple or all Terms of Reference of the Inquiry. Submissions close on Friday 10 June 2011. Guidance regarding submissions can be found at: http://www.parliament.vic.gov.au/committees/get-involved/making-a-submission

Submissions can be provided in either hard copy or by email to Mr Edward O'Donohue, Chairperson.

Email: charter.review@parliament.vic.gov.au

Hard copy submissions should be sent to:

Mr Edward O'Donohue, MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

The Committee draws your attention that **all submissions are public documents unless confidentiality is requested.** Please contact the Committee if confidentiality is sought, as this has bearing on how evidence can be used in the report to Parliament.

B
Submissions

Submissions

1. The Hon. Marilyn Warren, Chief Justice of Victoria, Supreme Court Victoria
2. Bill O'Dowd
3. Robert Jones
4. Paul Stratov
5. Jennifer Pakula
6. Leigh Howard
7. Emidio Restall
8. Paul Dickson
9. Diarmuid Hannigan
10. Confidential
11. Damien Cremean
12. Julien Lesser, Menzies Research Centre
13. Peter Beriman
14. Dr Peter Zammit
15. Prof. John Martin, St Vincent's Institute Medical Research
16. Community Child Care
17. Catherine Davey
18. J Davens
19. FamilyVoice Australia
20. Land Owners Rights Association Inc
21. BMC Ministries Inc
22. Confidential
23. E Laws
24. Confidential
25. John Henderson
26. John Kerrin
27. Habitat Uniting Church
28. Judith Bond
29. Brian Magree
30. Dr Cerceeda G Hocking
31. Geoff Cutting
32. Catherine E Hayes
33. Dr. Ivan Stratov
34. Peter Eisler
35. Margaret Beazer
36. Terry Baldwin
37. Helen Leach
38. Action for Aboriginal Rights Bendigo
39. Social Questions Committee,
Catholic Women's League of Victoria & Wagga Wagga Inc.
40. Graham Ginns
41. M J Graham
42. David Perrin
43. United Macedonian Diaspora
44. Dianne Kelly
45. Stephanie Blake
46. Director of Public Prosecutions Victoria
47. Walter Wnuk
48. Housing Resource Support Service Inc
49. Joint Submission –
Professor George Williams,
Rhonda Galbally AO, Andrew Gaze and The Hon. Professor Haddon Storey QC
50. Dorothy Soffe
51. Community Information Victoria
52. City of Yarra
53. Georgina Gartland
54. Caroline Scott
55. Kendall Lister
56. Nigel Caswell
57. Confidential
58. Christopher Solum
59. Ethnic Communities' Council of Victoria Inc
60. Beyond Blue
61. William P Lewis
62. Mary Cotter
63. Michael Pearce SC
64. Prof. John Murtagh AM,
Faculty of Medicine, Monash University
65. Ombudsman Victoria
66. The Hon. Justice Kevin Bell
67. C M Heyward
68. Dr Mark Hobart

69. E D Watt
70. Jacob Sarkodee
71. Bendigo and District Environment Council
72. Macedonian Human Rights Committee
73. Maureen Jongeblood
74. Fred C Bramich
75. John A Gill
76. Jane Douglas
77. Victorian Council of Churches
78. Endeavour Forum Inc
79. National Civic Council
80. North & West Homelessness Network
81. Dallas Clarnette
82. Andris Blums
83. PILCH Homeless Persons' Legal Clinic
84. Lidija Bujanovic
85. YWCA Victoria
86. 2020 Women
87. Domestic Violence Resource Centre Victoria
88. Victorian Independent Education Union
89. Australian Family Association (WA)
90. Youth Disability Advocacy Service
91. Dr Steven Tudor, School of Law, Latrobe University
92. Save the Children Australia
93. Women's International League for Peace and Freedom
94. Right to Life Australia Inc
95. Victoria Bar Council
96. Arnold Bloch Leibler
97. Office of Victorian Privacy Commissioner
98. Geoff Allshorn
99. Vision Australia
100. Tenants Union of Victoria
101. Mornington Peninsula Human Rights Group
102. Magistrates' Court of Victoria
103. Andrew Oliver
104. Australian Christian Lobby
105. Victorian Aboriginal Child Care Agency
106. The Salvation Army
107. Halina Strnad
108. Alex Kilgour
109. Whitehorse Friends For Reconciliation Inc
110. Peninsula Community Legal Centre
111. City of Darebin
112. Manningham City Council
113. Humanist Society of Victoria Inc
114. Dr Julie Debeljak, Faculty of Law, Monash University
115. Maribyrnong City Council
116. Community Housing Federation of Victoria
117. Child Safety Commissioner
118. Joint submission –
Western Region Health Centre,
Women's Health West,
Health West Partnership,
Sunbury Community Health Centre,
Women's Health in the North,
Dianella,
North Yarra Community Health,
Banyule Community Health,
Djerriwarrh Health Services,
Nillumbik Community Health Service
119. The Australian Family Association
120. Julie Fraser
121. Rita Joseph
122. Carlo Carli
123. Transgender Victoria
124. John Rutherford
125. Rob Watts
126. MacKillop Family Services
127. Top End Women's Legal Service
128. Office of the Health Services Commissioner
129. Headspace
130. Australian Association of Social Workers Ltd
131. Eastern Community Legal Centre Inc.
132. Hannah Lewis
133. Institute of Public Affairs
134. Hugh Crosthwaite
135. Evelyn Tadros
136. Salt Shakers
137. Christian Schools Australia
138. Fitzroy Legal Service
139. Derek Wilson
140. Ken J Francis
141. Penny Harris
142. World Federation of Doctors who Respect Human Life (Victoria Division)
143. Hume City Council
144. Action for More Independence and Dignity in Accommodation
145. Marion Minty
146. Leadership Plus
147. Amnesty International Australia
148. Youth Affairs Council of Victoria
149. Community Connections Vic Ltd
150. Magistrates' Court of Victoria (See 102)
151. Council to Homeless Persons
152. Women's Legal Service Victoria
153. Kerri-Ann Tipping
154. Centre for Multicultural Youth
155. Mary Walsh
156. Youthlaw
157. Christine Hancock
158. Office of the Public Advocate
159. Disability Justice Advocacy Inc.
160. Victorian Alcohol and Drug Association

161. Whitehorse City Council
162. Rainbow Network Victoria
163. Lisa Simpson
164. Anita Coles
165. Michael Power
166. Council of the Ageing Victoria
167. Michael Kottek
168. Australian Lawyers Alliance (Victorian Branch)
169. Shirley Roberts
170. Victoria Police
171. Victoria Legal Aid
172. Catie Shavin
173. Women's Health Victoria
174. Jim South
175. Travellers Aid
176. Association of Employees with Disability
177. Loddon Mallee Homelessness Network
178. Brian Tideman
179. Dr Beverley Wood
180. Dr Rod Stephenson
181. Confidential
182. Athena Nguyen
183. Red Light Project
184. Gippsland Women's Health Service Inc
185. Inner South SRS Services Network
186. HG Recoveries Pty ltd
187. Women's Health in the North
188. City of Port Phillip
189. Tim Hamilton
190. Presbyterian Church of Victoria
191. Yarra Ranges Council
192. Municipal Association of Victoria
193. Shop Distributive & Allied Employees Assoc
194. Anthony van der Craats
195. National Children's and Youth Law Centre
196. Dorothy Long
197. Jeff Truscott
198. Maree Bourke
199. Victorian Advocacy League for Individuals with Disability (VALID)
200. Greater Dandenong
201. Graham Starkey
202. Brimbank City Council
203. The Law Society of New South Wales
204. Victorian Local Governance Association
205. Federation of Community Legal Services
206. Amy Fulton
207. City of Stonnington
208. Springvale Monash Legal Service Inc
209. Alyson Waterson
210. Sehen Yekenkurul
211. Public Interest Advocacy Centre
212. Desmond Kenneally
213. VicHealth
214. Wyndham City
215. Mary White
216. Chris Andrews
217. Ad Hoc Interfaith Committee
218. Jane Munro
219. Prof. Mirko Bagaric and Peter Faris QC
220. National Association of Community Legal Centres Inc
221. Malcolm Barr
222. William Twycross
223. Ange Kenos
224. Dr Scott Phillips
225. Graham Proctor
226. Doctors in Conscience
227. Dr Stephen Smith,
Department of Accounting and Finance,
Monash University
228. Psychiatric Disability Services
229. Jesuit Social Services
230. Centre for Excellence in Child and Family Welfare Inc
231. Justin Boyd
232. Good Shepherd Youth & Family Service
233. Andrew Venn
234. Women's Electoral Lobby Victoria Inc.
235. Laura Leonard
236. The Police Association
237. National Council of Women of Victoria Inc
238. Peter Murray
239. Barwon Community Legal Service
240. Disability Services Commissioner
241. Liberty Victoria
242. Andrew Woods
243. Jenny Michaelson
244. Martin Foley MP, Member for Albert Park
245. International Commission of Jurists in Victoria
246. Suzannah Rowntree
247. Law Institute of Victoria
248. Akshay D'Cruz
249. Law Council of Australia
250. Angela Parham
251. John Morrissey
252. Confidential
253. Andrew Kelly
254. Family Council of Victoria
256. Synod of Victoria and Tasmania, Uniting Church in Australia
257. Public Interest Law Clearing House (PILCH)
258. Victorian Aboriginal Legal Service Co-operative Ltd
259. Victorian Disability Advisory Council

260. Keith Wolahan
261. Erinyes Autonomous Activist Lesbians
262. Victorian Council of Social Service
263. Human Rights Law Centre
264. Australian Lawyers for Human Rights
265. Peter Quinn
266. Robert J Mears
267. Liz Curran
268. The Hon. Greg Donnelly MLC, Parliament of New South Wales
269. Ida Day
270. Victorian Gay and Lesbian Rights Lobby
271. Environment Defenders Office
272. Catholic Archdiocese of Victoria
273. Isaiah One
274. Jamie Gardiner
275. Melbourne Catholic Lawyers' Association
276. Australian Centre for Human Rights Education, RMIT University
277. Hanover Welfare Services
278. Victorian Equal Opportunity and Human Rights Commission
279. Australian Sex Party
280. ALSO Foundation
281. Grampian Region Homelessness Network
282. National Disability Services Victoria
283. Port Phillip Community Group
284. Tenants Union of Victora (See 100)
285. Castan Centre for Human Rights Law, Monash University
286. The Hon. Justice Marcia Neave AO
287. Joseph G. Santamaria QC
288. Moreland City Council
289. Community Services, City of Greater Geelong
290. League of Women Voters of Victoria
291. Australian Federation of University Women
292. Catholic Social Services Victoria
293. Status of Women, United Nations Association of Australia
294. Walter Morrison
295. Mallesons Human Rights Law Group
296. Mental Health Legal Centre
297. ANTaR Victoria
298. Native Title Services Victoria
299. Office of Police Integrity
300. Alfred Health Human Ethics Committee
301. Laurel Smith
302. J. T. Stone
303. Pauline M Bourke
304. Patrick McKay
305. Roscoe Howell
306. Graham A F Connolly KHS
307. Arthur Weavew
308. Nick Pastalatzis
309. Bernadette Wilks
310. Mary Rose Treacy
311. Margaret Nedved
312. Vince Lopresti
313. Lawrence Steele
314. Diana Rask
315. Bryan and Leanne Mahney
316. Mike Lovett
317. Judy Bartosy
318. W. Van Heuzen
319. Kevin Brown
320. Catholic Archdiocese of Sydney
321. The Hon. Sir James Gobbo AC CVO
322. Tony O'Brien
323. St Kilda Legal Service
324. Victorian Government
325. Victorian Aboriginal Heritage Council
326. The Hon. Michael Kirby AC GMC
327. Gillian Hirst
328. GRD Waldron AO, QC
329. William G O'Chee

Short or pro forma submissions and comments

In addition to the 329 submissions listed SARC received over 3500 short or pro forma submissions and comments and 183 submissions that did not address the terms of reference. Further information concerning these submissions is available on the SARC website.

C
Briefings and Hearings

Briefings

23 May 2011

Dr Helen Szoke, Commissioner
Ms Karen Toohey, CEO, and
Ms Kerin Leonard, Manager, Legal Unit
Victorian Equal Opportunity and Human Rights Commission

30 June 2011

Professor Frank Brennan
Chairperson,
National Human Rights Consultation Committee

Public Hearings

Held in the Legislative Council Committee Room, Parliament House, Melbourne, 18-22 July 2011

18 July 2011

Dr Helen Szoke, Commissioner, and
Ms Karen Toohey, Chief Executive Officer
Victorian Equal Opportunity and Human Rights Commission

19 July 2011

Mr Mark Moshinsky QC,
Ms Kristen Walker, and
Dr Stephen Donaghue
Victorian Bar Council

Ms Caroline Counsel, President,
Ms Alice Palmer, Lawyer, Administrative Law and Human Rights Section, and
Mr Richard Wilson, Charter of Rights Committee
Law Institute of Victoria

Ms Maree McPherson, and
Mr Gary Jungwirth
Victorian Local Governance Association

Ms Jan Black, Policy Adviser, and
Mr Andrew Rowe, Councillor Development Officer
Municipal Association of Victoria

Mr Greg Davies, Secretary, and
Mr Tony Walsh, Legal Manager
Police Association Victoria

Deputy Commissioner Keiran Walshe,
Ms Mmaskepe Sejoe, Manager, Human Rights Unit, and
Ms Alison Creighton, Acting Director, Corporate Strategy and Governance
Victoria Police

Ms Rachel Ball, and
Ms Emily Howie
Human Rights Law Centre

Mr Bevan Warner, Managing Director,
Ms Kristen Hilton, Director, Civil Justice, Access and Equity, and
Ms Sam Horsfield, Director, Civil Justice, Access and Equity
Victoria Legal Aid

20 July 2011

Mr Hugh de Kretser, Executive Officer, and
Ms Jacqui Bell, Policy Officer
Federation of Community Legal Centres

Mr Chris Povey, Senior Lawyer, and
Mr James Farrell, Manager and Principle Lawyer,
Homeless Persons' Legal Clinic, Public Interest Law Clearing House
Ms Jenny Smith, CEO, **Council to Homeless Persons**, and
Mr Tony Keenan, CEO, **Hanover Welfare Services**

Mr Colleen Pearce, Public Advocate,
Ms Liz Dearn, and
Mr John Chesterman, Manager, Policy and Education
Office of the Public Advocate

Mr Toby Archer, Policy Worker, and
Ms Maya Narayan, Senior Advocate
Tenants Union of Victoria

Rev. Ian Smith, President
Rev. Kaye Reid, Chair, Faith and Order Commission, and
Mr Denis Fitzgerald, Chair, Social Questions Commission
Victorian Council of Churches

Mr Ted Lapkin, Research Fellow
Institute of Public Affairs

21 July 2011

Dr David Phillips, and
Mr Jim Collins
Family Voice

Rev. David Palmer, and
Mr Ben Saunders,
Presbyterian Church of Victoria

Ms Jo Grainger

Mr Carlo Carli

Mr Joe Santamaria QC

Rev. Mgr. Anthony J. Ireland, **Episcopal Vicar for Health and Aged Care**,
Mr Francis Moore, Business Manager, **Catholic Archdiocese of Melbourne**, and
Associate Professor Nicholas Tonti Filippini, Associate Dean and Head of Bioethics, **John Paul II Institute for Marriage and Family**

Prof. John Murtagh,
Dr. Rod Stephenson,
Dr. John Neil, and
Dr. Chris French,
Doctors in Conscience

22 July 2011

Prof. Mirko Bagaric, and
Mr Peter Faris QC

Mr R Ward, and
Ms M Pietsche,
Ad Hoc Interfaith Committee

Mr Daniel McGlone, and
Ms Christina Warren
Melbourne Catholic Lawyers' Association

Ms Cath Smith, Chief Executive Officer, and
Ms Carolyn Atkins, Deputy Director
Victorian Council of Social Services

Justice Simon Whelan,
Mr Michael Hepworth, and
Mr David Provan
Adult Parole Board of Victoria

Mr Julian Burnside, QC,
Dr Diane Sisely, and
Mr Jamie M. Gardiner, Vice-President
Liberty Victoria

Mr Wayne Muir, Chief Executive Officer,
Ms Louise Hicks, Research Officer, and
Ms Jill Prior, Executive Officer of Legal Practice
Victorian Aboriginal Legal Service

D

Supplementary Evidence

This appendix contains a list of supplementary information provided by witnesses, including questions on notice.

- **Victorian Equal Opportunity and Human Rights Commission**, 10 August 2011
- "Victoria Bar Pro Bono Work", **Victorian Bar Council**, 1 August 2011
- **Law Institute of Victoria**, 1 August 2011
- **Municipal Association of Victoria**, received 25 July 2011
- Additional information requested for the inquiry and review of the *Charter of Human Rights and Responsibility Act 2006*, Kieran Walshe, Deputy Commissioner, Regional and Road Policing, Chair – Human Rights Compliance Advisory Committee, 21 July 2011

  Additional information provided at the public hearing:

Attachment A:	Human Rights Impact Assessment template
Attachment B:	Human Rights Audit template
Attachment C:	Human Rights Risk Assessment template
Attachment D:	Agenda for a 4 hour introductory seminar (education and information initiative relevant to detention)
Attachment E:	Human Rights and Policing Program, developed and delivered in conjunction with Curtin University (education and information initiative relevant to detention)
Attachment F:	Human Rights Audit to measure compliance with Convention on the Elimination of all Forms of Discrimination Against Women, in terms of the organisation's response to gender based violence
Attachment G:	Work conducted in 2008 to measure compliance with the Convention on the Rights of the Child, which informed youth-focused initiatives in the organisation
Attachment H:	Audits undertaken on family violence, both policy and practice. This measured Victoria Police compliance with the Convention on the Elimination of all Forms of Discrimination Against Women
Attachment I:	Human Rights compliance with the high risk of detention of alcohol affected individuals within the Melbourne central business district as part of the Safe Streets initiative
Attachment K:	Human Rights Practice Audit, Melbourne Custody Centre

  Victoria Police Human Rights Project, Report 2006-08,
  Good Practice Audit
  T*he Station Study Report, Victoria Police and victims of crime: Police perspectives and experiences from*

across Victoria, ARC Linkage Project, Monash University
Victoria Police

- "Absolute and Non-Derogable Rights in International Law", 21 July 2011; and Response to Questions on Notice, 8 August 2011
  Human Rights Law Centre

- **Victoria Legal Aid**, 25 July 2011

- **Federation of Community Legal Centres**, 2 August 2011

- **Homeless Persons' Legal Clinic PILCH**, 22 August 2011

- **Office of Public Advocate**, 18 August 2011

- **Tenants Union of Victoria**, received 23 August 2011

- **Family Voice Australia**, 9 August 2011

- **Mr Joe Santamaria QC**, 22 August 2011

- **Victorian Council of Social Service**, 15 August 2011

- "Self-Determination: Dispelling the Myth of Separatism", 21 July 2011; and Supplementary information, 29 July 2011
  Victorian Aboriginal Legal Service

E

Charter of Human Rights and Responsibilities Act 2006[958]

Preamble

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles—

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- 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.

The Parliament of Victoria therefore enacts:

PART 1—PRELIMINARY

1 Purpose and citation

(1) This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act.

(2) The main purpose of this Charter is to protect and promote human rights by—

(a) setting out the human rights that Parliament specifically seeks to protect and promote; and

(b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and

(c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and

958 Version No. 010 incorporating amendments as at 1 August 2011

(d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and

(e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

(3) In addition, this Charter—

(a) enables Parliament, in exceptional circumstances, to override the application of the Charter to a statutory provision; and

(b) renames the Equal Opportunity Commission as the Victorian Equal Opportunity and Human Rights Commission and confers additional functions on it; and

(c) makes consequential amendments to certain Acts.

2 Commencement

(1) This Charter (except Divisions 3 and 4 of Part 3) comes into operation on 1 January 2007.

(2) Divisions 3 and 4 of Part 3 come into operation on 1 January 2008.

3 Definitions

(1) In this Charter—

Aboriginal means a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples;

act includes a failure to act and a proposal to act;

Charter means the Charter of Human Rights and Responsibilities;

child means a person under 18 years of age;

Commission means the Victorian Equal Opportunity and Human Rights Commission under the *Equal Opportunity Act 2010*;

court means the Supreme Court, the County Court, the Magistrates' Court, the Children's Court or the Coroners Court;

declaration of inconsistent interpretation means a declaration made by the Supreme Court under section 36(2);

discrimination, in relation to a person, means discrimination (within the meaning of the *Equal Opportunity Act 2010*) on the basis of an attribute set out in section 6 of that Act;

Note

Section 6 of the *Equal Opportunity Act 2010* lists a number of attributes in respect of which discrimination is prohibited, including age; disability; political belief or activity; race; religious belief or activity; sex; and sexual orientation.

human rights means the civil and political rights set out in Part 2;

interpreter means—

(a) an interpreter accredited by a prescribed body; or

(b) if an accredited interpreter is not readily available, a competent interpreter—

and relates only to the oral rendering of the meaning of the spoken word or other form of communication from one language or form of communication into another language or form of communication;

override declaration means a declaration made by Parliament under section 31;

Parliamentary Committee has the same meaning as ***Joint House Committee*** has in the *Parliamentary Committees Act 2003*;

person means a human being;

public authority has the meaning given in section 4;

statutory provision means an Act (including this Charter) or a subordinate instrument or a provision of an Act (including this Charter) or of a subordinate instrument;

trial, in relation to the Magistrates' Court or the Children's Court, means hearing of a charge;

Victoria Police has the same meaning as ***the force*** has in the *Police Regulation Act 1958*.

Note

In the *Police Regulation Act 1958* the force means officers and other members of the police force.

(2) In this Charter—

(a) a reference to a function includes a reference to a power, authority and duty; and

(b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

4 What is a public authority?

(1) For the purposes of this Charter a public authority is—

(a) a public official within the meaning of the *Public Administration Act 2004*; or

Note

A public official under the Public Administration Act 2004 includes employees of the public service, including the Head of a government department or an Administrative Office (such as the Secretary to the Department of Justice or the Chairman of the Environment Protection Authority) and the Chief Executive Officer of the State Services Authority. It also includes the directors and staff of certain public entities, court staff, parliamentary officers and holders of certain statutory or prerogative offices.

(b) an entity established by a statutory provision that has functions of a public nature; or

Notes

1 In section 38 of the Interpretation of Legislation Act 1984 entity is defined to include a person (both a human being and a legal person) and an unincorporated body.

2 See subsection (2) in relation to "functions of a public nature".

(c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise); or

Example

A non-government school in educating students may be exercising functions of a public nature but as it is not doing so on behalf of the State it is not a public authority for the purposes of this Charter.

Note

See subsections (4) and (5) in relation to "on behalf of the State or a public authority".

(d) Victoria Police; or

(e) a Council within the meaning of the Local Government Act 1989 and Councillors and members of Council staff within the meaning of that Act; or

(f) a Minister; or

(g) members of a Parliamentary Committee when the Committee is acting in an administrative capacity; or

(h) an entity declared by the regulations to be a public authority for the purposes of this Charter—

but does not include—

(i) Parliament or a person exercising functions in connection with proceedings in Parliament; or

(j) a court or tribunal except when it is acting in an administrative capacity; or

Note

Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

(k) an entity declared by the regulations not to be a public authority for the purposes of this Charter.

(2) In determining if a function is of a public nature the factors that may be taken into account include—

(a) that the function is conferred on the entity by or under a statutory provision;

Example

The *Transport (Compliance and Miscellaneous) Act 1983* confers powers of arrest on an authorised officer under that Act.

(b) that the function is connected to or generally identified with functions of government;

Example

Under the *Corrections Act 1986* a private company may have the function of providing correctional services (such as managing a prison), which is a function generally identified as being a function of government.

(c) that the function is of a regulatory nature;

(d) that the entity is publicly funded to perform the function;

(e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.

Example

All the shares in the companies responsible for the retail supply of water within Melbourne are held by or on behalf of the State.

(3) To avoid doubt—

(a) the factors listed in subsection (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and

(b) the fact that one or more of the factors set out in subsection (2) are present in relation to a function does not necessarily result in the function being of a public nature.

(4) For the purposes of subsection (1)(c), an entity may be acting on behalf of the State or a public authority even if there is no agency relationship between the entity and the State or public authority.

(5) For the purposes of subsection (1)(c), the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the State or a public authority.

5 Human rights in this Charter in addition to other rights and freedoms

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

6 Application

(1) Only persons have human rights. All persons have the human rights set out in Part 2.

Note

Corporations do not have human rights.

(2) This Charter applies to—

(a) the Parliament, to the extent that the Parliament has functions under Divisions 1 and 2 of Part 3; and

(b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; and

(c) public authorities, to the extent that they have functions under Division 4 of Part 3.

(3) Subsection (2) does not take away from or limit—

(a) any other function conferred by this Charter on an entity specified in subsection (2); or

(b) any function conferred on any other entity by this Charter.

(4) This Charter binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

Part 2—Human Rights

7 Human rights—what they are and when they may be limited

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

8 Recognition and equality before the law

(1) Every person has the right to recognition as a person before the law.

(2) Every person has the right to enjoy his or her human rights without discrimination.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

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

9 Right to life

Every person has the right to life and has the right not to be arbitrarily deprived of life.

10 Protection from torture and cruel, inhuman or degrading treatment

A person must not be—

(a) subjected to torture; or

(b) treated or punished in a cruel, inhuman or degrading way; or

(c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

11 Freedom from forced work

(1) A person must not be held in slavery or servitude.

(2) A person must not be made to perform forced or compulsory labour.

(3) For the purposes of subsection (2) forced or compulsory labour does not include—

(a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or

(b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or

(c) work or service that forms part of normal civil obligations.

(4) In this section court order includes an order made by a court of another jurisdiction.

12 Freedom of movement

Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

13 Privacy and reputation

A person has the right—

(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have his or her reputation unlawfully attacked.

14 Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief, including—

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

15 Freedom of expression

(1) Every person has the right to hold an opinion without interference.

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons; or

(b) for the protection of national security, public order, public health or public morality.

16 Peaceful assembly and freedom of association

(1) Every person has the right of peaceful assembly.

(2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

17 Protection of families and children

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

(2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

18 Taking part in public life

(1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

(2) Every eligible person has the right, and is to have the opportunity, without discrimination—

(a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and

(b) to have access, on general terms of equality, to the Victorian public service and public office.

19 Cultural rights

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

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

(a) to enjoy their identity and culture; and

(b) to maintain and use their language; and

(c) to maintain their kinship ties; and

(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

20 Property rights

A person must not be deprived of his or her property other than in accordance with law.

21 Right to liberty and security of person

(1) Every person has the right to liberty and security.

(2) A person must not be subjected to arbitrary arrest or detention.

(3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

(4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.

(5) A person who is arrested or detained on a criminal charge—

(a) must be promptly brought before a court; and

(b) has the right to be brought to trial without unreasonable delay; and

(c) must be released if paragraph (a) or (b) is not complied with.

(6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to attend—

(a) for trial; and

(b) at any other stage of the judicial proceeding; and

(c) if appropriate, for execution of judgment.

(7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must—

(a) make a decision without delay; and

(b) order the release of the person if it finds that the detention is unlawful.

(8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

22 Humane treatment when deprived of liberty

(1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

(2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.

(3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

23 Children in the criminal process

(1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.

(2) An accused child must be brought to trial as quickly as possible.

(3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

24 Fair hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

Note

For example, section 19 of the *Supreme Court Act 1986* sets out the circumstances in which the Supreme Court may close all or part of a proceeding to the public. See also section 80AA of the *County Court Act 1958* and section 126 of the *Magistrates' Court Act 1989*.

(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

25 Rights in criminal proceedings

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—

(a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and

(b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and

(c) to be tried without unreasonable delay; and

(d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the *Legal Aid Act 1978*; and

(e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the *Legal Aid Act 1978*; and

(f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*; and

(g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and

(h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and

(i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and

(j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and

(k) not to be compelled to testify against himself or herself or to confess guilt.

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

(4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

26 Right not to be tried or punished more than once

A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.

27 Retrospective criminal laws

(1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

(2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

(4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

PART 3—APPLICATION OF HUMAN RIGHTS IN VICTORIA

Division 1—Scrutiny of new legislation

28 Statements of compatibility

(1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.

(2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.

Note

The obligation in subsections (1) and (2) applies to Ministers introducing government Bills and members of Parliament introducing non-government Bills.

(3) A statement of compatibility must state—

(a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and

(b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

(4) A statement of compatibility made under this section is not binding on any court or tribunal.

29 No effect on Victorian law

A failure to comply with section 28 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

30 Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

Note

The Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights: see section 21 of the Subordinate Legislation Act 1994.

Division 2—Override declaration

31 Override by Parliament

(1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.

(2) If an override declaration is made in respect of an Act or a provision of an Act that declaration must be taken to extend to any subordinate instrument made under or for the purpose of that Act or provision.

(3) A member of Parliament who introduces a Bill containing an override declaration, or another member acting on his or her behalf, must make a statement to the Legislative Council or the Legislative Assembly, as the case requires, explaining the exceptional circumstances that justify the inclusion of the override declaration.

(4) It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.

(5) A statement under subsection (3) must be made—

(a) during the second reading speech for the Bill that contains the override declaration; or

(b) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or

(c) with the leave of the Legislative Council or the Legislative Assembly, as the case requires, at any time before the third reading of the Bill.

(6) If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.

Note

As the Charter has no application to a statutory provision for which an override declaration has been made, the Supreme Court cannot make a declaration of inconsistent interpretation in respect of that statutory provision. Also, the requirement under section 32 to interpret that provision in a way that is compatible with human rights does not apply.

(7) A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.

(8) Parliament may, at any time, re-enact an override declaration, and the provisions of this section apply to any re-enacted declaration.

(9) A failure to comply with subsection (3) or (5) in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

Division 3—Interpretation of laws

32 Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(3) This section does not affect the validity of—

(a) an Act or provision of an Act that is incompatible with a human right; or

(b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

33 Referral to Supreme Court

(1) If, in a proceeding before a court or tribunal, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter, that question may be referred to the Supreme Court if—

(a) a party has made an application for referral; and

(b) the court or tribunal considers that the question is appropriate for determination by the Supreme Court.

(2) If a question has been referred to the Supreme Court under subsection (1), the court or tribunal referring the question must not—

(a) make a determination to which the question is relevant while the referral is pending; or

(b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.

(3) If a question is referred under subsection (1) by the Trial Division of the Supreme Court or by the County Court, the referral is to be made to the Court of Appeal.

(4) Despite anything contained in any other Act, if a question arises of a kind referred to in subsection (1), that question may only be referred to the Supreme Court in accordance with this section.

34 Attorney-General's right to intervene

(1) The Attorney-General may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter.

(2) If the Attorney-General intervenes in a proceeding under this section, then, for the purpose of the institution and prosecution of an appeal from an order made in that proceeding, the Attorney-General may be taken to be a party to the proceeding.

35 Notice to Attorney-General and Commission

(1) A party to a proceeding must give notice in the prescribed form to the Attorney-General and the Commission if—

(a) in the case of a Supreme Court or County Court proceeding, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or

(b) in any case, a question is referred to the Supreme Court under section 33.

(2) For the purpose of subsection (1), a notice is not required to be given to—

(a) the Attorney-General if the State is a party to the relevant proceeding; or

(b) the Commission if the Commission is a party to the relevant proceeding.

36 Declaration of inconsistent interpretation

(1) This section applies if—

(a) in a Supreme Court proceeding a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or

(b) the Supreme Court has had a question referred to it under section 33; or

(c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a).

(2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

(3) If the Supreme Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission.

(4) The Supreme Court must not make a declaration of inconsistent interpretation unless the Court is satisfied that—

(a) notice in the prescribed form has been given to the Attorney-General and the Commission under subsection (3); and

(b) a reasonable opportunity has been given to the Attorney-General and the Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.

(5) A declaration of inconsistent interpretation does not—

(a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or

(b) create in any person any legal right or give rise to any civil cause of action.

(6) The Supreme Court must cause a copy of a declaration of inconsistent interpretation to be given to the Attorney-General—

(a) if the period provided for the lodging of an appeal in respect of the proceeding in which the declaration was made has ended without such an appeal having been lodged, within 7 days after the end of that period; or

(b) if on appeal the declaration is upheld, within 7 days after any appeal has been finalised.

Example

If the Trial Division of the Supreme Court makes a declaration of inconsistent interpretation (based on a referral of a question from VCAT) and on appeal the Court of Appeal upholds the

declaration, a copy of the declaration must be sent to the Attorney-General within 7 days after the Court of Appeal's decision.

(7) The Attorney-General must, as soon as reasonably practicable, give a copy of a declaration of inconsistent interpretation received under subsection (6) to the Minister administering the statutory provision in respect of which the declaration was made, unless the relevant Minister is the Attorney-General.

37 Action on declaration of inconsistent interpretation

Within 6 months after receiving a declaration of inconsistent interpretation, the Minister administering the statutory provision in respect of which the declaration was made must—

(a) prepare a written response to the declaration; and

(b) cause a copy of the declaration and of his or her response to it to be—

(i) laid before each House of Parliament; and

(ii) published in the Government Gazette.

Division 4—Obligations on public authorities

38 Conduct of public authorities

(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

(2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Example

Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

(3) This section does not apply to an act or decision of a private nature.

(4) Subsection (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

(5) In this section religious body means—

(a) a body established for a religious purpose; or

(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

39 Legal proceedings

(1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

(2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right—

(a) to seek judicial review under the Administrative Law Act 1978 or under Order 56 of Chapter I of the Rules of the Supreme Court; and

(b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

(3) A person is not entitled to be awarded any damages because of a breach of this Charter.

(4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

PART 4—VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

40 Intervention by Commission

(1) The Commission may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter.

(2) If the Commission intervenes in a proceeding under this section, then, for the purpose of the institution and prosecution of an appeal from an order made in that proceeding, the Commission may be taken to be a party to the proceeding.

41 Functions of the Commission

The Commission has the following functions in relation to this Charter—

(a) to present to the Attorney-General an annual report that examines—

(i) the operation of this Charter, including its interaction with other statutory provisions and the common law; and

(ii) all declarations of inconsistent interpretation made during the relevant year; and

(iii) all override declarations made during the relevant year; and

(b) when requested by the Attorney-General, to review the effect of statutory provisions and the common law on human rights and report in writing to the Attorney-General on the results of the review; and

(c) when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights; and

(d) to provide education about human rights and this Charter; and

(e) to assist the Attorney-General in the review of this Charter under sections 44 and 45; and

(f) to advise the Attorney-General on anything relevant to the operation of this Charter; and

(g) any other function conferred on the Commission under this Charter or any other Act.

42 Powers

The Commission has power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions under this Charter.

43 Reports to be laid before Parliament

(1) The Attorney-General must cause a copy of any report prepared by the Commission in accordance with section 41(a) or (b) (as amended under subsection (2), if applicable) to be laid before each House of Parliament on or before the 6th sitting day of that House after the Attorney-General has received the report.

(2) The Attorney-General may amend a report received under section 41(a) or (b) if the Attorney-General considers it necessary to do so to prevent disclosure of—

(a) the identity of any person whose human rights have, or may have been, contravened; or

(b) the identity of any person who may have contravened another person's human rights; or

(c) information that could, in the Attorney-General's opinion, harm the public interest.

(3) If the Attorney-General amends the report in accordance with subsection (2), he or she must present a statement that the report has been amended when laying the report before Parliament in accordance with subsection (1).

PART 5—GENERAL

44 Review of Charter after 4 years of operation

(1) The Attorney-General must cause a review to be made of the first 4 years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2011.

(2) A review under subsection (1) must include consideration as to whether—

(a) additional human rights should be included as human rights under this Charter, including but not limited to, rights under—

(i) the International Covenant on Economic, Social and Cultural Rights; and

(ii) the Convention on the Rights of the Child; and

(iii) the Convention on the Elimination of All Forms of Discrimination against Women; and

(b) the right to self-determination should be included in this Charter; and

(c) regular auditing of public authorities to assess compliance with human rights should be made mandatory; and

(d) further provision should be made in this Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of this Charter.

45 Review of Charter after 8 years of operation

(1) The Attorney-General must cause a review to be made of the 5th to 8th years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2015.

(2) A report under subsection (1) must include a recommendation as to whether any further review of this Charter is necessary.

46 Regulations

(1) The Governor in Council may make regulations for or with respect to any matter or thing required or permitted by this Charter to be prescribed or necessary to be prescribed to give effect to this Charter.

(2) Without limiting subsection (1), the Governor in Council may make regulations for or with respect to—

(a) prescribing entities to be public authorities for the purposes of this Charter; and

(b) prescribing entities not to be public authorities for the purposes of this Charter; and

(c) prescribing entities not to be public authorities for the purposes of this Charter when exercising certain functions; and

(d) prescribing bodies that are authorised to accredit interpreters; and

(e) prescribing forms for the purposes of this Charter.

(3) A power conferred by this Charter to make regulations may be exercised—

(a) either in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified case or class of case; and

(b) so as to make, as respects the cases in relation to which the power is exercised—

(i) the same provision for all cases in relation to which the power is exercised, or different provisions for different cases or classes of case, or different provisions for the same case or class of case for different purposes; or

(ii) any such provision either unconditionally or subject to any specified condition.

(4) Regulations under this Charter may be made—

(a) so as to apply at all times or at a specified time; and

(b) so as to require matters affected by the regulations to be—

(i) in accordance with specified standards or specified requirements; or

(ii) approved by or to the satisfaction of specified persons or bodies or specified classes of persons or bodies; or

(iii) as specified in both subparagraphs (i) and (ii); and

(c) so as to apply, adopt or incorporate any matter contained in any document whatsoever whether—

(i) wholly or partially or as amended by the regulations; or

(ii) as in force at a particular time or as in force from time to time; and

(d) so as to confer a discretionary authority or impose a duty on specified persons or bodies or specified classes of persons or bodies; and

(e) so as to provide in specified cases or classes of case for the exemption of persons or things or classes of persons or things from any of the provisions of the regulations, whether unconditionally or on specified conditions and either wholly or to such an extent as is specified.

* * *959

48 Savings provision

Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

49 Transitional provisions

(1) This Charter extends and applies to all Acts, whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or after that commencement.

(2) This Charter does not affect any proceedings commenced or concluded before the commencement of Part 2.

959 See Endnotes "Table of Amendments", *Statute Law Revision Act 2011*.

(3) Division 4 of Part 3 does not apply to any act or decision made by a public authority before the commencement of that Division.

(4) Section 33(3) as amended by item 18.3 of the Schedule to the Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009 applies to a question referred under section 33(1) on or after the commencement of that item.

ENDNOTES

1. General Information

Minister's second reading speech—

Legislative Assembly: 4 May 2006

Legislative Council: 19 July 2006

The long title for the Bill for this Act was "to protect and promote human rights, to make consequential amendments to certain Acts and for other purposes."

The *Charter of Human Rights and Responsibilities Act 2006* was assented to on 25 July 2006 and came into operation as follows:

Sections 1–31, 40–49 and the Schedule on 1 January 2007: section 2(1); sections 32–39 on 1 January 2008: section 2(2).

2. Table of Amendments

This Version incorporates amendments made to the Charter of Human Rights and Responsibilities Act 2006 by Acts and subordinate instruments.

Coroners Act 2008, No. 77/2008

Assent Date:	11.12.08
Commencement Date:	S. 129(Sch. 2 item 5) on 1.11.09: s. 2
Current State:	This information relates only to the provision/s amending the Charter of Human Rights and Responsibilities Act 2006

Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009, No. 68/2009

Assent Date:	24.11.09
Commencement Date:	S. 97(Sch. item 18) on 1.1.10: Government Gazette 10.12.09 p. 3215
Current State:	This information relates only to the provision/s amending the Charter of Human Rights and Responsibilities Act 2006

Transport Integration Act 2010, No. 6/2010 (as amended by No. 45/2010)

Assent Date:	2.3.10
Commencement Date:	S. 203(1)(Sch. 6 item 5) on 1.7.10: Special Gazette (No. 256) 30.6.10 p. 1
Current State:	This information relates only to the provision/s amending the Charter of Human Rights and Responsibilities Act 2006

Equal Opportunity Act 2010, No. 16/2010 (as amended by No. 26/2011)

Assent Date:	27.4.10

Commencement Date: S. 209(Sch. item 1) on 1.8.11: s. 2(4)

Current State: This information relates only to the provision/s amending the Charter of Human Rights and Responsibilities Act 2006

Statute Law Revision Act 2011, No. 29/2011

Assent Date: 21.6.11

Commencement Date: S. 3(Sch. 1 item 8) on 22.6.11: s. 2(1)

Current State: This information relates only to the provision/s amending the Charter of Human Rights and Responsibilities Act 2006

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3. Explanatory Details

No entries at date of publication.

F

International Covenant on Civil and Political Rights*

THE STATES PARTIES TO THE PRESENT COVENANT,

CONSIDERING that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

RECOGNIZING that these rights derive from the inherent dignity of the human person,

RECOGNIZING that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

CONSIDERING the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

REALIZING that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

AGREE upon the following articles:

PART I
Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II
Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the

* Including Australia's Reservations and Declarations, from: http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html

present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide.[1] This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize[2] to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the presented Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.[3] Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

(d) The Committee shall hold closed meetings when examining communications under this article.

(e) Subject to the provisions of sub-paragraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (b), to supply any relevant information.

(g) The States Parties concerned, referred to in sub-paragraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.

(h) The Committee shall, within twelve months after the date of receipt of notice under sub-paragraph (b), submit a report:

(i) If a solution within the terms of sub-paragraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of sub-paragraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article.[4] Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned.

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached.

(c) If a solution within the terms of sub-paragraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned.

(d) If the Commission's report is submitted under sub-paragraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.[5]

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI
Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.[6]

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.[7]

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.[8]

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.[9]

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

IN FAITH WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Covenant, opened for signature at New York, on the nineteenth day of December, one thousand nine hundred and sixty-six.

[Signatures not reproduced here.]

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE
CANBERRA

International Covenant on Civil and Political Rights

(New York, 16 December 1966)
Entry into force generally (except Article 41): 23 March 1976

Entry into force for Australia (except Article 41): 13 November 1980
Article 41 came into force generally on 28 March 1979
and for Australia on 28 January 1993
AUSTRALIAN TREATY SERIES
1980 No. 23 [REPRINT]
Australian Government Publishing Service
Canberra

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1 ATS 1951 No. 2 UNTS 78 p. 277; UKTS 1970 No. 58 (Cmnd. 4421).

2 ILO Convention No. 87: ATS 1974 No. 3 UNTS 68 p. 17.

3 A declaration of acceptance to this effect was deposited for Australia on 28 January 1993.

4 Article 41 came into effect generally on 28 March 1979 and for Australia on 28 January 1993.

5 ATS 1949 No. 3 UNTS 1 p. 15; UKTS 1950 No. 10 (Cmd. 7891).

6 The Covenant was signed for Australia on 18 December 1972.

7 Instrument of ratification deposited for Australia 13 August 1980 with following reservations and declarations:

RESERVATIONS AND DECLARATIONS

The instrument of ratification of the Covenant on Civil and Political Rights deposited for the Government of Australia with the Secretary-General of the United Nations contained the following reservations and declarations:

Articles 2 and 50

Australia advises that, the people having united as one people in a Federal Commonwealth under the Crown, it has a federal constitutional system. It accepts that the provisions of the Covenant extend to all parts of Australia as a federal State without any limitations or exceptions. It enters a general reservation that Article 2, paragraphs 2 and 3 and Article 50 shall be given effect consistently with and subject to the provisions in Article 2, paragraph 2.

Under Article 2, paragraph 2, steps to adopt measures necessary to give effect to the rights recognised in the Covenant are to be taken in accordance with each State Party's Constitutional processes which, in the case of Australia, are the processes of a federation in which legislative, executive and judicial powers to give effect to the rights recognised in the Covenant are distributed among the federal (Commonwealth) authorities and the authorities of the constituent States. In particular, in relation to the Australian States the implementation of those provisions of the Covenant over whose subject matter the federal authorities exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and the implementation of those provisions of the Covenant over whose subject matter the authorities of the constituent States exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and where a provision has both federal and State aspects, its implementation will accordingly be a matter for the respective constitutionally appropriate authorities (for the purpose of implementation, the Northern Territory will be regarded as a constituent State).

To this end, the Australian Government has been in consultation with the responsible State and Territory Ministers with the object of developing co-operative arrangements to co-ordinate and facilitate the implementation of the Covenant.

Article 10

Australia accepts the principle stated in paragraph 1 of Article 10 and the general principles of the other paragraphs of that Article, but makes the reservation that these and other provisions of the Covenant are without prejudice to laws and lawful arrangements, of the type now in force in Australia, for the preservation of custodial discipline in penal establishments. In relation to paragraph 2(a) the principal of segregation is accepted as an objective to be achieved progressively. In relation to paragraphs 2(b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.

Article 14

Australia accepts paragraph 3(b) on the understanding that the reference to adequate facilities does not require provision to prisoners of all the facilities available to a prisoner's legal representative.

Australia accepts the requirement in paragraph 3(d) that everyone is entitled to be tried in his presence, but reserves the right to exclude an accused person where his conduct makes it impossible for the trial to proceed.

Australia interprets paragraph 3(d) of Article 14 as consistent with the operation of schemes of legal assistance in which the person assisted is required to make a contribution towards the cost of the defence related to his capacity to pay and determined according to law, or in which assistance is granted in respect of other than indictable offences only after having regard to all relevant matters.

Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of Article 14 may be by administrative procedures rather than pursuant to specific legal provision.

Article 17

Australia accepts the principles stated in Article 17 without prejudice to the right to enact and administer laws which, insofar as they authorise action which impinges on a person's privacy, family, home or correspondence, are necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the protection of public health or morals, or the protection of the rights and freedoms of others.

Article 19

Australia interprets paragraph 2 of Article 19 as being compatible with the regulation of radio and television broadcasting in the public interest with the object of providing the best possible broadcasting services to the Australian people.

Article 20

Australia interprets the rights provided for by Articles 19, 21 and 22 as consistent with Article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the Article in matters of practical concern in the interests of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters.

Article 25

The reference in paragraph (b) of Article 25 to "universal and equal suffrage" is accepted without prejudice to laws which provide that factors such as regional interests may be taken into account in defining electoral divisions, or which establish franchises for municipal and other local government elections related to the sources of revenue and the functions of such governments.

Convicted persons

Australia declares that laws now in force in Australia relating to the rights of persons who have been convicted of serious criminal offences are generally consistent with the requirements of Articles 14, 18, 19, 25 and 26 and reserves the right not to seek amendment of such laws.

Discrimination and distinction

The provisions of Articles 2(1) and 24(1), 25 and 26 relating to discrimination and distinction between persons shall be without prejudice to laws designed to achieve for the members of some class or classes of persons equal enjoyment of the rights defined in the Covenant. Australia accepts Article 26 on the basis that the object of the provision is to confirm the right of each person to equal treatment in the application of the law.

[END OF RESERVATIONS AND DECLARATIONS]

On 6 November 1984 Australia withdrew reservations and declarations made upon ratification, with the exception of reservations to Article 10, paragraphs 2(a), 2(b), and 3, Article 14, paragraph 6 and Article 20. At the same time the following declaration [federal statement] was deposited:

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

[8] The Covenant entered into force generally 23 March 1976, except for Article 41 (qv).

[9] The Covenant entered into force for Australia 13 November 1980, except for Article 41 (qv).

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