Strengthening Victoria's Human Rights Charter

Submission to the Four Year Review

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About the Federation of Community Legal Centres (Victoria) Inc

The Federation is the peak body for fifty community legal centres across Victoria. A full list of our members is available at [http://www.communitylaw.org.au](http://www.communitylaw.org.au).

The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:
- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (e.g., mental health, disability, consumer law, environment etc.).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome. Overall, around 60% of our work is in civil law, 35% in family law and 5% in criminal law.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.
Glossary

**Charter** - Charter of Human Rights and Responsibilities Act 2006 (Vic)


**CLCs** - Community legal centres

**ESC** - Economic, social and cultural (rights)

**HPLC** - PILCH Homeless Persons Legal Clinic

**HRLC** - Human Rights Law Centre

**ICCPR** - International Covenant on Civil and Political Rights

**ICESCR** - International Covenant on Economic, Social and Cultural Rights

**OPI** - Office of Police Integrity

**SARC** - Scrutiny of Acts and Regulations Committee

**SOCS** - Statements of Compatibility

**VEOHRC** - Victorian Equal Opportunity and Human Rights Commission

**WHCLS** - West Heidelberg Community Legal Service
Introduction

The Federation welcomes the opportunity to contribute to the four year review of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter). Our member community legal centre, the Human Rights Law Centre (HRLC), is recognised as a leading expert organisation on domestic and international human rights law, including on the operation of the Charter, and will be making a submission to the Review.

Representing the voices and interests of Victorians experiencing significant disadvantage

Community legal centres (CLCs) work to improve the lives of our clients and potential clients, who are among the most vulnerable members of our community. Our client base includes people facing multiple sources of disadvantage such as homelessness, mental illness, disability and financial hardship. The most recent government review of CLCs noted that 58% of community legal sector clients received some form of income support, 82% of clients earned less than $26,000 per annum, and almost 9% of clients had some form of disability.¹

CLCs aim to empower our client base to understand their legal rights and voice their concerns directly to law and policy makers. However, where an individual has a mental illness, has to focus on finding a place to sleep each night, or is under significant financial pressure, little time or energy is left to participate in important democratic processes of direct relevance to their interests, such as the Charter Review. The Federation’s submission seeks to represent the voices of our client base and to make their interests known to the Review Committee.

The Charter is helping to improve the lives of disadvantaged Victorians

The experiences of our member CLCs, and our own work and research, strongly indicate that the Charter is improving the lives of disadvantaged Victorians. The Charter is securing concrete improvements to lives of individuals and families, particularly in areas such as housing.² More broadly, the Charter is encouraging a cultural shift within government and Parliament by focusing the attention of decision maker’s on the human impact of government and legislative action. This shift has not been uniform or consistent, and some agencies have been slow to embrace the Charter.³ Improved, more human-focused decision making is in itself a major advance brought about by the Charter which should be celebrated. The tangible outcomes arising from these improvements will be increasingly evident in coming years.⁴

The achievements of the Charter to date can be summarised under the following areas:

Human-focused decision making by government agencies

The Charter’s greatest impact has come from its requirement that government agencies consider and comply with human rights. This requirement is like a mandatory human rights quality assurance mechanism. Government agencies are required to evaluate their practices against human rights standards. Individuals and their advocates are able to rely on those standards in negotiating better outcomes. Many improved outcomes are being achieved through negotiation with agencies, rather than court action.⁵ Charter-compliant outcomes achieved through individual negotiations can greatly

² See Homeless Persons Legal Clinic, Charting the Right Course, Submission to the Inquiry Into the Charter of Human Rights and Responsibilities.
⁴ See for example our discussion on ongoing Improvements to the management and accountability around police cells, pp 19-21. These changes in themselves are valuable and will promote humane treatment of police detainees. However the reductions in self-harm, conflict, litigation and deaths in custody which will flow from these changes may only be measurable over time and with a specific focus given to evaluation of the changes.
⁵ See Homeless Persons Legal Clinic, Charting the Right Course, Submission to the Inquiry Into the Charter of Human Rights and Responsibilities.
assist in identifying the need for service-wide changes. Overall, the Charter is producing better, fairer and more rational outcomes from government service delivery.

**Human-focused scrutiny and transparency in Parliament**
The legislative processes introduced by the Charter, including Statements of Compatibility and Scrutiny of Acts and Regulations Committee Reports, have provided a consistent framework for encouraging early and ongoing consideration of human rights issues in policy and legislative development; enhancing Parliament's capacity to scrutinise a proposed law for human rights compliance; and increasing transparency by demonstrating to the community how the government has weighed competing interests in developing laws. Transparency promotes community confidence in laws that impact on their human rights.

**Promoting community dialogue and input**
The existence of the Charter promotes opportunities for community members and organisations to participate in public debate around human rights issues in a consistent framework with government, Parliament and the courts. The community is able to see how Parliament has weighed competing interests in developing laws. The community is able to engage with government, Members of Parliament and the Scrutiny of Acts and Regulations Committee on these issues. This promotes the development of more effective, human rights compliant laws.

**Holding government accountable in the courts and interpreting laws consistently with human rights**
The codification of the common law presumption that laws will be interpreted compatibly with human rights helps to ensure that human rights are consistently taken into account in the interpretation of laws by the courts. This has not displaced or transferred the power of Parliament to the courts. As demonstrated by R v Momcilovic [2010] VSCA 50, where a court is unable to interpret a law consistently with human rights, the court has referred the issue of incompatibility back to Parliament for decision.

The Charter provides indirect means for individuals to hold government accountable to its obligations to comply with human rights. While court cases involving the Charter have been limited, access to the courts is an important measure of last resort. It provides an important incentive for government agencies to take action to comply with their obligations under the Charter.

**Empowering communities**
For people already experiencing significant stress, navigating the patchwork of complex laws and multiple service standards that govern their circumstances can be overwhelming. The existence of one, clear, accessible statement of rights has made it easier for disadvantaged Victorians to understand and apply human rights and gain a sense of empowerment through this knowledge. Our recent discussion with members of the West Heidelberg community for the purpose of this submission, affirms this.

**Strengthening the Charter**
Based on the experiences of our member CLCs, and our own work and research, we strongly believe the Charter should be maintained. Further, we believe that the benefits delivered by the Charter to Victoria could be enhanced by strengthening the Charter in three key aspects.

**A direct means of holding government accountable through the courts**
The Charter should be amended to provide a direct means for individuals to access the courts in order to hold government accountable to its human rights obligations. The indirect means that currently exist in the Charter is limited and difficult to apply. Directly enforceable human rights standards will enhance government's compliance with its human rights obligations by strengthening the incentive for compliance and clarifying when an individual can access the courts in the event of non-compliance.
Clarifying and strengthening the powers of the Supreme Court in relation to legislation that is inconsistent with human rights

Sections 32 and 36 of the Charter which empower the Supreme Court to issue declarations of incompatibility should be repealed and replaced with a provision which states that:

- by way of express provision, Parliament may enact legislation which is valid and operates notwithstanding any incompatibility with human rights;
- absent such express provision, a law is not to be construed and applied in a way which abrogates, abridges or infringes human rights; and
- any law which cannot be so construed and applied is invalid to the extent of that inconsistency.

Strengthening the protection of economic, social and cultural rights

The Charter should protect all human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Economic social and cultural rights are particularly important to our clients because people facing social and financial disadvantage need their basic housing, health and income needs to be met before they can meaningfully enjoy many of the civil and political rights currently contained in the Charter. The realisation and enjoyment of all human rights starts with the fostering of community, government and public service cultures that are familiar with and respectful of rights. A clearly articulated domestic law is the most effective catalyst for working towards these goals. Economic, social and cultural rights are capable of legal enforceability and should be legally enforceable. Enforceability acts as both an important incentive for compliance and a measure of last resort.

Other improvements

We suggest a range of other improvements in this submission including in relation to improving statements of compatibility, the role of the Scrutiny of Acts and Regulations Committee and removing the intervention power of the Attorney-General.
1. Should additional rights be included in the Charter, including economic, social, cultural, children’s, women’s and self determination rights?

The Charter should include all rights contained in the ICCPR and the ICESCR (which includes the right to self-determination). Should the Charter protect all rights contained under the ICCPR and the ICESCR, it may be strictly unnecessary to articulate the additional rights contained in other core human rights treaties. However, these treaties may assist in the interpretation of relevant human rights and accordingly it is important that the Charter continue to expressly allow international law to be considered in interpreting relevant statutory provisions (section 32(2)). It is also important in this regard that section 5 of the Charter be retained. This section clarifies that the inclusion of a human right in the Charter does not abrogate or limit a human right arising under any other law.

Why economic social and cultural rights are important

Economic, social and cultural (ESC) rights matter most to Australians because they are the rights at greatest risk. For CLC clients - some of the most disadvantaged members of our community - ESC rights are particularly important. People facing social and financial disadvantage need their basic housing, health and income needs to be met before they can meaningfully enjoy many of the civil and political rights currently contained in the Charter. For example:

- If a person is unable to access adequate food, clothing and housing - ESC rights - it becomes extremely difficult for that person to meaningfully participate in public life - a civil and political right. When someone has to focus on where they will be sleeping each night and where their next meal will come from, this leaves little or no time to engage with lawmakers regarding how their interests are affected by government action.

- The obligation to protect the right to life of a woman who is subjected to domestic violence - a civil and political right - requires government to ensure that if that woman flees the relationship, she is able to obtain adequate housing - an ESC right.

- Children with disability frequently face barriers to accessing an adequate education, caring arrangements and healthcare, in circumstances which often engage both ESC rights and the civil and political right to equality. Without appropriate education and caring arrangements, children with disability will miss out on almost every other opportunity for participation in our society, including the right to work. Family members also experience significant social isolation if caring support is not available. As primary carers, family members have limited capacity to enter the workforce, leading to a cycle of disadvantage for their family, particularly in light of the high cost needs of their child with disability.

Why ESC rights should be included in the Charter

The realisation and enjoyment of all human rights starts with the fostering of community, government and public service cultures that are familiar with and respectful of rights. A clearly articulated domestic law is the most effective catalyst for working towards these goals. This has proven to be the case with other laws aimed at encouraging change in community and government practices, such as antidiscrimination laws. For the community, the inclusion of ESC rights in the Charter will provide an accessible framework within which ESC rights education and promotion can take place in Victoria. For lawmakers, an essential function of the Charter is to encourage early and ongoing consideration of human rights issues in policy and legislative development. ESC rights should be at the forefront of this
process (as recognised by the National Human Rights Consultation). For public authorities, the inclusion of ESC rights will provide a clear statement from government about the rights that the community can expect to enjoy. Because that statement will be applicable to every public authority delivering services to the community, it will encourage greater consistency across service standards and service delivery.

**ESC rights are capable of legal enforceability**

The Federation strongly supports the view that ESC rights, like civil and political rights, are capable of being justiciable and should be justiciable. A common concern with making ESC rights justiciable is that it will result in courts making decisions about the allocation of public money. A misconceived argument exists that ESC rights predominantly entail “positive” obligations (which require governments to take action, and thus put resources towards upholding ESC rights); whereas civil and political rights predominantly entail “negative” obligations (which require governments to refrain from taking action that interferes with those rights). This sharp distinction is overstated because both sets of rights entail positive and negative obligations which can entail the allocation of resources in upholding rights. The main legal issue regarding the justiciability of ESC rights relates to how the rights should be framed, and what remedial powers should be given to the courts in relation to ESC rights. That is, the extent to which courts could rule on the allocation of public money would depend on the particular legislative model adopted.

For example, the South African Bill of Rights contains both civil and political rights and ESC rights. The rights contained in the South African Bill of Rights are subject to a general limitations clause (section 36) which is framed similarly to section 7(2) of the Victorian Charter. The ESC rights contained in the South African Bill of Rights – the right to housing, the right to healthcare, food, water and social security - are each subject to a sub-clause which “establishes and delimits the scope of the positive obligation imposed upon the state” in upholding ESC rights. In relation to those rights, the state is required to take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of those rights.”

South African judicial decisions regarding ESC rights demonstrate how a reasonableness test can be framed so it does not require courts to make decisions regarding the allocation of public money (even though judicial decisions may lead to government reallocating public money in light of the court’s orders, just as occurs when courts make orders upholding civil and political rights). The following principles have been established through South African ESC rights cases:

- A court considering reasonableness “will not enquire [into] whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable”.
- Where reasonable measures are found not to have been taken to protect ESC rights, the precise contours and content of the alternative measures to be adopted are primarily a matter for the legislature and the executive.
- The South African Bill of Rights “contemplates...a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject

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11. Ibid 385 (15.3).
12. Memorandum of Advice from Peter Hands QC, Debbie Mortimer SC, Associate Professor Kristian Walker and Groome Hill on the justicability of social and economic rights under a Commonwealth Human Rights Act [2.2]
13. Ibid [26].
14. Ibid [27].
15. The Human Rights Law Resource Centre, A Human Rights Act for all Australians, Submission to the National Human Rights Consultation on the protection and promotion of human rights in Australia, [22] [70]
16. The Republic of South Africa v Grobbelaar 2001 (1) 46 [21].
17. South African Bill of Rights as 26 and 27.
18. The Republic of South Africa v Grobbelaar 2001 (1) 46 [41].
19. Ibid at [41], cited by Debbie Mortimer SC et al, above n 12, [30.2].
the reasonableness of those measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets.\(^{20}\)

**ESC rights should be legally enforceable**

Legal enforceability is critical to promoting the implementation of ESC rights. Without legal enforceability, government agencies may avoid committing the time and resources towards implementing rights compliant service delivery and may avoid human rights compliant decisions in particular circumstances. This has proven to be the case with the introduction of other laws aimed at encouraging change in both community and government practices, such as anti-discrimination laws. It is essential that individuals be able to rely on enforceable Charter rights when attempting to negotiate fairer outcomes. Charter compliant outcomes achieved through individual negotiations can greatly assist in identifying the need for service wide changes. Experiences of our member centres demonstrate that a vulnerable person attempting to negotiate with a public authority on the basis of non-enforceable standards can too easily be ignored. When this occurs, not only does the individual suffer, but the public authority misses an important opportunity to identify ways in which the delivery of services could be improved for the benefit of all. This is demonstrated by the case study below.

**Case Study - Access to healthcare for asylum seeker - the right to life; protection from cruel, inhumane or degrading treatment; right to non discrimination; right to security of the person**

On the same day as receiving advocacy training on how to use the Charter, a community nurse who had been trying to assist a very ill asylum seeker access a hospital used the Charter to remedy the refused treatment. The hospital was refusing treatment on the basis the asylum seeker could not afford to pay and did not have a Health Care Card. Whilst a more senior person had assured the nurse the asylum seeker would be able to have access to the hospital’s health service, when it came to receiving access it was indicated the service would be denied unless the patient paid. On questioning the staff member on whether this ‘contravened the Charter’, the staff member said she did not know. The community nurse then sent an email to senior staff at the hospital raising the Charter rights. On receiving her email a further email from the hospital was sent out to all hospital staff in Victoria. This email directed staff to follow a DHS directive stating all asylum seekers and refugees were to receive free services from the hospitals.\(^{21}\)

**An appropriate limitation clause for ESC rights - progressive realisation**

ESC rights should be subject to a limitation clause that establishes and defines the scope of the positive obligation imposed upon the State in upholding ESC rights. This limitation clause should require public authorities to take reasonable steps to ensure the progressive realisation of the relevant ESC right within available resources. Statements of Compatibility should also be prepared against the limitation clause. The Charter could set out a non-exhaustive list of factors to be taken into account when deciding whether reasonable measures have been taken to uphold or consider ESC rights. A report by Hilary Charlesworth and Andrew Byrnes (and others) of the Australian Research Council Linkage Project, considers the inclusion of ESC rights in the Human Rights Act 2004.\(^{22}\) The authors propose a model clause 28A setting out a positive duty to take reasonable measures to progressively realise ESC rights.\(^{23}\) We endorse this drafting:

\(^{20}\) Minister of Health and Treatment Action Campaign 2002 (5) SA 721 at [37]–[38]; cited by Debbie Mortimer SC et al, above n 12, at [30.3].


\(^{22}\) Hilary Charlesworth, Andrew Byrnes, Remu Musgrave and Katherine Young, Australian Capital Territory, Economic Social and Cultural Rights Research Project, Australian Research Council Linkage Project L0988167 (September 2010) (ACT ESCR Research Project).

\(^{23}\) In the ACT ESCR Research Project, model clauses of individual ESC rights specify which aspects of each right are immediately enforceable; see the Model Bill at 135 - 136.
Model clause 28A

(1) In deciding whether reasonable measures have been taken, all relevant factors must be considered, including the following:
(a) the availability of Government resources;
(b) whether the measures are likely to assist in progressively achieving the full realisation of the economic, social or cultural right;
(c) whether the measures include emergency relief for people whose needs are urgent;
(d) whether the public was appropriately consulted and effectively informed about the measures;
(e) that a wide range of measures may be taken to progressively achieve the full realisation of the economic, social or cultural right.

These non-exhaustive criteria (a) – (e) have developed through jurisprudence regarding ESC rights under the South African Bill of Rights.24

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<tr>
<th>Recommendation 1 - protecting economic, social and cultural rights in the Charter</th>
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<td>Public authorities should be obliged to take reasonable steps to ensure the progressive realisation of the relevant ESC right within available resources. The reasonableness of administrative action in this regard should be subject to judicial review. The introduction of enforceable ESC rights in the Charter should allow sufficient time for public agencies to prepare for compliance.</td>
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24 See the ACT ESCR Research Project, above n 22 (7.41).
2. Should the right to self-determination be included in the Charter?

The right to self-determination should be included in the Charter. We refer to the submission of our member centre, the Victorian Aboriginal Legal Service, on this term of reference.

3. Should there be mandatory regular auditing of public authorities to assess compliance with human rights?

The Charter should mandate regular reporting by public authorities on steps they have taken to monitor and evaluate their processes for ensuring that their decisions and actions are compatible with human rights. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) should be granted an own motion power to inquire into and audit the human rights compliance of a public authority's policies, programs and practices and make recommendations for greater Charter compliance.

4. Should the Charter 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?

Currently, the Charter provides a limited, indirect means to enforce rights through section 39. The drafting of section 39 is widely acknowledged to be too complex and difficult to apply. The requirement to have an existing cause of action prior to putting human rights concerns before a court may prohibit those experiencing breaches of their human rights from seeking relief.

As a matter of principle and practicality, the Charter should be amended to provide a direct, stand-alone means for individuals to access the courts in order to hold government accountable to its human rights obligations. Directly enforceable human rights standards will enhance government’s compliance with its human rights obligations by strengthening the incentive for compliance and clarifying when an individual can access the courts in the event of non-compliance.

Recommendation 2 - A direct means of holding government accountable through the courts

- Breach of Charter rights should comprise a stand-alone cause of action;
- Individuals should be able to lodge a complaint with the VEOHRC which could investigate the matter and facilitate alternative dispute resolution between the parties;
- Courts should be able to exercise powers to award appropriate remedies such as making a declaration, imposing an injunction or awarding damages;
- If an individual has lodged a complaint with the VEOHRC, the Commissioner should be empowered to initiate proceedings on that individual’s behalf. However, this should be in addition to the right of the individual to initiate proceedings on their own behalf.
5. The Effects of the Charter

A. The development and drafting of statutory provisions

The Charter has played an important role in ensuring that all new laws are assessed against fundamental human rights standards. We refer to the submission of our member centre, the PILCH Homeless Persons Legal Clinic (HPLC) at 5.2, and the discussion of the police powers legislation in particular. We provide further case studies below based on our work.

**Case Study – Promoting the right to life in coronial law reform**

For over two decades, several CLCs have worked closely with the families and friends of persons whose deaths have been investigated by Coroners, supporting and representing them through the inquest process. Our law reform advocacy in this area aims to enhance the coronial process so that:

- families may fully, effectively and genuinely participate in the coronial process; and
- preventable deaths are avoided by learning from past deaths.

Following advocacy by the Federation, CLCs, and other coronial system participants, the Victorian Parliament’s Law Reform Committee reviewed the *Coroners Act 1985* (Vic). The Attorney-General responded to the Committee’s final report by introducing the Coroner’s Bill 2008. The Federation welcomed a range of improvements in the Bill, yet the Bill ignored, or only partly implemented, key recommendations of the Committee’s Final Report. In particular, there was no requirement for relevant government agencies to respond to coronial recommendations directed towards them. Agencies could ignore or adopt them as they wanted without having to inform the court, the deceased’s family or the public, of the response.

Accordingly, the Federation pushed for amendments to the Bill, providing a detailed submission to MPs outlining our concerns and suggested amendments. We also met with the Attorney-General’s advisers, the Shadow Attorney-General, and raised with the Greens. The Federation framed its advocacy and written submissions around the right to life contained in section 9 of the Charter.

**Relevance of the Charter**

The right to life is central to coronial processes. It requires that families of the deceased be fully informed and empowered to participate in the coronial process with genuine access to legal representation at inquests. It requires that the coronial process take place in an accountable and genuinely preventative framework.

**Response from government**

The Federation’s initiatives resulted in important amendments being incorporated into the Coroner’s Act 2008 (Vic). The highlight of these amendments was a new requirement that if a Coroner makes recommendations to a particular Minister, statutory authority or entity, they must now respond within three months outlining actions that will be taken in response to the recommendations. The response must be published on the internet and be provided to any interested person. This is a substantial gain for families and for the death-prevention focus of inquests. In particular it reflects important aspects of the right to life contained in section 9 of the Charter.

**The impact of the Charter**

The Charter strengthened the focus of the legislation and the parliamentary debate on the right to life. The Statement of Compatibility to the Coroner’s Bill 2008 noted that “...is the most significant

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26 See Federation of Community Legal Centres: Letter to Legislative Assembly on the Coroners Bill 2008; Letter on the Coroners Bill 2008 – Scope of the Coroners Court as a Public Authority; Letter to Associate to the State Coroner – draft Coroners Court Rule; and Letter to Department of Justice – draft Coroners Regulations available at <http://www.communitylaw.org.au/lrs.php#Coroners & inquests>
investigative mechanism into reportable and reviewable deaths, the coronial system gives effect to "the right to life". The changes we sought centred directly on the right to life and our Charter-based advocacy informed the parliamentary debate which led to the Bill's amendments.

Case Study - Corrections Regulations 2009

The Corrections Regulations 1998 (Vic) were replaced in April 2009 by the Corrections Regulations 2009 (Vic). In drawing up the 2009 Regulations, Corrections Victoria consulted with stakeholders on issues including the compatibility of the 1998 Regulations with the Charter. The Federation, together with the HRLC, met with Corrections Victoria and made submissions to the review process.

Relevance of the Charter

The Federation and the HRLC argued for a range of improvements to be included in the 2009 Regulations to ensure their compatibility with the Charter, including in relation to use of firearms on escaping prisoners, use of restraints, prison placement decisions, use of segregation and strip searching of prisoners. Our submissions engaged a number of Charter rights including the right to humane treatment when deprived of liberty, the right to life and the right to protection from cruel, inhuman or degrading treatment.

Response from the Government

The 2009 Regulations contain a range of improved human rights protections around the use of restraints, prison placement and the strip searching of prisoners. For example, the Regulations now require that a prison Governor must believe on reasonable grounds that a strip search is necessary before authorising the search, and the Governor must keep a register containing information about strip searches that are conducted, including the reason for the search. The Regulations now list a range of factors that must be taken into account in deciding where to place a prisoner including any medical conditions or disability, family issues or any relevant cultural background.

The Impact of the Charter

The existence of the Charter resulted in important human rights safeguards being included in the 2009 Regulations. The 2009 Regulations would not have been improved to the extent they were without the Charter. The Charter was expressly referred to as one of five issues driving the changes to the Regulations. The Regulatory Impact Statement on the proposed regulations stated "Many of these changes are proposed due to the change in the regulatory environment as a result of the operation of the Charter and the input of stakeholders into [their] development...". The Charter also provided a framework for us to engage with Corrections Victoria on how to protect human rights in the Regulations. A number of improvements would not have been made without our contribution to the review process.

B. The consideration of statutory provisions by Parliament

It is important that Parliament's consideration of the human rights impact of laws occurs consistently and transparently. Two Charter processes have, overall, proven to be important in this regard, being Statements of Compatibility (SOC) and the role of the Scrutiny of Acts and Regulations Committee (SARC) in reviewing all Bills and statutory rules for compliance with the Victorian Charter and providing a report to Parliament regarding its findings (SARC Report).

**Statements of Compatibility**

Statements of Compatibility are important because they provide a consistent framework for:
- encouraging early and ongoing consideration of human rights issues in policy and legislative development;\(^{26}\)
- enhancing Parliament's capacity to scrutinise a proposed law for human rights compliance; and
- increasing transparency by demonstrating to the community how the government has weighed competing interests in developing laws. Transparency promotes community confidence in laws that impact on their human rights.

**Recommendation 3 – Improving Statements of Compatibility**

- As a matter of practice, SOCs should be thorough, on point, and informed by relevant national and international jurisprudence.
- Because amendments to a Bill may impact human rights, the Charter should require additional SOCs to be tabled where amendments are made to a Bill prior to it passing to the next house.
- Except in exceptional circumstances, a Bill should not proceed to the second reading debate until SARC has tabled its Report on that Bill (as occurred in the case of the Sentencing Amendment Bill 2010).\(^{27}\) The Charter should be amended to reflect this.
- The Charter should require SOCs to include the view of the Attorney-General as to whether a particular agency established pursuant to a State/Commonwealth joint scheme, is a "public authority" for the purpose of the Charter. Joint Schemes have given rise to some ambiguity as to whether they are "public authorities" for the purpose of the Charter.\(^{28}\)
- Parliament may have previously passed a law that adopts a law of another State or of the Commonwealth; and any amendment to that law, as a law of Victoria. The Charter should require a SOC to be tabled by the Responsible Minister or Attorney General in relation to such laws and any amendments made to those laws, and SARC should be required to report on the Charter compatibility of those laws.\(^{29}\)

**The role of SARC**

SARC Reports are important because they enhance Parliament’s ability to scrutinise Bills. SARC Reports also increase transparency by providing a public statement on the potential human rights impact of proposed laws.

The SARC process currently allows individuals and organisations to make submissions to SARC. SARC publishes submissions it receives on its website. SARC can refer to submissions in its report but is not required to do so. The SARC process underpins a crucial aspect of the ‘dialogue’ Charter model by allowing for a dialogue to occur between Parliament and the community on human rights issues. Submissions from the community communicate the actual or likely human rights impact of Bills on the ground and assist SARC to properly fulfil its duty to assess a Bill’s compatibility with human rights. However, the timing of the SARC process needs to be improved to facilitate this dialogue.


\(^{27}\) The Act received royal assent on 10 October 2010 and SARC reported in the first Alert Digest of 2011.


\(^{29}\) See SARC’s report on the National Gas (Victoria) Bill 2009 (Alert Digest No. 6 of 2008).
Ideally, Bills of significant public interest would be the subject of proper community consultation, including the release of an exposure draft, prior to being put before Parliament. Without prior consultation, the current timing around the SARC process makes it very difficult for individuals and organisations to make submissions in enough time to inform SARC’s report (and thus the second reading debate). We understand that the second reading speech for a Bill is usually delivered on the Thursday of a sitting week and that SARC usually reports on the Tuesday of the next sitting week. This can leave SARC with as little as seven business days to prepare its report; and community members with maybe four or five business days to make a submission in enough time for SARC to consider those submissions for the purpose of its report. Rushing Bills of significant public interest through Parliament undermines one of the important functions of the Charter in enhancing dialogue between the community and parliament.

By way of example, the introduction of the Summary Offences and Control of Weapons Amendment Bill 2010 prompted 33 organisations and individuals to provide written submissions to SARC. Most organisations and individuals expressed serious concern about the lack of community consultation.

To enhance SARC’s capacity to fulfill its statutory duty to report on whether the Bill is incompatible with human rights, SARC should be able to recommend an additional adjournment period to allow it to receive and consider submissions from the community.

**Recommendation 4: Empowering SARC to recommend a further adjournment period**

The Charter should be amended to empower SARC to recommend that the two week adjournment period be extended for another two weeks where Bills raise matters of significant public importance. Ministers should be empowered to reject that recommendation only in exceptional circumstances, and must be required to table a statement setting out those exceptional circumstances. During the extended adjournment period, SARC should accept further submissions on the relevant Bill and provide a report to table in Parliament summarising the community’s feedback, prior to the second reading debate.
C. The provision of services, and the performance of other functions, by public authorities

The Charter is still in its early stages of operation and four years is a short time in which to assess the impact of a law aimed at changing attitudes and practices. However, the VEOHRC reports that "the time that public authorities have invested in building human rights principles into their work is now beginning to make a genuine difference in the business of government and in the lives of Victorians". Based on the experiences of our member centres and our research, we can further attest to the VEOHRC’s findings.

Experience of our member centres

Our member community legal centres, the HPLC, and Eastern Community Legal Centre, have both made submissions to the review and we understand that a number of other community legal centres will be making submissions also. These organisations work with some of the most disadvantaged members of our community and are well placed to report on the Charter’s impact on the provision of social services. We note that the HPLC reports that

[b]ased on our direct experience, the HPLC can say with confidence that the formal legal protection of human rights in Victoria has brought about a gradual but noticeable improvement in the way decisions are made by public authorities.

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Case study - Promoting human rights compliant CLC services

The Federation obtained legal advice that it is unlikely that CLCs are required by law to comply with the Charter. However, the Federation believes that CLCs should aim to be Charter compliant because it is consistent with the CLC ethos to do so. In 2008 the Federation released a guide titled "Complying with the Charter of Human Rights and Responsibilities Act 2006 - A Community Legal Centre Guide (CLC Charter Compliance Guide). The guide focuses on the rights to a fair hearing and equality and helps centres work through difficult service delivery issues in the context of high demand and limited resources. The Federation found the process of developing the guide incredibly useful in resolving difficult questions of how to best deliver CLC services to the community.

We recently conducted a survey of our member centres on Charter compliance and the utility of the CLC Charter Compliance Guide. Twenty of the 50 Victorian CLCs responded to the survey. The survey revealed that 50% of respondents use the CLC Charter Compliance Guide, and 90% of those respondents said the CLC Charter Compliance Guide helps their organisation to deliver better services. 64% agreed specifically that it helped promote more accessible services and more flexible human-focused services.

Case Study - Promoting the participation of victims in the Bushfires Royal Commission

The Federation was one of the partners in Bushfire Legal Help, a coalition of legal organisations providing free legal assistance and information to victims of the 2009 Black Saturday bushfires. The Federation was concerned to ensure that victims of the fires were afforded a proper opportunity to participate effectively in the Bushfires Royal Commission, particularly when all applications for permission to appear before the Royal Commission by individuals and community groups affected by the fires were denied. We were also concerned about the adequacy of information being provided to victims about the Royal Commission’s processes.

Relevance of the Charter

The Charter guarantees the right to life. International human rights jurisprudence, particularly from the United Kingdom, confirms that the right to life imposes obligations on the state to:

- take appropriate steps to protect life;

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33 Ibid.
34 Homeless Persons Legal Clinic, Chartering the Right Course, Submission to the Inquiry into the Charter of Human Rights and Responsibilities, above n 2, 2 [1.3].
• conduct a proper independent investigation when there is evidence that the state may have
failed in its obligation to protect life;
• ensure that there is a sufficient element of public scrutiny in the investigation; and
• ensure that the next of kin or the family are involved to an appropriate extent in the
investigation.

Relying on the right to life, the Federation and its Bushfire Legal Help partners wrote to and met
with the Royal Commission to advocate for increased victim participation in its processes.

Response from the Royal Commission
Following our advocacy, the Royal Commission made a number of changes to improve the partici-
pation of victims in its processes, including:
• preparing a guide to writing submissions;
• providing information about the Bushfire Legal Help service on its website to promote access to
legal advice for victims on the Royal Commission and other issues;
• clarifying that submissions received after the initial deadline could still be used for its final
report;
• providing improved information about how the Royal Commission worked and how individuals
could participate in the Commission; and
• most importantly, interviewing and obtaining witness statements from a number of victims of
the fires and ensuring that on most hearing days, a victim of the fires gave evidence to the
Commission.

After the Interim Report was delivered, the Commission also granted limited permission to appear
to individuals who were involved in the class action litigation seeking compensation from electricity
companies in connection with the fires.

The Impact of the Charter
It appears that our advocacy had a direct impact on the Royal Commission’s engagement with vic-
tims of the fires. Our advocacy was strengthened by the existence of the Charter and the obligations
it imposed on the Royal Commission.

Case Study – Promoting the humane treatment of people detained in police cells
Police cells are at the frontier of potential human rights abuses. The criminalisation of public
drunkenness in Victoria results in over 20,000 people each year being taken into police custody for
being drunk.36 Drunk, drug affected and mentally ill people in police cells provides a recipe for mis-
treatment and deaths in custody unless they are managed properly according to human rights
standards. The Federation recently sought information from Victorian Police about initiatives under-
taken for the purpose of Charter compliance in police cells.

Background
Prior to the Charter coming into operation, a joint Office of Police Integrity (OPI) and Ombudsman
Victoria investigation was conducted into conditions for people in police cells and prisons. The In-
vestigation found amongst other things:
• unsatisfactory physical conditions and design faults, including hanging points in older police
   cell complexes;
• the absence of consistent training in duty of care and custodial role of watch-house staff; and
• the absence of systemic monitoring of conditions in police cells.

Since the enactment of the Charter, the OPI has held a statutory duty to ensure that members of
Victorian Police have regard to the human rights set out in the Charter.37 In the 2008 OPI Annual

37 Police Integrity Act 2006 (Vic) s 8(d).
Report, the treatment of people in police custody was identified as a key risk for potential human rights infringements. In December 2008, the OPI launched a set of standards for police cells based on human rights principles. The toolkit was developed to assist Victoria Police to develop uniform custodial practices, and to further ensure police have appropriate regard to human rights consistent with the Charter.

In 2010, the OPI provided a report titled Update on conditions in Victoria Police Cells. The report noted particular instances of progress, but concluded that much work remained to be done to achieve consistent human rights-compliant practices across all police cells. It acknowledged that the Victoria Police Human Rights Project is working to address human rights in police cells. The Federation wrote to Victoria Police requesting information undertaken through the Human Rights Project.

**Victoria Police – Person in Custody Review**

Victoria Police reported to us that a “Persons in Custody Review” had recently begun reviewing relevant Victoria Police policies and guidelines, undertaking a state-wide assessment of all Victorian detention facilities, and a state-wide recategorization of all detention facilities as either Police Cells (suitable for multi-day detention) or Holding Rooms (suitable for short-term detention up to 12 hours).

Victoria Police noted that the review team produced revised policies that align with human rights standards, to be applied across all police cells in Victoria. Key reforms include requirements for:

- drinking water to be installed in all detention facilities;
- the removal of bars and hanging points in all facilities;
- professional and personal visitation;
- appropriate exercise yards and seating;
- overnight light dimming; and
- natural light and fresh air exercise yards at all police cells.

Physical assessments of all Victorian Police stations were undertaken. Particular facilities were identified for either long-term replacement or specific upgrades such as improvements to CCTV, installation of drinking water, smoke detectors, improved visitor facilities and duress alarms. A number of older facilities are proposed to be formally closed as a result of the assessment. These upgrades are set to be undertaken over the next 12-18 months.

**Victoria Police Human Rights Project**

The Victoria Police Human Rights Project includes an initiative to facilitate compliance with the Optional Protocol to the Convention Against Torture and relevant international human rights practice standards for law enforcement. The Federation was provided with a copy of an audit undertaken at Werribee Police Station. The audit required police stations to:

- note the policies in place for human rights compliance at the Station;
- provide reasoning for the practice adopted;
- note whether the policy was consistent with the Victoria Police Policy; and
- provide a summary of the necessity for the policy on the ground.

The Werribee Police Station’s audit noted that it has a policy to treat detainees with respect and dignity, and that Police members state that they experience “greater compliance from detainees when this is the case”. The audit notes other potential risks for non-compliance with human rights.

Phase two of the project will focus on a human rights risk assessment of station procedures and management as well as transport of persons in custody.

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38 Office of Police Integrity, Annual Report, Financial year ending 30 June 2009, 44.
Our analysis

Many of the measures undertaken under the Victoria Police Human Rights Project and Persons in Custody Review are simple measures, undertaken for the purpose of human rights compliance, which can save lives. Obvious examples include the removal of hanging points, and the installation of smoke detectors and duress alarms in every cell. The audit of Werribee Police Station demonstrates that a human rights based approach can benefit both detainees and police due to increased compliance and cooperation.

The Human Rights Project and Custody Review is clearly linked to the operation of the Charter:

- Victoria Police reported to us that the Human Rights Project was established as part of "a broad Victorian Government implementation of the Charter of Human Rights and Responsibilities Act 2006".
- Victoria Police reported to us that the primary role of the Human Rights Unit is "to assist Victoria Police in the implementation of legal requirements under the Charter, and facilitate the transition across Victoria Police practices by embedding human rights principles into all work areas, projects, policies, practices and educational material".
- The OPI's oversight and initiatives in relation to police cells have been underscored by the OPI's statutory duty to ensure that members of Victoria Police have regard to the human rights set out in the Charter.39

Victoria Police continues to support the Charter, stating in its submission to the National Human Rights Consultation:

"Victoria Police believes that robust domestic human rights legislation provides 'on the ground' policing practitioners with overarching mechanisms to integrate the aspirations articulated in international human rights instruments into their work practices;"40

and

"While many of the rights in the Victorian Charter are protected through other domestic legislation, the articulation of human rights protections in Victoria in a single piece of legislation provides a clear standard for Victoria Police to hold itself accountable against."41

These important improvements to the management of police cells in Victoria will promote the humane treatment of police detainees and will in turn help to reduce self-harm incidents, deaths in custody, complaints to police watchdog bodies, litigation and conflict between police and detainees. It is unlikely that these changes would have been implemented in the absence of the Charter. Victoria Police's Human Rights Project requires ongoing approval and funding allocation from Victoria Police and the Charter provides an important incentive and justification for undertaking such work, as well as the framework for executing it systematically.

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39 See the Police Regulation Act 1958 s 1028A(o) (version 122); Police Integrity Act 2008 (Vic) s 8(d).
40 Victoria Police, Submission to the National Human Rights Consultation (2009), 4.
41 ibid 7.
D. Litigation and the roles and functioning of courts and tribunals

The role of courts and tribunals - Section 32(1) of the Charter

Rules of statutory interpretation relevant to the protection of human rights have developed at common law over many years. An important example is the interpretive presumption that Parliament does not intend to override human rights in laws, unless such an intention is clearly expressed. Another example is how the ratification of a convention (that has not been incorporated as a law of Australia), may in some circumstances bear upon an individual's procedural rights by creating a "legitimate expectation" that the convention will be taken into account by a government decision maker exercising discretion.33

Section 32(1) of the Charter strengthens these common law presumptions to help ensure that human rights are consistently taken into account in the interpretation of laws. Importantly, section 32(1) operates so that human rights can be taken into account in a manner that upholds parliament's intention behind enacting a particular law.

Holding government accountable to its human rights obligations through litigation

In its submission to the National Human Rights Consultation, Telstra noted that:

It is regrettably rare that Charters (or Bills of Rights) are described as what they are - a last resort for the underprivileged, the disadvantaged, the marginalised and poor, to be pointed to when basic human dignity is denied.44

For our client base, litigation represents an important measure of last resort to guard against the denial of rights. We refer to the submission of our member centre, the HPLC, at 5.3, where they explain the importance of litigation as a measure of last resort to their vulnerable client base, and provide eight case studies on point. We provide an additional case study below in the context of mental health and the right to a fair hearing. The applicant was represented by the Mental Health Legal Centre, and the HRLC appeared as amicus.

Case Study – Right to a Fair Hearing

Kracke v Mental Health Review Board & Ors (General) [2009] VCAT 646

Mr Kracke was subject to both an involuntary treatment order (ITO) and community treatment order (CTO) under the Mental Health Act 1986. The orders for both treatments had not been reviewed for over two years and one year respectively, despite the Act requiring ITO's to be reviewed within 12 months and CTO’s to be reviewed within 8 weeks. VCAT made a declaration that the Mental Health Review Board breached Mr Kracke's human right to a fair hearing under section 24(1) of the Charter by failing to conduct the reviews of his involuntary and community treatment orders within a reasonable time.

At a minimum, VCAT's decision drew widespread attention to the importance of the timely review of involuntary treatment orders. In 2010 the Victorian Government undertook a review of the Mental Health Act 1986. In the explanatory guide to the exposure draft, it was noted that under the draft Bill "the membership, administration and procedures of the Tribunal have been clarified consistent with other quasi judicial bodies, the Charter right to a fair hearing, and the decision in Kracke v Mental Health Review Board & Ors (General) [2009] VCAT 646. The Exposure Draft Bill empowers the Tribunal to issue rules which should lead to practice improvements."

35 Telstra, Submission to the National Human Rights Consultation, In Support of a Human Rights Charter for Australia, 8.
Recommendation 5 - Clarifying and strengthening the powers of the Supreme Court in relation to legislation that is inconsistent with human rights

The principle contained in section 32(1) should be maintained, but expressed in a manner that strengthens the dialogue model. We recommend that sections 32 and 36 (empowering the Supreme Court to issue declarations of incompatibility) be repealed and replaced with a provision which states that:

- By way of express provision, Parliament may enact legislation which is valid and operates notwithstanding any incompatibility with human rights.
- Absent such express provision, a law is not to be construed and applied in a way which abrogates, abridges or infringes human rights; and
- Any law which cannot be so construed and applied is invalid to the extent of that inconsistency.

Alternatively, if the Government does not want to allow courts to invalidate laws under the Charter, we recommend that the override declaration process in section 31 be repealed. Under section 31(6), if Parliament makes an override declaration in relation to a particular law, this removes the duty under section 32(1) to interpret that law, as far as possible, consistently with human rights. If incompatible laws are to remain valid, it is particularly important to maintain the duty to interpret laws compatibly with human rights as far as it is possible to do so.

The function of courts and tribunals - statutory intervention powers

There is scope to consider streamlining Charter litigation by amending the statutory intervention powers.

Attorney-General

The Attorney-General's statutory intervention powers could be removed. The State - via the relevant public authority - is already a part of Charter proceedings. If the statutory intervention powers are removed, the Attorney-General will still maintain the right to apply for amicus intervention. Alternatively, the decision whether or not to remove these powers could be deferred until the eight year review.

VEOHRC

The VEOHRC has played an important role in litigation because it is an expert body capable of informing the court on a new area of law. Once the Charter has been in operation for a longer period of time, it may no longer be necessary for the VEOHRC to have a statutory intervention power, instead maintaining the right to apply for amicus intervention. The decision whether or not to remove these powers should be addressed under the eight year review of the Charter.
E. The availability to Victorians of accessible, just and timely remedies for infringements of rights

Importance of judicial remedies

Important progress can be made towards the enjoyment of human rights through the development of Charter compliant service standards and practices on the ground. However, the role of the courts in adjudicating human rights complaints is also crucial to the protection of human rights for two main reasons.

First, the fact that individuals can seek redress through the courts is an important incentive for all parties to attempt to negotiate a fair and balanced outcome in the circumstances. If legal remedies were unavailable, the incentive to deliver Charter compliant services would be greatly reduced. Secondly, courts and tribunals provide an essential avenue of redress for individuals whose concerns have been ignored or the subject of unfair delay. Access to the courts is particularly crucial where urgent action is required to protect a particular right.

Case Study – the importance of enforceable obligations

A female prisoner who urgently requested permission from Corrections Victoria to continue the IVF treatment that she had been undergoing for 18 months prior to her incarceration, did not receive any response to her request. After 3 months of waiting she sought legal assistance which prompted a response. It was only the engagement of lawyers that prompted a response from Corrections Victoria to her urgent request. The final decision on her application for a permit to attend IVF appointments was not made until the day before judgement on her interlocutory proceedings was due to be handed down. It was only the impending interlocutory decision that prompted the decision to be made.

As set out above, the Charter provides a limited, indirect means of challenging an infringement of rights in the courts. This indirect means has been an important improvement on the situation existing before the Charter. However, as set out in section 4, the ability to obtain a just and timely remedy for the infringement of human rights should be strengthened by the introduction of a direct stand-alone cause of action.

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

As set out above, the experiences of our member CLCs, and our own work and research, strongly indicate that the Charter is improving the lives of disadvantaged Victorians. The Charter’s greatest impact has come from its requirement that government agencies consider and comply with human rights. This requirement is producing better, fairer and more rational outcomes from government service delivery. Improved, more human-focused decision making is in itself a major advance brought about by the Charter which should be celebrated. The tangible outcomes arising from these improvements will be increasingly evident in coming years.

**Economic costs and benefits**

Caution must be exercised when conducting an economic cost-benefit analysis of human rights protections. Protection of human rights should be a social given and a legal obligation and should not need to be justified on an economic basis. However, an analysis of the economic costs and benefits of human rights protection can assist in evaluating the impact of particular protections and may assist in determining the most effective allocation of resources to protect human rights.

As the Charter is still in its early stages of operation, many of the long term economic benefits to flow from Charter compliant practices will not be measurable for the purpose of this review. Our research revealed a lack of publicly available information about the economic costs and benefits of the Charter for public authorities to date. As noted above under term of reference 3, the Charter should mandate regular reporting by public authorities on steps they have taken to monitor and evaluate their processes for Charter compliance. Reporting should include the costs and benefits of Charter compliance (both economic and non-economic).

Complying with the Charter necessarily involves economic costs to update policies, undertake training and reform service delivery. Charter compliance will result in improved, more targeted services. Detailed research and analysis would be needed to assess the flow of economic benefits of improved services in various service delivery areas. For example, as set out above in relation to our police cells case study, if Victoria Police continues to improve its cell management, this will help to reduce self-harm incidents, deaths in custody, complaints to police watchdog bodies, litigation and conflict between police and detainees. It may be possible to isolate the impact of these changes from other factors and consequently evaluate the economic costs and benefits of these changes over time.

In broad terms, economic benefits of Charter compliance are likely to include:

- more efficient service delivery;
- improved health and well-being of individuals with consequently reduced health and welfare costs;
- improved participation by individuals in economic and social life; and
- reduced complaints and costs associated with handling disputes.

Our member centres report that the operation of the Charter is already contributing to improvement of the life circumstances of our client base. For example, case studies presented by the HPLC demonstrate that families and individuals have avoided homelessness following Charter based negotiations. Avoiding the instability arising from homelessness permits people to commence or continue with employment or community activities. In one HPLC case study it was reported that, as result of being permitted to remain in her public housing, the HPLC client "continued to engage with a local youth group, including assisting to organise a leadership and recreational camp for other young people. She hopes to continue the studies she had commenced prior to the first eviction proceedings".47

The HPLC reports that it used the Charter to negotiate to keep seven families out of homelessness.

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47 See the Homeless Persons Legal Clinic, Charting the Right Course, Submission to the Inquiry into the Charter of Human Rights and Responsibilities, above n 2, 14.
These outcomes can be estimated as an annual saving of $266,000 in costs of homelessness services and increased health and justice costs that stem from homelessness. Thus the improved decision making and processes of public authorities due to the Charter can lead to substantial savings in the long term for government.

**Other benefits**

In addition to the other benefits identified earlier in this submission, the Charter has delivered a range of benefits set out below.

**Empowerment of people facing social and financial disadvantage**

Our clients have often experienced traumatic events, such as physical and sexual abuse, domestic violence, mental illness, profound grief, unstable family upbringings and disability. These events often set people on a cycle of disadvantage including homelessness, poor education, unemployment, and addiction to drugs and alcohol. People in these circumstances have an overwhelming feeling of powerlessness. They have little time or energy to have their voices heard through our democracy, find it frustrating to navigate complex social service standards, and often feel overwhelmed upon becoming engaged in our justice system.

The Charter helps to address this sense of powerlessness, disengagement and frustration by providing a clear and accessible framework within which the disadvantaged can seek to have their voices heard, negotiate fairer outcomes and become familiar with their legal rights. It is the existence of one, clear, accessible statement of rights that makes it possible for the most disadvantaged people to become familiar with basic rights and gain a sense of empowerment through this knowledge. This is demonstrated by the Charter-related community legal education and development work of West Heidelberg Community Legal Service (WHCLS), discussed below.

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**Case Study - West Heidelberg Community Legal Service - Charter Workshops**

Between August 2009 and June 2010, Liz Curran, the then Director of WHCLS, ran 45 training sessions with different professionals and community groups. The aim of the training was to “skill people up in how they might use the Charter to broker better outcomes in their dealings with public authorities.” For the purpose of this submission, we spoke to two individuals, Maxine Mathews and Christine Morrow, who both undertook human rights training with Liz Curran.

**Interviews - Maxine Mathews and Christine Morrow**

Maxine and Christine live in the West Heidelberg area and are both residents of public housing. They are very familiar with the multiple sources of disadvantage impacting their community. For about four years, Maxine has been a member of the Residents’ Group 3081 and she is now the Chair of that group. Christine has also attended some of the Resident Group meetings. The Residents’ Group 3081 originally came about because a small group of people were concerned about the standard of their public housing and how they were being treated. The Residents’ Group came into contact with WHCLS who offered to provide advocacy training to them and the broader community.

**What the residents took away from the Charter advocacy training**

When we asked Maxine and Christine what they took away from the training, they noted the following:

- People discussed their individual circumstances and how particular Charter rights were applicable to them;
- They “should never be afraid to speak up” or raise their concerns; and
- If they think an outcome or situation is unfair, there is always someone higher up within the government agency that they can request to have their matter referred to. The session gave

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48 Ibid 2.
them practical tips on who to refer their concerns to.

Maxine and Christine emphasised the great importance of these messages and skills to their community. They explained that "a lot of people are scared of the repercussions" of speaking up, because "they don't realise that they have legal rights". Maxine and Christine made it clear that informing people that they have legal rights and on ways to rely on them is incredibly empowering for the most disadvantaged members of the community. Knowing that government has an obligation to listen to them and take their rights into account helps to decrease the sense of fear many experience when raising their concerns with government agencies.

The importance of a clear statement of rights
We asked Maxine and Christine about whether it is important to their community to have a basic set of rights set out in one document. They noted that:
- "It's very hard to find the law" and without one set of basic rights, people in their community including Somali refugees and children would find it "impossible" to find out about their rights;
- Christine added that "a lot of things aren't the law". She elaborated that many of the other rules governing the circumstances of her community, such as department of housing policies, do not have the status of the law and can't be relied on in the same way as the Charter.

The importance of education
When we asked Maxine and Christine what the sessions meant to the other participants, they noted that:
- "A lot of people don't know what to do or where to go for help";
- There is a "desperate" need for greater education on rights;
- The government should do greater advertising of rights and provide more opportunities for education on human rights to the community.

Both Christine and Maxine said they feel far more empowered as a result of the training. Following the training, Maxine was involved in the preparation of a submission to the inquiry Into the Adequacy and Future Directions of Public Housing in Victoria and supported other members of the Residents Group to appear before the inquiry. As Chair of the Residents' Group she went to the Community Cabinet with the then Premier Brumby, and after lengthy negotiations she signed a memorandum of understanding on behalf of the Residents Group with the Office of Housing.⁵⁰

Human rights education
The concerns noted above expressed by Maxine and Christine about a lack of knowledge of human rights, exist more broadly in the community. The National Human Rights Consultation Report noted that:

The Committee heard strong criticism of the extent of human rights education available in the Australian community. 'We don't know what our rights are' and 'We don't know where to find out about human rights' were common refrains when the Committee visited locations around Australia.⁵¹

In Victoria, the Charter has proven to be a crucial tool for human rights education. The Federation's Human Rights Working Group has conducted various workshops with community advocates on the rights guaranteed under the Charter. We have used the general principles contained in the Charter, being "Freedom, Respect, Equality, and Dignity" (using the simple acronym "FRED") to help community members and organisations identify when laws and actions of public authorities engage Charter rights. These kinds of short, practical workshops would not have been possible had we been attempting to educate advocates on the complex "patchwork" of human rights protection that people had to rely on

⁵⁰ West Heidelberg Community Legal Service, 09/10 Annual Report, 18.
⁵¹ National Human Rights Committee, above n 5, 134.
in Victoria prior to the Charter coming into operation. Following the training undertaken by Liz Curran of the WHCLS, she reported that: “As word got out about how the Charter can be used effectively more and more groups want our style of training on the Charter.”

Effective community engagement
Individuals and community organisations engage in debate with government and policy makers around the common framework of the Charter. Additionally (as discussed above), SOGs increase transparency on how government has weighed competing interests in developing laws. SARG Reports provide critical analysis on the potential human rights impact of laws. These factors combined enhance the capacity for dialogue between the community and government, which in turn will inform the development of more effective laws.

Compliance with international obligations
Australia ratified the ILO Convention in 1975 and ratified the ICCPR on 13 August 1980. Both covenants make it clear that federal and state governments have responsibilities in relation to the realisation of human rights. In Australia, all branches of government (legislative, executive and judicial) and other public authorities, at the national, state and local levels, are required under international law to respect, protect and fulfil human rights. The Charter is a central measure in fulfilling these responsibilities.

Victorian jurisprudence leading international developments
Many other Western democracies have adopted either constitutional or statutory human rights protection, including the UK (in 1998), Canada (in 1982), South Africa (in 1996) as well as many European nations. As recently noted by Justice Emeron of the Supreme Court of Victoria:

Presently, much of the content of rights that is urged upon decision-makers and the courts here in Victoria emanates from human rights decisions and commentary from overseas. This is entirely consistent with section 32(2) of the Charter, which provides for international law and the judgments of foreign and international courts and tribunals relevant to human rights to be considered in interpreting a statutory provision, including a provision in the Charter itself. This is a good thing, as it will expose Victorian jurisprudence to relevant jurisprudence from other parts of the world and, indeed, make Victorian jurisprudence more relevant in an international context.

Promoting corporate social responsibility
The Charter sends a strong message to Australian and international private actors that Victoria respects human rights. In light of the strong and growing emphasis on corporate social responsibility, this has been recognised as an important benefit of the Charter by members of the private sector. During the 2009 National Human Rights Consultation, Telstra made a submission strongly supporting the adoption of a national human rights charter.

Telstra put forward reasoned arguments about the utility and necessity of legislated human rights protection for the broader community and the most disadvantaged people in our society. Telstra explained its view that, because legislated human rights protection is in the interests of people, it is also in the interest of the private sector:

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52 West Heidelberg Community Legal Service, 09/10 Annual Report, 7.
55 See Article 28 of the ILO Convention and Article 50 of the ICCPR.
57 Castles v Secretary to the Department of Justice & Ors [2010] VSC 310 [70].
58 Telstra, Submission to the National Human Rights Consultation, In Support of a Human Rights Charter for Australia.
Companies reflect the combined interest of individuals; and, for the most part, individuals support the protection of each other’s rights...corporations therefore play an integral role in protecting and promoting human rights values...\textsuperscript{59}

Telstra noted how “corporations, like individuals, are affected by the level of human rights protection and other important matters that affect the political, economic and social environment” in which businesses operate, and stated its belief that “corporations - large and small - share a common interest with individuals in promoting and enshrining human rights” (emphases omitted).\textsuperscript{60}

\textsuperscript{59} Ibid 4.
\textsuperscript{60} Ibid.
7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

In addition to the recommendations noted in text boxes above, we make the further recommendations below.

**Greater human rights education**

Upon the release of the terms of reference, the Federation, in conjunction with the HRLC and the Victorian Council of Social Services, held four workshops on how to participate in the Charter Review. The workshops were attended by approximately 70 individuals from many different non-profit organisations. We consistently received feedback that community organisations would greatly benefit from education on the operation on the Charter and how it can be used as an advocacy tool. As noted above, our consultation with West Heidelberg community members revealed that there is a “desperate” need for greater human rights education within disadvantaged communities because people remain fearful of expressing their concerns when unaware of legal protections and how they can be relied on.

**Improved access to justice**

As noted by the National Human Rights Consultation Report:

‘Access to justice’ is not simply about the ability to enforce rights in courts: it also refers to the ability to obtain legal advice and non-legal advocacy and support to participate effectively in law reform processes. The Committee heard that access to justice is important in the promotion, protection and fulfilment of human rights... (footnotes omitted).\(^{61}\)

The report found that:

Access to justice is limited for many Australians, and more effort on the part of the Federal Government is needed to remove the barriers and so ensure more effective protection of human rights in Australia...The cost to the community of not taking any action is likely to be greater if the people who experience human rights violations are unable to seek justice or redegree.\(^{62}\)

There are a number of ways the Victorian Government could support access to justice in the context of human rights including:

- providing greater resources to community legal centres and Victoria Legal Aid to provide advice, representation and education for individuals in relation to human rights issues;\(^{63}\)
- providing greater resources for community legal centres and Victoria Legal Aid to represent the interests of disadvantaged client groups in law reform and policy work and to assist disadvantaged individuals and groups to participate in law reform processes;
- promoting human rights education;
- providing a direct stand-alone cause of action (see recommendation 2); and
- maintaining and improving the accessibility of the Charter as an overarching framework with simple, workable mechanisms for the consideration and application of human rights.

**Coverage of all Public Authorities**

The Charter should no longer exempt particular public authorities from the operation of the Charter, including the Parole Board. Non-exempted public authorities had two years in which to familiarise themselves with Charter requirements before they became enforceable. After four years, it is appro-

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62. Ibid 203 [8.4].
63. Repeated inquiries confirm the poor funding and high demand for CLC services. The Review of the Commonwealth CLSP, above n 1, at 47 confirmed that CLCs experience “particular problems in meeting demand for services within their current funding allocations”. The Senate Legal and Constitutional Affairs Committee’s 2009 Access to Justice Inquiry noted at p 129 “Evidence to the inquiry, together with evidence from the 2003-04 Inquiry, overwhelmingly suggests...that CLCs need greater funding to provide minimum levels of access to justice.”
appropriate that the remaining exempted public authorities become subject to the Charter. The Federation made a detailed submission in 2009 arguing for the removal of the exemption from the Charter of the Parole Board and supports efforts being made to make the Parole Board Charter compliant.  

Human rights should be drafted in broad language
We do not support the detailed codification of human rights. Like many other areas of law, the scope and meaning of both ESC and civil and political human rights should not be exhaustively defined in the statute. It would be extremely difficult to codify the scope and application of each human right to address every situation, particularly where there are competing rights. The broad language used in the Charter promotes its accessibility and is supported by a workable mechanism (section 7) to help government agencies and others apply human rights in particular contexts. This allows the Charter to remain modern, adaptable and workable. There are many other successful examples where parliaments have deliberately expressed legal obligations in broad language, such as misleading and deceptive conduct laws and unfair dismissal laws.

Appropriate limitation clauses – civil and political rights
Particular provisions of the Charter have been subject to judicial uncertainty, including:

- The relationship between section 38(1) (duties on public authorities) and section 7(2) (see Director of Housing v Sudi [2010] VCAT 328; and
- The relationship between section 32(1) (the interpretive principle) and section 7(2) (see R v Mancilovic [2010] VSCA 50 (17 March 2010)).

Depending on the outcomes of the above proceedings, the Charter should be amended to provide a clear, workable mechanism to guide lawmakers and public authority decision makers on the interaction of rights, and when rights may be limited. In addition, the Charter should expressly recognise absolute rights as contained under international law. Section 7(2) should not apply to absolute rights.

We refer to our Recommendation 1 above with respect to an appropriate limitation clause for ESC rights.