9 June 2011

Mr Edward O'Donohue MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament of Victoria
MELBOURNE, 3002

Dear Mr O'Donohue,

Re: Submission on the Victorian Charter of Rights

The Australian Lawyers Alliance (ALA) (Victorian Branch) welcomes the opportunity to provide our submission on the Victorian Charter of Rights.

The ALA is the only national association of lawyers and other professionals dedicated solely to the protection and promotion of justice, freedom and the rights of individuals. Our members act for real people.

We value a fair, just and democratic society, and aim to redress the imbalance between the ample resources available to corporations and those available to members of the public.

We take an active role in contributing to the development of policy and legislation that will affect the rights of the ordinary citizen.

We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. We oppose oppression and discrimination and support democratic systems of government and an independent judiciary.

Please find our submission attached.

Should you wish to discuss, please do not hesitate to contact the writer on 9334 6803 or by email at gcollins@mauriceblackburn.com.au

Yours faithfully,

[Signature]

Geraldine Collins  (Enquiries: Mary Ferdyanto - (03) 9334 6803)
Victorian President
Australian Lawyers Alliance
Encl
Submission on the Review of the Victorian Charter of Human Rights and Responsibilities from the Australian Lawyers Alliance (Victorian Branch)

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**Introduction**

The Australian Lawyers Alliance (‘ALA’) is the only national association of lawyers and other professionals dedicated solely to the protection and promotion of justice, freedom and the rights of individuals. Members of the ALA act for real people.

The ALA values a fair, just and democratic society, and aims to redress the imbalance between the ample resources available to corporations and their insurers, and those available to members of the public. Lawyers who act for real people are in a unique position to understand the challenges that face plaintiffs. The ALA sees first hand the human cost of injury in the workplace and other environments.

The ALA is dedicated to representing the interests of our clients. This dedication extends to fighting for the rights of the injured and others who suffer loss due to the fault of another. The ALA takes an active role in contributing to the development of
policy and legislation that will affect the rights of the injured, marginalised and disadvantaged. The ALA also promotes access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. We oppose oppression and discrimination and support democratic systems of government and an independent judiciary.

In its submission to the Victorian Government regarding the review of the Victorian Charter of Human Rights and Responsibilities (the Charter), the ALA would first like to express its utmost commitment to human rights, which it sees as one of the best ways of ensuring human dignity and promoting justice. It also wishes to note that Victoria holds a special place in Australia in respect to the enforcement of human rights, in terms of being the only State that has enacted a Charter of Human Rights.

The ALA also believes that the best way to promote human rights is by the direct enforcement of these rights through instruments such as Charters/ Bills of human rights. Human rights can only truly be enforced and upheld by individuals when they have direct access to those rights and are able to enforce them in courts, tribunals and other arenas. Although this is not to say that the Charter does not also serve other important functions, such as its legislation compatibility requirements contained in Section 28 of the Charter.

Ultimately, however, one of the most important functions that the Charter serves is to allow Victorians the ability to directly enforce their human rights. Human rights serve little purpose if they are only tokenistic and/or unable to be utilised by those they serve to protect. Consequently, the significance of the Charter's direct and proper enforcement of human rights should not be underestimated. Australia is not only the sole democratic nation without a bill of rights, but has also largely failed to comprehensively incorporate its international human rights commitments into domestic law, despite having signed and/or ratified the Universal Bill of Rights. Instead, Australia only has a 'patchwork' system of human rights protection which, as noted by the National Human Rights Consultation Committee in its comprehensive 2010 report regarding human rights in Australia, is 'fragmented and incomplete, and its inadequacies are felt most keenly by the marginalised and the vulnerable.'

As such, Victorians are in a privileged position in terms of human rights in Australian in that they are able to directly access human rights and in the event a public authority breaches these rights, they are able to potentially enforce them in courts or tribunals if they so wish. This ability to access to human rights in Australia cannot be understated, as without it, as noted above, human rights simply become bywords and empty rhetoric. Additionally, as human rights are the rights of individuals and Victorian law, it is appropriate that they belong in the domain of parliament and the judiciary.

In light of the above, the ALA confirms its commitment to the Charter and wishes to express its desire to see the Charter further strengthened and enhanced. Victoria should not become the first western State to revoke a Charter of human rights and/or reduce

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its power to the point of being a meaningless document. However, it should also be noted that the Charter itself is by no means a perfect document nor has its implementation always run smoothly. There are several areas of the Charter that should be revised by the Victorian Government. Further, the Government should also undertake a comprehensive program of promotion of the Charter to educate Victorians on the human rights that they are able to access and the ways in which they can do so.

1. The Importance of the Institutional Dialogue Model of the Charter

In its discussion of the Charter, the ALA would first like to point out that the Charter does not allow the judiciary to unfettered powers to re-interpret any law as it sees fit. There has been much discussion in respect to the fear that judges will be able to utilise the Charter to effectively run riot with Victoria’s laws, by utilising Section 32 and Section 26 of the Charter to re-interpret laws as they see fit. Several members of the community have expressed this view. The ALA points out that although the Victorian judiciary does indeed have powers to ensure that Charter rights are complied with; the structure of the Charter places ultimate power over the rights in the Charter in the hands of the democratically elected Parliament. Although perhaps questionable in terms of perhaps placing too much power into the hands of parliament, any fears that the Charter allows un-elected judges to remake laws should be completely cast aside.

The structure of the Charter places ultimate power over the rights contained in it because it adopts the ‘institutional dialogue’ model of rights protection. This type of human rights system specifically seeks to ensure parliamentary sovereignty in respect to rights and create a ‘dialogue’ between the legislature and the judiciary about the scope and limits of the rights in the Charter. There are several components of the institutional dialogue model, including broadly constructed rights, non-absolute rights, limited judicial power and the availability of appropriate mechanisms for parliament to respond to the judicial assessment of rights. All of these components are present in the Charter.

Further, in respect to the limitations of rights, the Charter goes further than many other human rights instruments by including two further limitation clauses. Section 7 of the Charter also generally permits limitations on rights, and seems to exhaustively list the circumstances under which a right can be limited. Further, Section 31 of the Charter also expressly allows parliament to ‘override’ the Charter when it sees fit by allowing the introduction of legislation into parliament that is not compatible with the rights in the Charter.

In contrast to the United States model of rights enforcement, under the Charter, the Victorian judiciary is specifically prohibited from invalidating legislation. Instead, under Section 32(1) of the Charter, the judiciary is obliged to try and interpret laws compatibly with human rights. This section of the Charter was clearly modelled after Section 3 of the United Kingdom’s Human Rights Act and similar to its predecessor it

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provides that '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 the event that such an interpretation is not possible, the VSC is able to make a declaration of inconsistency under Section 36 of the Charter.

Following a declaration of inconsistency, parliament is obliged to re-consider the law in question and its compatibility with human rights. However, at all times, ultimate power of the limit, scope and enforcement of the rights lies with parliament. In the event that it does not agree with a judicial interpretation of a law or a Section 36 declaration, parliament can either pass a law to amend the legislation as it sees fit or simply retain the legislation assessed as being incompatible with human rights. Finally, parliament can also choose to utilise its Section 31 powers, which, as previously mentioned, allow it to expressly override the Charter when it sees fit. All of these options are also available to parliament following a judicial decision re-interpreting a law into conformity with the Charter under Section 32.

The structure of the Charter is designed to leave the final say over the rights in the Charter, and the obligations they place on public authorities and individuals, with parliament. Consequently, any fear that the judiciary will be able to simply amend or re-work laws as it sees fit are completely unfounded.

Submission:

The ALA submits that any removal of the powers of the judiciary under Section 32 or Section 36 of the Charter would be drastically undermine the 'institutional dialogue' model of the Charter and would be entirely unnecessary due to the fact that power is always left with the democratically elected parliament.

2. The Charter’s Impact on Ordinary Victorians

The ALA wishes to draw the attention to the Victorian Government of the very real impact that the Charter have on the lives of ordinary Victorians.

For example there have been a series of cases in VCAT that have affirmed that the Charter does in fact prevent arbitrary or unlawful interference with one’s home. These decisions have effectively prevented public authorities from making arbitrary or unfounded decisions to make several individuals homeless. Obviously, the Director of Housing has a job to ensure that Victorian public housing is managed appropriately and in the current housing shortage this cannot be an easy task. However, in light of the fact that such decisions can render people homeless, such decisions of the Director of Housing must be both reasonable, in compliance with human rights and lawful.

In the case of Director of Housing v Sudi, the Director of Housing sought to evict a family and render them homeless without properly justifying such an enormous interference with their human rights. Ultimately, VCAT struck down an application made by the Director of Housing to evict the applicant and his son. In this case Mr Sudi had continued to reside in the public housing with his son after his mother, with whom the original tenancy agreement had been made, had died. Consequently, Mr Sudi had not actually signed a tenancy agreement with the Director of Housing, despite living in the

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5 Section 13 of the Charter states that 'a person has the right (a) not to have his or privacy, family or home or correspondence unlawfully or arbitrarily interfered with...'
publicly provided accommodation. As such, the Director of Housing had made an application in VCAT to evict Mr Sudi from his publicly provided housing on the grounds that there was no actual tenancy agreement between the applicant and respondent. Such a decision would have effectively rendered Mr Sudi and his son homeless. Consequently, in response to the application, Mr Sudi argued that to evict him from the public housing would be in breach of his Charter rights, namely Section 13.6 In this case the Director of Housing did not put forward any arguments as to the justifications behind the interference with Mr Sudi’s housing, and merely argued that the Tribunal did not have jurisdiction to hear the matter.7

In his discussion of whether to make the order, Justice Bell analysed a significant amount of international human rights law in respect to the right to privacy. Significantly, he recognized that the words ‘home’, ‘interference’ and ‘family’ should be construed broadly.8 Further, the decision also recognised the importance of an individual’s ‘home’ as being a ‘refuge’ and ultimately that the determination of whether a dwelling is in fact a home, is a ‘question of fact, not law’.9 Consequently, Justice Bell stated that even those individuals living unlawfully in public housing still had the right not to have their home arbitrarily or unlawfully interfered with. In this case, Justice Bell also looked at what might be a justified interference with this right by way of examination of the case law from the European Court of Human Rights, amongst other international jurisprudence.10

In light of the fact that the Director of Housing did not offer any arguments in favour of eviction, it is perhaps unsurprising that the Tribunal found in favour of the respondent and declared that the Director of Housing had breached its human rights obligations under the Charter not to arbitrarily or unlawfully evict someone from their home, which in turn meant that its application to evict Mr Sudi was unlawful.

Submission:

Addressing the plight of such disaffected people was one of the reasons behind why the Victorian Government enacted the Charter.11 Decisions such as Director of Housing v Sudi offer powerful evidence that the Charter can provide real human rights protection to vulnerable and disadvantaged persons, such as those living in public housing. It demonstrates that the Charter, properly enforced by VCAT and the judiciary, ensures that public authorities take into account their human rights in decision making.

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7 Ibid – para 3.
8 Ibid – para 32-34.
9 Ibid – para 32.
10 Ibid – para 36-69
3. Embracing the Charter

However, despite the abovementioned examples of positive enforcement of the Charter, the ALA submits that the Victorian Government needs to more actively engage with the judiciary in terms of providing encouragement to embrace the Charter.

Several ALA members have reported dissatisfaction with the judiciary in terms of properly embracing the potential impact of the Charter. One particular example of this, was the *Dawson v Transport Accident Commission*. This case involved the denial of child care services to a mother injured in a transport accident by the relevant public authority, which she argued was necessary so that she could properly rehabilitate herself and improve her quality of life. However, despite the plight of the applicant and over 17 volumes of submission by the applicant citing international human rights case law, VCAT failed to properly take into account the human rights of Ms Dawson. The Tribunal Member in this case, Deputy President McNamara, elected to specifically distance himself from the Charter, stating that he was 'at a loss' to understand the connection between the provision of childcare services and the right to privacy, a civil and political right. In light of this inability to make such a connection, the Tribunal Member then went on to affirm the public authority's decision to deny child care services.

It is well established in international jurisprudence that the provision of a monetary entitlement can significantly impact on a person's private autonomy, family and home life. For example, the provision of childcare services could allow a person the necessary time to undertake a professional career or to undergo rehabilitation that could improve their quality of life and therefore improve their private relationships with their family and others. Indeed, the European Court of Human Rights has specifically recognised the right to private life encompasses both a right to personal relationships and the right to seek and undertake employment. Consequently, although there are differences between the Article 8 of the European Convention of Human Rights and Section 13 of the Charter in regard to their framing, surely the refusal of a monetary entitlement that could help provide the aforementioned aspects of a person's private life is at least a negative interference with their private life and consequently a breach of the human right. Ultimately, the decision of the Tribunal Member in this case demonstrates an unwillingness of the judiciary to properly embrace the Charter and international human rights jurisprudence.

The ALA is by no means stating that the judiciary or VCAT must find for the applicant in every case where a Charter is raised. Obviously every case turns on its own facts and application of the appropriate law. However, the judiciary needs to be on the front foot.

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13 Ibid – para 85-86.
14 Ibid – para 87-88.
16 See the cases of *Zickus v Lithuania* - Judgment of 7 April 2009 – App No.26652/02 and *Sidabras and Džiautas v Lithuania* – Judgment of 27 July 2004 – App No.55480/00 and 59330/00 - para 32-35 and para 59 respectively.
in terms of properly embracing the Charter and willingness to utilise international human rights jurisprudence in its interpretation of the Charter and its impact on Victorian laws.

The ALA considers that the Victorian Government should provide greater encouragement and incentive to the Victorian judiciary to embrace the Charter. The ALA considers that the judiciary should interpret human rights instruments ‘purposefully and generously’.

Given the broad nature of human rights generally, judges must give content to them and that in light of the fact that human rights are designed to preserve and protect human dignity, then in giving these rights content, judges should interpret them ‘generously’ in favour of those who seek to utilise them in order to protect or preserve their human dignity. Of course, this is the very aim of such rights.

Indeed, it is difficult to properly protect the rights of the marginalised and disadvantaged, one of the prime objectives of the Charter, if judges adopt a narrow or constrictive approach to the interpretation of those rights. Indeed, the adoption of a conservative approach to human rights throws into question the whole point of codifying them in the first place. Although, as noted above, adopting a judicial activist approach to human rights does not necessarily mean taking a one-eyed view of any case before it, and any judiciary should of course take into account the arguments of both sides, and if a restrictive on a right is ‘demonstrably justified’ for appropriate reasons, then the court should perhaps find in favour of the State or respondent in question.

Further, in order for the ‘institutional dialogue’ model of the Charter to function properly, the judiciary needs to be ‘creative’ and ‘robustly contribute its view on the scope of the rights and justifiability of its limits’. It is argued that if the judiciary shies away from a strong and activist approach to the interpretation and enforcement of the broadly worded rights, then essentially only the voice of the executive or legislature would be heard in regard to the shape and content of the rights in the Charter. This means that the model of rights protection in Victoria would effectively become a monologue rather than the intended dialogue between the various arms of democracy.

Additionally, in light of the fact that there is only limited Victorian jurisprudence in respect to the Charter, Victorian Courts are forced to look elsewhere for guidance in respect to the enforcement of the broadly worded human rights in the Charter. Indeed, the Charter specifically provides for the incorporation of international human rights law by the courts in Section 32(2).

Submission:

The ALA submits that that the Victorian Government should provide greater encouragement and incentive to the Victorian judiciary to embrace the Charter.

\[17 XYZ v Victorian Police (General) (2010) – VCAT 255 – para 529.\]
\[19 Debeljak, Julie – Supra Note 4 – p.30-31.\]
\[20 Ibid – p.30-31.\]
4. Revision of Section 39 of the Charter (Remedies Provision):

The ALA submits that Section 39 of the Charter, the section that governs the remedies provisions of the Charter, is in need of fundamental change. We submit that Section 39 of the Charter is not only confusingly worded but also excessively restricts individuals from the proper enforcement of their human rights.21

Whilst most of the provisions in the Charter are based on other international human rights systems and treaties, Section 39 is a wholly unique provision in that it does not have any true equivalent in international human rights law.22 There are three major sub-sections to Section 39. First, Section 39 (1) ostensibly states that the Charter does not create any new cause of action for individuals. As a result, an individual cannot bring a claim for a breach of the Charter itself. However, if an applicant already has a legal claim under an existing area of law concerning the unlawfulness of an action or a decision of a public authority, then that person could also argue that the act or decision was unlawful under the Charter.

Second, under Section 39(2)(a) of the Charter, a person can seek judicial review of a decision of a public authority on the grounds of unlawfulness, failing to properly take into account human rights or improperly exercising their statutory function in accordance with the Charter.23 Third, Section 39(2)(b) allows applicants to bring a cause of action requesting that a court or tribunal make a declaration that a public authority has acted inconsistently with respect to the Charter, and potentially seek an injunction prohibiting the public authority from continuing with such conduct.24 Finally, Section 39(3) of the Charter specifically states that a person is not entitled to damages for a breach of the Charter.

The confusing and difficult nature of Section 39 is largely contrary to the rest of the Charter, which to a large extent is straightforward in both its language and intent. Indeed, the Chair of the original Victorian Human Rights Consultation Committee expressly noted that Section 39 is an exception to the otherwise ‘clear language’ of the Charter and ‘is a provision that can require multiple readings to yield coherent

21 Section 39 of the Charter states:
“(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 1 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.”


meaning'. Its confusing and unclear language and the substance of the provision itself has also provoked significant debate amongst academics in respect to its interpretation.

4.1. The Judicial Interpretation of Section 39

The judiciary has not yet clarified this lack of clear understanding of Section 39. In part, perhaps due to the fact that by its very conflicting and confusing nature, it is arguably not possible to properly interpret Section 39. To date, this section has only been mentioned in a meaningful way in two cases: Kracke v Mental Health Review Board27; and The Director of Housing v Sudi28. Both of these cases were in fact adjudicated by the same judge, Mr Justice Bell, who has been one of the leading judicial figures in the interpretation of the Charter. However, despite mentioning Section 39 on various occasions in both judgments, his honour Justice Bell failed to provide any substantial clarification regarding its interpretation.

The case of Kracke v Mental Health Review Board was the first time that a Victorian Court or Tribunal actually granted a remedy under the Charter. In this case, the Tribunal held that the failure of the Mental Health Review Board ('the Board') to review the applicant's involuntary community treatment orders ('CTO') regarding his treatment for mental illness, which was a statutory duty, breached his right to a fair trial, specifically the 'reasonable time requirement', as protected by Section 24(1) of the Charter.29 In this case, Mr Kracke had been subject to a CTO without review for over two years. In his decision, Justice Bell stated that the Charter was not a 'toothless tiger' in respect to providing substantive remedies to claimants, noting that the Charter 'extends the power of the court or tribunals to grant relief or remedies for unlawful acts or decisions of a public authority to a ground of unlawfulness arising under the Charter'.30 His honour then went on to make a vehement argument for the power of declarations as a remedy to human rights violations, citing various international jurisprudence31 in defence of the argument that a court's 'principle objective must be to vindicate the right in the sense of upholding it in the face of the State's infringement'.32

However, despite these positive comments regarding the importance of declarations to human rights decisions and vehemently arguing that the Charter was not a 'toothless tiger', it could easily be argued that the applicant in this case walked away with a meaningless remedy. Mr Kracke had actually sought a declaration that he did not have to comply with the order of the Board to take psychotropic medication, and that by forcing him to do so without proper review, the State had breached his right to freedom.

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29 Section 24(1) of the Charter states: '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'.
of movement (Section 12), privacy (Section 13) and fair hearing (Section 24). Justice Bell declined to make such a declaration, on the grounds that the limitations of Mr Kracke's human rights were demonstrably justified as a psychiatrist had approved the treatment in question. Consequently, whilst perhaps significant in awarding a declaration of a breach of human rights, it would be difficult to argue that Mr Kracke had received 'just satisfaction'. Indeed, one critic has argued that all Justice Bell actually did in the case was confirm that Tribunals could make declarations that public authorities had not acted compatibly with human rights, something which is clearly set out in Section 39 and which has never been particularly controversial.

Subsequently, in the case of Director of Housing v Sudi, his honour Justice Bell made less overt references to Section 39, although he did observe that the 'explanatory memorandum of the Charter makes it clear that Section 39(1) does not create any new or independent right of relief'. Further, his honour also stated that the Charter merely extends the grounds an applicant can rely on when exercising their rights under ordinary legislation. These comments are not particularly helpful in terms of providing clarification regarding the proper interpretation of Section 39.

Interestingly, however, the actual remedy afforded in this case was quite substantive in its effect for the applicant. In this case the Director of Housing, a public authority, had sought to evict Mr Sudi from public housing on the grounds that the original agreement had been made with his mother, who had died of cancer. His honour Justice Bell held that this was a clear interference with Mr Sudi's right to respect for his privacy, which included his family and home. Consequently, he found that the application was not valid under the legislation that gave the DOH the power to evict tenants from public housing. Accordingly, Mr Sudi was granted what could be considered to be a proper substantive remedy, as he was not evicted from his home. This can be directly contrasted with Mr Kracke, who was still under an obligation to take psychotropic medication, despite the public authority's lack of compliance with the statutorily imposed review process.

4.2. The Structure of the Charter and Section 39

It should be observed that the structure of the Charter itself is arguably deficient in regard to the provision of remedies. For example, the previously mentioned case of R v Momcilovic was significant in that the VSCA made the first declaration of inconsistency under Section 36 of the Charter. In this case, the plaintiff argued that her conviction under Section 5 of the Drugs, Poisons and Substance Control Act, which states that where drugs are found in a person's property, they are deemed to be in possession of them unless they can satisfy a court to the contrary, should be overturned in light of the fact that this section clearly conflicts with the right to be presumed innocence in criminal trials as contained in Section 25(1) of the Charter. The plaintiff argued that under

34 Ibid – para 847.
37 Ibid – para 132.
38 Director of Housing v Sudi (2010) – para 151-152.
40 R v Momcilovic – Victorian Supreme Court of Aappeal 50 – 17 March 2010– para 94.
Section 25(1) of the Charter, the VSC was obliged to interpret Section 5 as only placing an ‘evidentiary burden’ on the accused rather than strict liability.\textsuperscript{41}

However, although the VSC in \textit{R v Momcilovic} agreed that Section 5 conflicted with Section 25(1) of the Charter, they decided that due to the absolute nature of Section 5 they were unable to adopt an interpretation to make it compatible with the Charter and, as a consequence, they had to issue a declaration instead.\textsuperscript{42} Obviously, there are benefits to courts making such a declaration, such as the fact that it starts a dialogue between parliament and the courts in regard to the conflicting legislation and whether it should be amended to ensure compliance with the human rights in the Charter. In this regard, Section 36 declarations are obviously integral to the overall functioning of the Charter as an ‘institutional dialogue’ human rights system. However, a significant disadvantage of the VSC making a Section 36 declaration is that the plaintiff in question is left without a remedy, despite the fact that the law under which they were convicted is shown by the highest court in the State to be in conflict with their guaranteed human rights. As such, it could be reasonably argued that this situation, necessary for the ‘institutional dialogue’ model, also actively prohibits individuals from obtaining substantive relief even when a breach of their rights has been proven. This means that while human rights are perhaps better protected on a large scale, that the individual in question who has suffered a violation is left without their rights actually being protected.

\textbf{4.3. The Inadequacy of Declarations in Human Rights Law}

As it stands, there are still options open to those who have suffered a breach of a Charter right to access a forum to contest the breach. However, once they have reached such a forum, individuals are extremely limited in the relief they can actually seek. Indeed, Section 39(3) of the Charter completely precludes an individual from obtaining damages in respect to a breach of the Charter. The lacklustre provisions of Section 39 risks turning the Charter into an empty vessel. That is, the Charter may theoretically provide human rights protection to Victorians through the codifying of rights, but is unable to enforce those rights in any real practical way. This means that the Charter is only paying lip service to human rights, rather than offering Victorians a real way of holding public authorities accountable for their rights.

Additionally, it should also be noted that whilst declarations are certainly important as a human rights remedy, particularly in cases only involving moral injury, they are not necessarily appropriate for every situation. In the case of \textit{Kracke v Mental Health Review Board}, the declaration received by Mr Kracke did not end the ITO in question, and also did little to provide him with relief for the breach in question. Indeed, it has been argued by critics of declarations that they are only the beginning of a remedy, not an end in of themselves and that ‘the denial of damages or other remedies should be exceptional because a violation of human rights is \textit{ipso facto} an infringement of the individual’s moral dignity and demands a personal remedy, not simply a prospective change in law or practice’.\textsuperscript{43} Further, as noted by the Canadian Supreme Court, while declarations are an important in regard to ensuring a proper dialogue between parliament and the courts, they also ‘suffer from vagueness, insufficient remedial specificity, an inability to

\textsuperscript{41} Ibid – para 23.
\textsuperscript{42} Ibid – para 156-157.
monitor compliance, and an ensuing need for subsequent litigation to ensure compliance.  

Ultimately, the declarations received by Mr Kracke and Mr Sudi in the abovementioned cases could hardly be considered remedies that properly provided redress to the individuals in question. It is arguable that in order to remedy the breach of the Charter/human rights both Mr Kracke and Mr Sudi should have also received compensation. For example, Mr Sudi may have suffered significant emotional distress at the prospect of being evicted from his home resulting in psychological injury. However, the Charter ostensibly dictates that he would have to bring a further action under a different law in order to obtain compensation. This may be difficult for a number of reasons, such as the fact that Mr Sudi would have to incur further legal fees to bring such a claim for compensation and whether such a claim does in fact actually exist under ordinary Victorian law. As such, Section 39 is unable to always properly provide a substantive remedy to those individuals whose rights have been breached.

The ALA notes that remedies are particularly important to the enforcement of human rights, as they are the means by which victims seek to have their claims heard and to receive appropriate reparations for any damage that has been inflicted. There are multiple reasons behind why remedies, particularly compensation, are important in the event of breaches of human rights. First, remedies attempt to correct the injustice afforded to the victim and restore them to their previous position.  

Second, remedies, such as the awarding of damages, act as a deterrent to other parties. In respect to public authorities, the awarding of damages may also prevent that authority from repeating the act that caused the violation in question or putting procedures in place to ensure that it does not re-occur. Finally, remedies, such as apologies, can contribute to the wider social recognition of human rights violations and the process of reconciliation between victims and perpetrators.

Submission:

The ALA submits that the Victorian Government should amend Section 39. Several suggestions have already been put forward by academics in respect to overhauling Section 39, such as the adoption of a simple provision such as that contained in Section 8 of the UK Human Rights Act, which states:

> 'In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.'

Such a provision shows how the Victorian Parliament could rectify many of the difficulties of Section 39 with simply, clear and effective language. Further, such a

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provision does not command that a court must award damages in every single event of a breach. Rather, the provision would allow forums, such as courts, to award a wide range of substantive remedies, including compensation.

In order to make sure that victims of violations receive proper reparations for any harm inflicted by violations, and to ensure justice is performed, the Victorian Government needs to thoroughly review and overhaul Section 39.

5. The Inclusion of further Economic, Social and Cultural Rights into the Charter

The ALA submits that the Victorian Government should amend the Charter to include further economic, social and cultural ("ESC") human rights. The Charter already contains several ESC rights such as the right to protection of one's cultural rights (Section 19) and the right not to be arbitrarily deprived of one's property (Section 20). The Victorian Government should reform the Charter to include further ESC rights such as the right to basic education, housing and health.

In the Victorian Government's original Statement of Intent, it declared that it wished the Consultation Committee to 'focus on the rights in the ICCPR (International Covenant for Civil and Political Rights) in considering a statutory human rights model as a starting point in its deliberations'.\(^{49}\) The ALA submits that having started with rights in the ICCPR, the Victorian Government should now move onto to entrench ESC rights contained in the International Covenant of Economic, Social and Cultural Rights (ICESCR).

The ALA submits that one of the best ways of ensuring civil and political rights is through the entrenchment of ESC rights. It also submits that ESC rights are much more widely accepted in the community than is often thought. Indeed, it is worth noting that, despite the fact that the Victorian Human Rights Consultation Committee did not specifically seek submissions from the public in respect to ESC rights, 41% of the submissions it received from the public advocated for the inclusion of ESC rights in the Charter.\(^{50}\) Further, these submissions were received from a 'wide range' of people and organisations.\(^{51}\)

The ALA submits that the fears/conceptions of critics of ESC rights are shown to be largely unfounded upon reference to international human rights law. As will be discussed below, international human rights law has given an enormous of content to ESC rights and common law jurisdictions such as South Africa have demonstrated that the judiciary is capable of enforcing such decisions without breaching the separation of powers doctrine.

\(^{49}\) Ibid – para 16.


\(^{51}\) Ibid – p.27.
5.1. The Legal Content of ESC Rights

Traditional conceptions and fears of ESC rights initially stopped the Victorian Government from including ESC rights into the Charter. Critics of ESC rights have long argued that they are both inferior to civil and political rights and essentially non-justiciable/enforceable. One of the primary arguments against the inclusion of ESC rights into the Charter was that ESC rights are too vague in content to be enforced or that they are programmatic goals that States should strive to achieve but are not individually enforceable rights per se.

The ALA submits that the fears of critics of ESC rights are wholly unfounded. In respect to the concerns regarding the lack of content of such rights, as demonstrated above, the ALA notes that ESC rights have been given legal content by a wide range of authorities on the subject, including United Nations’ bodies, academics, etc. For example, in respect to the right to the ‘highest attainable standard of mental and physical health’, as contained in Article 12 of ICESCR, the UN Committee on Economic, Social and Cultural rights (‘CESCR’) has stated in General Comment No.14 that this right does not merely encompass a right to access good quality health services, but also the right to the ‘underlying determinants of health’ such as a clean environment, access to safe drinking water etc. Indeed, even if the right was only taken to grant access to health care, CESCR has stated that this does not mean that States should merely establish hospitals, but that States are also obliged to ensure, amongst many other things, the right of access to information about one’s health and the right to affordable health facilities and care.

In this way we can see that the right to health has been given structure and content by the foremost UN authority on ESC rights.

Despite the potentially strenuous obligations that ESC rights place on States, CESCR has also noted in its General Comments that ESC rights are no different from other human rights, in that they place obligations on States to respect, protect and fulfill those rights, otherwise known as the ‘tripartite typology’. This means that States have both negative and positive duties in respect to ESC rights, in that they must refrain from interfering with an individual’s rights, but must also undertake positive steps to ensure these rights. Therefore, under international human rights law, there is no difference between States’ obligations in respect to civil and political rights and ESC rights.

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57 Ibid.
58 See various General Comments of CESCR. For example, see CESCR – Supra Note 61 – para 15 and Young, Rebecca – Supra Note 52 – p.192.
In fact, it is arguable that the only major difference between the drafting of the ICCPR and ICESCR was the inclusion of Article 2 into ICESCR that only obliges States to ‘progressively’ achieve the human rights in the Convention to the ‘maximum of its available resources’. In contrast, Article 2 of the ICCPR simply provides that States must immediately ‘undertake the necessary steps’ to ensure the rights in the Covenant. However, this concept of ‘progressive realisation’ was included in the ICESCR to ensure that ESC rights did not remain an impossible task for States to achieve, in light of the fact that every State has varying resources and that ESC rights undeniably place broad and strenuous obligations on States. 59 CESC has also sought to clarify the obligations of States in respect to ESC rights with the development of the ‘minimum core obligations’ principle. 60 Essentially, CESC has articulated that a State will be in breach of ICESCR if it fails to provide at least the minimum core of the ESC right in question. In addition, if a State is going to rely on the argument that it does not have the resources to do so, it must show that ‘every effort’ has been made to use its available resources to ensure the minimum core of the right. 61

It should be noted that the exact content of any ESC rights to be included in the Charter is in the hands of the drafters of the amendments to the Charter, and as such, the Government could insert a ‘progressively realise to the maximum of available resources’ clause into the Charter to ensure that budgetary implications are taken into account by courts in any decisions concerning ESC rights.

5.2. The Judicial Enforcement of ESC Rights

The primary argument against the inclusion of ESC rights in the Charter and in Australia generally, is that courts do not have the institutional capacity to make decisions concerning rights that entail positive obligations on the State. 62 These arguments can be divided into two parts. First, critics of ESC rights argue that it is ‘inappropriate’ for courts to enforce ESC rights due to the fact that enforcement of ESC rights involves making polycentric decisions. That is, because the enforcement of ESC rights potentially involves large segments of society as well as budgetary implications, that courts neither have the required knowledge or necessary information to be able to make such decisions. 63

Second, and perhaps more importantly, it is argued that courts do not have the institutional capacity to make decisions concerning rights that entail positive obligations on the State. 64 It is argued that the enforcement of these rights by court decisions means that States will have to undertake positive acts that often have broad social policy or budgetary implications and that these policy decisions should be left to the discretion of the democratically elected executive or legislature, rather than in the

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62 Ibid - p.36.
64 Ibid - p.36.

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hands of un-elected judges. For example, in respect to the right to health, in order to ensure the right is promoted, the State needs to build an appropriate number of hospitals, and this in turn depends on budgets and social policy, which are arguably the domain of the legislature and not courts.

However, several landmark decisions in international human rights law severely undermine the abovementioned arguments against allowing Victorian Courts to enforce ESC rights (if they were to be included in the Charter. For example, the South African Constitutional Court ("the SACC"), enforcement of ESC rights demonstrates how ESC rights can be enforced in a common law legal system. In landmark decisions such as Government of the Republic of South Africa v Grootboom ("Grootboom") and Minister for Health v Treatment Action Campaign ("TAC")

, the SACC developed its own 'reasonableness' test in regard to evaluating whether the Government had breached its obligations in respect to ESC rights, which are contained in the South African Constitution.

Essentially, under its 'reasonableness' test, the SACC examines whether the measures undertaken by the Government to 'progressively realise' the ESC rights contained in the South African Constitution are reasonable in light of the resources available to the State. In the decision of Grootboom, which involved a discussion of the Government's housing programmes and policies in regard to the provision of housing for applicants that were living in deplorable temporary housing, the SACC stated that it in order to meet this test of reasonableness, it is not merely sufficient for the State to enact legislation but must also ensure that such legislation is 'supported by appropriate, well-directed policies and programmes implemented by the executive'. Further, the SACC also stated that such policies and programmes must be 'reasonable both in their conception and their implementation', take into account the 'social, economic and historical context', 'be balanced and flexible', 'make appropriate provision for... short, medium and long term needs', not exclude a 'significant segment of society' and be subject to 'continuous review'. However, the SACC also acknowledges that 'the precise contours and content' of the policies and programmes adopted by the State are still the responsibility of the legislature and the executive.

In Grootboom, the SACC ultimately found that the Government had not properly taken into account the situation of those 'living in intolerable conditions or crisis situations' in its housing policy and issued a declaration to this effect. The SACC has also granted more direct remedies in subsequent cases, including mandatory orders and damages. For example, in the case of TAC it ordered that the State had to actually 'plan and

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65 Abramovich, Victor - 'Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies


68 Grootboom - Supra Note 68 - para 42.

69 Ibid - para 43.

70 Ibid - para 41.

71 Ibid - para 99.

72 See the cases of Grootboom - Supra Note 68, TAC - Supra Note 69 and President of the RSA and Another v Modderklip Boerdery (Pty) Ltd and Others (2005) - 8 BCLR 786 (CC).
implement' a program for the wide-scale administration of an anti-retroviral HIV drug.\textsuperscript{73}

Decisions of the SACC not only shows that ESC rights are inherently justiciable/enforceable, but also that such rights can be effectively enforced without radically overhauling a State's legal system or breaching the separation of powers doctrine. This is because, by adopting the 'reasonableness' test, the court has adopted a 'classic liberal legal approach'\textsuperscript{74}, historically utilised in a number of common law countries, including Australia.\textsuperscript{75} The adoption of a classic liberal legal approach, already utilised for the interpretation and enforcement of other rights and laws, has meant that the South African legal system has been able to cope with the enforcement of ESC rights without being radically overhauled or undermined.\textsuperscript{76}

Additionally, the reasonableness approach also arguably ensures the separation of powers doctrine due to the fact that the SACC does not seek to engage in policy-making or budget allocation, or even 'whether the government has adopted the best program', but simply an evaluation of whether the measures that it employed were reasonable.\textsuperscript{77} This act of scrutinising and evaluating laws and policy is ultimately a task which courts are both eminently suited for and have undertaken for years as part of the judicial review powers.\textsuperscript{78} Consequently, the SACC's demonstration of the enforcement of ESC rights demonstrates a court undertaking its traditional role of judicial review of government laws and policies, something which is not questioned in respect to civil and political rights and which occurs on a daily basis in democratic countries. The decisions of the SACC demonstrate that ESC rights are as justiciable/enforceable as civil and political rights. Victorian Courts could also easily adopt the South African model of ESC rights enforcement. Indeed, the reasonableness test used by the SACC is already utilised by Australian courts in decisions involving both Federal and State anti-discrimination law.\textsuperscript{79} As such, there is no reason why ESC rights could not be included in the Charter and enforced by the Courts.

Further, in light of the structure of the Charter, the ALA submits that it would be virtually impossible for Victorian Courts to breach the separation of powers doctrine and/or intrude on parliamentary sovereignty. As previously noted in the ALA's submission, the Charter resolutely ensures parliamentary sovereignty through the insertion of the Section 31 'override' provision and the fact that parliament can simply pass ordinary legislation to change a judicially re-interpreted law that does not have to

\textsuperscript{73} TAC - Supra Note 69 - para 5.
\textsuperscript{74} Pieterse, Marius - Supra Note 56 – p.416
\textsuperscript{76} Leibenberg, Sandra - Supra Note 67 – p.20-23.
\textsuperscript{78} Pieterse, Marius - Supra Note 56 – p.408-409.
\textsuperscript{79} Hanks, Peter, Walker, K.L., Mortimer, D.S. and Hill, Graeme - Proposed Commonwealth Human Rights Act: Justiciability of Economic and Social Rights - Memorandum of Advice - available at www.hrlrc.org.au; last accessed May 2010 – p.16. See also the decision of Thomas v Mowbray (2007) - 233 CLR 307 at para 100 where Gummow and Brennan, JJ described the principle of reasonableness as 'the great workhorse of the common law'.
be compliant with Charter rights.80 This ensures that Parliament can avoid having legislation be subject to human rights consideration by the courts if it so wishes. Further, the VSCA in *R v Momcilovic* has stated that in the event that the VSC cannot interpret a law to be compatible with the Charter, and if the infringement by the Government cannot be demonstrably justified, then the only option available to them is to make a declaration of inconsistency under Section 36.81 This means that even if ESC rights were included in the Charter, in the event an individual brought a case that challenged a law on the grounds that it conflicted with ESC rights, it would still ultimately fall to parliament as to whether or not to amend the law to make it consistent with that ESC right. Further, any decision challenged by an individual in respect to an ESC right would still be subject to the limited remedies available for a Charter breach under Section 39, such as a declaration.

5.3. Further Reasons Why ESC Rights Should Be Included In the Charter

The ALA also notes that ESC rights also have a strong acceptance in the community. As previously noted, in the Consultation Committee report, 41% of submissions to the Committee advocated for ESC rights and these submissions also came from an acknowledged 'wide range' of sources. This percentage should be viewed as a strong indicator of community support for ESC rights, particularly in light of the fact that no submissions were actually sought from the Government on this issue. Further, there have been numerous studies and surveys conducted on the Australian populace as a whole which indicate that ESC rights are one of their primary concerns in any discussion of human rights.82 The National Consultation Committee's Report also noted the Australian community's desire for greater protection of ESC rights, such as the right to health, particularly in respect to combating issues regarding the Indigenous population, the disabled and the mentally ill.83 These sentiments were also reflected in the report of the Victorian Consultation Committee, which similarly noted the significant community support for rights that assisted marginalised people such as the disabled.84 It is worth nothing that these two reports, on both a State and national level, have been the two primary consultations with the Australian community in respect to human rights in the last ten years. Consequently, in light of the significant community support for ESC rights, reflected in both the Victorian and National Consultation Committee reports, the Charter should be amended to include such rights.

Additionally, the exclusion of ESC rights and the fear of such rights directly runs counter to the generally accepted fundamental legal principle that all human rights are indivisible and non-hierarchical.85 This principle was famously re-affirmed in the Vienna Declaration adopted at the World Conference on Human Rights in 1993, which stated:

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80 Section 29 of the Charter states that a law is still valid even if it is passed without a 'Statement of Compatibility.'
81 See *R v Momcilovic* - *Supra* Note 36 - para 91-94 and p.12-13 of Chapter One of this thesis.
'All human rights are universal, indivisible and inter-dependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.\textsuperscript{86}

The ALA submits that this principle should not merely be viewed as legal or political rhetoric, but fundamental to the aim of human rights. For example, there is little point in ensuring that Victorians have the right to vote, if they do not enjoy basic human rights such as food, shelter or housing. It has also been argued that in order to properly ensure civil and political rights, States need to guarantee ESC rights.\textsuperscript{87} For example, without the right to education, individuals may not have the tools, such as literacy, to be able to properly enjoy civil political rights such as the right to vote or participate in public life.

\textbf{Submission:}

The ALA submits that ESC rights are no different from civil and political rights and are capable of being enforced in a common law jurisdiction. The Victorian Government should also include ESC rights in the Charter so that the plight of disadvantaged and marginalised groups and individuals is actually assisted by the Charter. Addressing the plight of such disaffected people was one of the reasons behind why the Government created the Charter in the first place and without the inclusion of ESC rights the Government will not be fulfilling one of the fundamental aims of the Charter.

\begin{center}
\textbf{Conclusion}
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The ALA submits that the Charter is by no means a perfect instrument and requires reform in a number of areas. However, this does not mean that the 'baby should be thrown out with the bath water'. That is, the Victorian Government should not reduce or remove the power of the human rights contained within the Charter. Instead, it should take steps to further strengthen the Charter as well as encourage and educate individuals and the judiciary on the merits of the Charter and how it can benefit society.

On a final note, the ALA wishes to point out that the proper enforcement of human rights requires the Victorian Government to take forward steps, not backwards ones. Victoria should not become the first western State to enact a Charter of rights and then subsequently revoke or reduce its power. The creation of a Charter of human rights was an enormously important step in the direct enforcement of human rights for Victorians. The Victorian Government should not take any action that stands to place these individual human rights in any danger of becoming meaningless or unenforceable. In the absence of directly enforceable human rights, the Charter risks simply becoming a instrument which only provides lip service to human rights for Victorians, rather than being a tool for the proper enforcement of an individual's human rights and, by consequence their human dignity, which is the very purpose of all human rights.