Inquiry and review of the Charter of Human Rights and Responsibilities Act 2006 (Vic)

To: The Chairperson, Scrutiny of Acts and Regulations Committee

30 June 2011

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A. EXECUTIVE SUMMARY

1. The Law Institute of Victoria (LIV) is pleased to make this submission to the inquiry and review of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter) by the Scrutiny of Acts and Regulations Committee (the Charter Review).

2. The Charter came into full effect on 1 January 2008. The Charter creates procedures to ensure that law-makers and public decision-makers (including courts and tribunals when acting in an administrative capacity) take account of human rights. In particular, they must act compatibly with and consider human rights. The rights protected fall primarily under the banner of ‘civil and political’ rights (such as free speech or the right to privacy) although it also contains a right to property and cultural rights. The Charter does not create an express independent cause of action to enforce human rights against public authorities.

Impact of Charter on the drafting and debate of laws

3. Based on the Registers of Statements of Compatibility compiled by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), we note that the percentage of Bills considered in the Statements of Compatibility to engage or otherwise affect human rights steadily increased over the four years from 2007 to 2010, with an average over the four years of 78%. The extent of the analysis justifying the view taken in the Statements of Compatibility varied from Bill to Bill and different views were expressed by the Scrutiny of Acts and Regulations Committee (SARC), Parliament or the public as to the compatibility of the Bills with human rights in some instances.

4. In light of the Statements of Compatibility for several Bills, such as the Bills for the Magistrates’ Court and Coroners Acts Amendment Act 2007 and the Coroners Act 2008, we conclude that the Charter has had a significant impact on the development and drafting of statutory provisions. Views on human rights compatibility of statutory provisions can be variable and there is room for legitimate difference of opinion as to compatibility.

5. The transparency, public debate and accountability promoted by the articulation of those views is very valuable in a free and democratic society and strengthens democratic institutions of government and of responsible government. Statements of compatibility provide a basis upon which government can be held to account for decisions that, without them, would otherwise be considered internally within government without public scrutiny.

6. Based on the VEOHRC Registers of Statements of Compatibility, there was parliamentary debate on human rights aspects of Bills for 20% and almost 60% of all Bills introduced into Parliament in 2009 and 2010 respectively. Based on the debate for some select Bills, it can be concluded that the Charter helped to identify issues and provided a frame of reference to guide the debate with consistent themes.

The impact of the Charter on public services

7. The Charter has had a significant impact on the provision of public services. We note, for example, that there have been developments in the setting of standards for public authorities guided by the Charter, annual reporting by public authorities on Charter obligations, the incorporation of Charter responsibilities into the strategic documents of a range of public authorities and Charter impacts on policy design and development. There have also been actions and decisions of public authorities informed by the Charter, including internal policy reviews conducted by public authorities and other activities.
8. We also note the important role that the Charter can play in informing and guiding decisions of public authorities to deliver positive results for people and keep matters out of complaints procedures and the courts.

**Impact on litigation and courts and tribunals**

9. The LIV has identified and reviewed 209 Victorian cases in which Charter issues have been raised or addressed from 26 September 2006 to 15 June 2011. The cases examined are contained in the table in Appendix 1 to this submission (LIV case audit).

10. The cases in the LIV case audit generally reflect decisions that have been reported or are otherwise available to the public. The audit does not, for the most part, include unreported decisions. Nor does it include cases where the Charter was cited in passing. It does not include matters resolved prior to hearing or final judgment. Finally, it does not include cases heard by non-Victorian courts which have referred to the Charter.

11. Of the 209 cases reviewed in the LIV case audit, there has been a steady but unremarkable increase in the numbers of cases raising or addressing the Charter, with an average of 57 cases a year. The majority of those cases were heard at VCAT (44%) and the Supreme Court and the Court of Appeal (combined 42%) although, as noted above, cases from other courts and tribunals are not necessarily as frequently reported.

12. The small number of cases does not represent the opening of the ‘floodgates’ of litigation that some had feared. For example, VCAT finalised a total of 81,186 cases in the 2008/2009 financial year yet the LIV case audit contains only 21 decisions heard in VCAT over that period (0.03% of cases). Percentages of Charter-related decisions compared with total cases in the Victorian Supreme Court and the Court of Appeal also appear to be small (less than 1%).

13. We have assigned a ranking to the cases, with ‘0’ representing a case in which the Charter had the least impact and ‘4’ representing a case in which the Charter had the most impact. Specifically, the categories are:

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<tr>
<th></th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>Charter mentioned but not relied on or not applicable;</td>
</tr>
<tr>
<td>1</td>
<td>Charter argued, considered either not applicable or rights not engaged, or unnecessary to determine Charter issue;</td>
</tr>
<tr>
<td>2</td>
<td>Charter raised, considered applicable, but found to reinforce or be consistent with existing law;</td>
</tr>
<tr>
<td>3</td>
<td>Charter raised, considered applicable or rights engaged, but no breach / justified limitation on rights found;</td>
</tr>
<tr>
<td>4</td>
<td>Charter raised, considered applicable or rights engaged, and decision turned on the Charter.</td>
</tr>
</tbody>
</table>

14. The LIV acknowledges that the rankings involve a degree of subjective assessment and that it could be argued that a different ranking should be assigned to any given case. Moreover, rankings ‘2’ and ‘3’ correlate to cases raising s.32 (interpretative) issues and cases raising s.38 (public authority acting incompatibly) issues respectively and do not necessarily reflect a higher or lower impact of the Charter.

15. The rankings have been made on the face of the decision. They do not reflect any broader impact of the Charter resulting from the decision, such as legislative reform or guidance on human rights compliance. The rankings also do not reflect the extent to which a decision is significant in terms of developing jurisprudence on how the Charter is applied and, importantly, when it does not apply.
16. Of the 209 cases, 12% were ranked ‘0’ and 9% were ranked ‘4’, with the larger proportion of cases being ranked ‘1’ (35%) or ‘3’ (29%). The number of cases at the extremes of the ranking scale are comparable, with 97 (47%) cases with a ‘0’ or ‘1’ ranking and 78 (38%) with a ranking of ‘3’ or ‘4’. This means that there have been almost as many cases in which the Charter had a high impact as there are cases in which the Charter’s impact was low.

17. Of the 20 sections in the Charter that prescribe substantive human rights (ss8-27), the most frequently invoked section (26% of cases) has been s.13 on the right to privacy and reputation (non-interference with privacy, family, home and correspondence and no unlawful attacks on reputation). The right to equality in s.8 was raised in 19% of cases, the right to a fair hearing in s.24 was raised in 19% of cases and rights concerning criminal process in s.25 were raised in 14% of cases.

18. Reliance on the Charter is not limited to individuals seeking to assert their rights under the Charter. However, of the cases in the LIV case audit, individuals raised or relied on the Charter in over half the cases (57%). Others to raise or rely on the Charter were the relevant court or tribunal, intervenors, public authorities and amicus curiae (‘friends of the court’).

19. We identified 21 areas of law in which the Charter was cited. Civil Procedure and Discrimination accounted respectively for 14% and 13% of the cases. Planning, Administrative Law, Residential Tenancies and Mental Health cases were each 6 or 7% of cases. Crime-related cases addressed Criminal Procedure (10% of all cases), Bail, (5% of all cases), Regulation of Sex Offenders (3% of all cases), Criminal Law in general (3% of all cases), Sentencing (2% of all cases) and Motor Vehicle offences (1% of all cases). The remaining areas were Freedom of Information, Disability, Real Property, Occupation and Business Regulation, Coronial Procedure, Tort, Adoption, Trade Practices and Constitutional Law.

20. Overall, 76% of the cases in which the Charter was cited concerned administrative or civil law-related areas and 24% of cases concerned crime-related areas. Note, however, that the ‘crime-related’ areas of law included here do not include approximately 11 cases in total that are: Real Property cases that concern the Confiscation Act 1997 (Vic); Residential Tenancies cases that concern notices to vacate upheld for illegal use; Administrative Review cases that concern, for example, parole or prison matters; Civil Procedure cases that concern compensation under the Sentencing Act 1991 (Vic).

21. The significance of particular cases can be considered from different perspectives. Some are significant in terms of how they have elaborated on the meaning of the human rights contained in the Charter, or the meaning of terms such as ‘public authority’ defined in s.4. Some cases develop the understanding of how rights may or may not be limited or balanced under s.7 of the Charter. Other cases are significant for describing the circumstances in which the Charter does not apply, including when rights are not engaged or limits on the retrospective application of the Charter. Others develop our understanding of how the Charter should be applied and the circumstances in which the Charter applies to courts and tribunals.

22. Acknowledging that reference to decisions of reported cases does not necessarily capture the frequency of reliance on the Charter in inferior courts or tribunals or in the interlocutory stages of all proceedings (where reporting is less frequent), the relatively small number of Charter-related cases would appear to indicate that the Charter is being applied in moderation. We also acknowledge that as people and their legal representatives become more familiar with the Charter and its relevance to legal argument, the number of cases might increase. We would expect, however, that as the jurisprudence develops and settles the law concerning the Charter, the number of any unmeritorious claims made would decrease. While questions around
the Charter’s application in particular instances remain, the jurisprudence will continue to develop and provide guidance on the Charter’s application, either resolving uncertainties or identifying areas in need of legislative reform.

**Impact on remedies**

23. Remedies in the course of or following litigation come in many forms. The Charter has helped people successfully challenge administrative orders. The Charter has helped to justify favourable discrimination and inform findings of unjustifiable discrimination. The Charter has contributed to interpretations of laws or recommendations for legislative reform to make laws more consistent with human rights. Court and tribunal procedures have been structured to accommodate people’s rights under the Charter. The Charter has also helped people in the interlocutory or procedural stages of court or tribunal hearings.

24. In our view, the Charter has assisted people in framing and substantiating their arguments. Through the interpretative obligation in s.32, the Charter has led to human rights-compliant applications of laws and procedures, all of which have helped to avoid infringements of human rights or provide accessible, just and timely remedies for any infringements of rights found to have occurred.

**Costs and benefits of Charter**

25. The LIV does not think it is possible or appropriate to attempt to assign a monetary value to the benefits of the Charter. We would also be wary of any selective analysis of benefits and costs of one law – such as the Charter – as opposed to other laws.

26. We would note, however, that the development of Charter jurisprudence over time is likely to contribute to cost-savings in terms of guiding the decisions of public authorities in the first instance – leading to human rights compliant decision-making which will lead to positive outcomes for people – as well as guiding people as to the merits of any challenge and ultimately reducing Charter claims.

27. We also note that costs might be incurred in responding to unmeritorious or vexatious claims based on the Charter. There have been very few unmeritorious claims reported. Unmeritorious or vexatious claims are a risk in the application of any law. As with any law, as the jurisprudence develops and authoritative decisions are handed down which can be relied on in future cases, fewer unmeritorious or vexatious claims can be expected to be made and, when they are, they will be promptly dismissed.

28. The protections afforded by the Charter have been applied universally and are available to everyone, not just minorities or particular groups. It has, however, been of significant benefit to some groups, such as children and young people. Indigenous peoples have not necessarily experienced particular benefits as a result of the Charter, perhaps pointing to a need for better engagement with Indigenous Peoples in Victoria on the issue of human rights protection.

**Strengthening the Charter**

29. The LIV considers that the requirements in the Charter for parliamentary scrutiny, the obligations of public authorities to comply with and consider human rights and the requirement to interpret laws in accordance with human rights have had a significant impact in promoting and protecting human rights in Victoria. We submit that each of these requirements and the ability to enforce the human rights obligations of public authorities in connection with court and tribunal proceedings should be preserved. There are, however, some amendments that could be made to strengthen the Charter.
30. In particular, we submit that the Charter should be amended to:

- Include all human rights, including economic, social and cultural rights and the right to self-determination;
- Permit limitations on human rights under s7 of the Charter only in accordance with international law;
- Require regular reporting by and auditing of public authorities for compliance with human rights;
- Create a direct cause of action against public authorities alleged to have acted inconsistently with human rights or to have failed to consider human rights in violation of s38 of the Charter, as is the case in the UK;
- Empower courts and tribunals to grant such relief or remedy, or make such order, within their powers as they consider just and appropriate, including damages, as is the case in the UK;
- Delete s48 so that no laws are excluded from the Charter’s application;
- Apply the Charter more clearly and comprehensively to courts and tribunals;
- Allow private entities the option of assuming the obligations of public authorities under the Charter;
- Ensure that assessments of compliance with the Charter in a Statement of Compatibility are genuine, comprehensive and properly described;
- Require or enable SARC to request an adjournment of parliamentary debate for a specified period (e.g. four weeks) where it considers that a Bill raises a human rights matter of significant public importance;
- Give the public a formal opportunity under the Charter to make submissions to SARC on the human rights compatibility of a Bill;
- Give the courts under s35 of the Charter the discretion to dispense with the requirement of notifications to the Attorney-General or VEOHRC in the circumstances of a particular case;
- Require courts and tribunals to develop a process whereby cases in which Charter issues are raised or addressed are notified to a central register and, unless restricted, are reported or otherwise made available to the public;
- Ensure that adequate resources are available to VEOHRC to fulfill its functions (s41), particularly its function to provide education about human rights and the Charter.

**Conclusion**

31. The LIV considers that the Charter has been a successful first step towards better protection and promotion of human rights in Victoria. The Charter has generated a greater awareness of human rights within public bodies and the general community and has facilitated the making of laws and decisions which are more sensitive to human rights concerns. The Charter has been an important advocacy tool for people wanting to ensure that their rights are protected before any violation has occurred. It has also been used to assert rights in the context of a range of cases before courts and tribunals in Victoria.

32. As a framework, the Charter informs public service standards, policies, public decision-making, laws and regulations. It provides a consistent thread to the standards of decision-making to be applied in individual cases. It is not a substitute
for specific standards or laws in a particular area, but a framework that brings them together to make laws and decision-making more consistent and fair.

33. Even with the guidance of the Charter, peoples’ human rights will be breached. This can occur through simple oversight or lack of awareness. We would expect, however, that over time there would be fewer breaches as public authorities are held to account for their actions. In the LIV’s view, the protection of human rights through a strengthened Charter is a sign of a confident government that welcomes and facilitates regular scrutiny of its actions by the people it represents.

B. INTRODUCTION

34. The LIV is Victoria’s peak body for lawyers and those who work with them in the legal sector, representing over 16,000 members. The LIV members who contributed to this submission include members of the Administrative Law and Human Rights Section and the Young Lawyers’ Section.

35. The Administrative Law and Human Rights Section of the LIV has members with a broad range of legal experience in administrative review, constitutional law and general human rights issues, as well as experience specific to Indigenous, refugee, migration, health, disability and discrimination law. The Section has an important role in raising awareness about human rights and social justice issues among lawyers and in the community. It also advocates and effects reform in administrative, constitutional and human rights law and policy. Members of the Section’s Charter of Rights and Human Rights sub-committees have had oversight of the drafting of the submission.

36. The LIV submission is strongly supported by the LIV’s Young Lawyers’ Section (YLS). The YLS is a dynamic group of approximately 6000 members which works to enhance the legal skills, knowledge and professional networks of members in the early stages of career development. The YLS aims to stimulate interest, to promote and facilitate discussion among young lawyers and to provide a voice for young lawyers.

37. In this submission, we address the seven questions posed in the Charter Review Terms of Reference under the following three headings:
   a) Complying with International Law (questions 1-4)
   b) Charter in Practice (questions 5-6)
   c) Strengthening the Charter (question 7).

38. We regret the short time frame in which submissions have been invited and in which the Charter Review must be completed. We hope that the Scrutiny of Acts and Regulations Committee (SARC) might be able to secure a longer time frame in which to complete the review by, for example, delivering an interim report in time for the statutory deadline of 1 October 2011 and taking further time after that date to examine all of the information and views that should inform considered findings and recommendations.

39. We understand that public hearings will be conducted as part of the Charter Review. We welcome the opportunity to appear at the public hearings and would be pleased to provide any further information with respect to our submission at SARC’s request. We would also urge SARC to engage with community groups in the course of the hearings, recognising that there will be many people and community groups who will have difficulties contributing to the public submission process.
40. Independent of the Charter Review, the LIV is undertaking a research project on the impact of the Charter on legal practice.¹ The findings will assist the LIV in planning professional development and education programmes and future policy. The project has included a survey of our membership and Victorian lawyers and interviews with lawyers experienced in applying the Charter. The report of the project will be finalised by August and will be made available to SARC.

C. COMPLYING WITH INTERNATIONAL LAW

41. Questions 1 to 4 in the Terms of Reference are, in our view, all relevant to compliance with international law. As discussed below, the LIV supports the inclusion in the Charter of:

   a) additional human rights, including economic, social and cultural rights and the right to self-determination;
   b) a requirement for mandatory auditing of Charter compliance; and
   c) direct proceedings for redress for breaches of human rights with appropriate remedies.

Each of these reforms is necessary to give proper effect to human rights in Victoria and to bring Victoria in line with international law.

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<tr>
<th>Terms of Reference Question 1</th>
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<tr>
<td>Whether the Charter should include additional human rights under the Charter, including but not limited to, rights under the –</td>
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<tr>
<td>(a) International Covenant on Economic, Social and Cultural Rights;</td>
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<tr>
<td>(b) Convention on the Rights of the Child; and</td>
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<tr>
<td>(c) Convention on the Elimination of All Forms of Discrimination against Women?</td>
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42. The Charter should promote and protect all rights and responsibilities contained in international human rights instruments to which Australia is a party now and in the future, including economic, social and cultural rights, rights of children and rights of women. Australia has agreed to protect and promote human rights contained in international human rights instruments and is also bound by other human rights under customary international law. It is undesirable and inappropriate under international standards to single out some human rights for protection under the Charter while omitting others to which Australia is equally bound.

43. The Charter should be amended to include all the human rights under the two principal international human rights instruments to which Australia is a party, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). It should include ICCPR rights that were omitted from the Charter, such as the right to birth registration.\(^2\) Any ICCPR rights that have been substantively modified in the Charter, such as the right to legal assistance, should be reviewed and amended as necessary, to be consistent with international law.\(^3\) The language of the new rights should reflect plain English and gender neutrality. In certain cases, the inclusion of a particular right may require changes to reflect the distribution of powers between the Commonwealth and Victoria.

44. Other human rights recognised by Australia and protected under other international human rights agreements include the *Convention on the Rights of the Child (CRC)* and the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* (highlighted in Terms of Reference question 1(b) and (c)), should also be protected under the Charter. If it is not practical to list all rights protected under international agreements to which Australia is a party, they could be incorporated by reference.\(^4\) The issue of addressing rights in addition to those in the ICCPR and ICESCR could be considered as part of the legislatively mandated 8-year review of the Charter.

45. We note that the Senate Legal and Constitutional Affairs Legislation Committee recommended in January 2011 that the Senate pass the *Human Rights (Parliamentary Scrutiny) Bill 2010*.\(^5\) The Bill proposes to establish a process for Commonwealth parliamentary scrutiny of proposed legislation for compliance with seven international agreements to which Australia is a party: ICCPR, ICESCR, CRC, CEDAW, the *International Convention on the Elimination of all Forms of Racial Discrimination*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *Convention on the Rights of Persons with Disabilities*. To promote consistency between Victorian and Commonwealth laws, it would be appropriate to include in the Charter at least those human rights included in the Commonwealth Bill. We are not, however, proposing that the Charter’s provisions be limited to parliamentary scrutiny in the manner of the Commonwealth Bill.\(^6\)

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http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&layout=item&id=1371&Itemid=147#Other resources (accessed at 27 June 2011) (Paula Gerber, ‘Making Indigenous Australians “Disappear”). This paper is from the Castan Centre for Human Rights Law (Castan Centre) on the right to birth registration under Article 24(2) of the International Covenant on Civil and Political Rights (ICCPR) and its inclusion in the Charter. This issue is raised in the context of challenges that Indigenous people in Victoria face when attempting to register their birth and obtain copies of birth certificates. The paper states, ‘[t]he failure to translate the right set out in article 24(2) of the ICCPR, into the Charter, in the belief that there are no issues surrounding birth registration in Victoria, is an error of judgment, to the detriment of the Indigenous population in that state’.

3 Section 25 of the Charter qualifies the right to legal assistance with reference to the *Legal Aid Act 1978* (Vic). The right to legal assistance in article 14(3)(d) of the ICCPR is possibly broader with a right ‘to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it’.

4 Note the relevance of Charter of Human Rights and Responsibilities Act 2006 (Vic) (Victorian Charter), ss5 and 32(2) in terms of incorporating international law into the Charter.


6 The Commonwealth does not yet have a Human Rights Act and the Bill is part of the Commonwealth’s introduction of its new ‘Australian Human Rights Framework’.
Economic, social and cultural rights

46. The LIV believes that the Charter must protect economic, social and cultural rights as well as civil and political rights. Australia is a party to both the ICCPR and the ICESCR and has committed to protecting and promoting all the rights under those treaties.

47. A community consultation by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in 2010 confirmed that economic, social and cultural rights – such as the rights to education, housing and health – are highly valued by Victorians.9 There are nevertheless gaps in Victoria’s current laws for the protection of economic, social and cultural rights which could be improved by comprehensive coverage of those rights in the Charter.9

48. Economic, social and cultural rights and civil and political rights are ‘universal, indivisible and interdependent and interrelated’.10 The UN Committee responsible for overseeing the implementation of the ICESCR has specifically affirmed that ‘the rights recognized in the [ICESCR] are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, … is recognized and reflected in the system in question’.11

49. Contrary to views that economic, social and cultural rights cannot be protected in law,12 the LIV submits that economic, social and cultural rights can be protected by government laws and policies and enforced by courts without compromising the role of Parliament.13 This does not entail courts making policy decisions or resource allocation decisions because that is not part of the judicial function of courts in an

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7 The Universal Declaration of Human Rights, the United Nation’s predecessor to the ICCPR and ICESCR, contains economic, social and cultural rights as well as civil and political rights. Australia voted in favour of the adoption of the Universal Declaration and was a vocal and prominent supporter of the rights contained in it. In its speech to the United Nations General Assembly at the time of the adoption of the Universal Declaration, the Australian delegation said that it ‘attached particular importance to articles [in the Universal Declaration] which dealt with economic and social rights, and particularly with the right to education, housing and health and well-being of every [person] and his [or her] family’. See comments by Australia’s representative, Mr Watts, United Nations General Assembly, Record of the 181st Plenary Meeting, held at the Palais de Chaillot, Paris, Friday 10 December 1948 at 10.45am, 875.


9 In a 2009 paper for the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in 2010 confirmed that economic, social and cultural rights – the nature of States parties obligations (art 2, para 1 of the Covenant) (Fifth session, 1990), para 8. See also, CESCR, General Comment 9, The nature of States parties obligations (art 2, para 1 of the Covenant) (Fifth session, 1990), para 8.


11 CESCR, General Comment 3, The nature of States parties obligations (art 2, para 1 of the Covenant) (Fifth session, 1990), para 8. See also, CESCR, General Comment 9, The domestic application of the Covenant (General Comments): 03/12/98. E/C.12/1998/24.

12 See Victorian Human Rights Consultation Committee, Rights, Responsibilities and Respect, above n 8; National Human Rights Consultation Report, above n 8.

adversarial process. It entails courts making determinations on whether human rights standards have been met.

50. Many civil and political rights require positive actions resulting in the allocation of resources and this has not been an obstacle to their implementation and enforcement. The right to life cannot, for example, be protected without laws and procedures to control guns or prosecute murder, or without an effective coronial system.14

51. The application of economic, social and cultural rights under the South African Constitution provides practical examples as to how such rights can be tested before the courts and resolved with appropriate deference to government to determine how to allocate available resources. Some provisions in the South African Constitution that provide for economic, social and cultural rights are limited to requiring the state to take only ‘reasonable’ measures within ‘available resources’ to achieve the progressive realisation of those rights.15 In examining the application of economic, social and cultural rights – such as the right to housing and to health care, food, water and social security – the South African Constitutional Court has deferred to the political organs and interpreted ‘reasonable’ measures broadly to include a ‘wide range of possible measures’.16 The UN Committee on Economic Social and Cultural Rights has taken a similar approach.17

52. Some economic, social and cultural rights have already been included in the Charter, such as the right to property (s20) and cultural rights (s.19). Moreover, some of the civil and political rights in the Charter also apply to protect economic and social matters, demonstrating the interrelated and interdependent nature of human rights standards. For example, the Charter’s right to privacy, including non-interference with a person’s home, has been relied on to ensure that a person has a home and is not evicted into homelessness. The right to humane treatment when deprived of liberty has been found to extend to the protection of health.18 Several cases have seen the right to equality used to facilitate access to sport and recreation facilities and to education.19 It would, however, be preferable to protect all economic, social and cultural rights under the Charter as this would prevent piecemeal protection of economic, social and cultural right under the Charter and provide clear and comprehensive protection of human rights.

Rights of children and young people

53. With the rights of children contained in sections 17 and 23, the Charter has been an important tool for protecting the rights of children and young people. It helped to

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15 For example, see Constitution of South Africa, ss 26(2) and 27(2) which refers respectively to housing and to health care, food, water and social security.

16 For example, see Soobramoney v Minister of Health, Kwa-Zulu Natal (1997) 12 BCLP 1969 [29]; Government of South Africa v Groothoom [2001] 1 SA 46 [41]; Minister of Health v Treatment Action Campaign [2002] 5 SA 271; see also CESC, General Comment 3, The nature of States parties obligations (art 2, para 1 of the Covenant) (Fifth session, 1990), para 10 (CESCR, General Comment 3) which states, [i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations:.

17 CESC, General Comment 3, above n 16, para 10.

18 Castles v Secretary to the Department of Justice [2010] VSC 310 (9 July 2010).

ensure, for example, that a young man was not evicted into homelessness.\textsuperscript{20} The Charter was also central to a finding that two children must be given an opportunity to give evidence against a man who was subsequently convicted of having sexually abused them.\textsuperscript{21} The Charter has also helped to guide courts on how to handle cases involving children.\textsuperscript{22} The rights of children were also central to a case in which an order placing four Aboriginal sibling children in separate non-Aboriginal homes was revoked.\textsuperscript{23}

54. The Charter should, however, provide full protection of the rights of children and young people protected under the \textit{Convention on the Rights of the Child}, particularly with respect to their participation in public life,\textsuperscript{24} protection from violence\textsuperscript{25} and their rights to food, housing, clothing and education.\textsuperscript{26}

55. The Victorian Equal Opportunity and Human Rights Commission addressed the human rights of children and young people in its \textit{2008 Report on the Operation of the Victorian Charter of Human Rights and Responsibilities: Emerging Change}.\textsuperscript{27} The report contains specific analysis of the participation of children and young people in public affairs, revealing ‘a strong desire on the part of young people to have input into setting the agenda for their communities both generally, as well as in relation to matters directly affecting them’.\textsuperscript{28} It is essential for Victoria to ensure that the right to participate in public affairs is protected and promoted for all Australians, including children and young people.

\section*{Rights of women}

56. The Charter protects general rights relevant to women, including the right to equality (s.8) and the rights of families (s.17). These rights have been significant to cases that have endorsed measures that discriminate in favour of women, such as participation in sport, use of sport and recreation facilities and education.\textsuperscript{29} The Charter must, however, properly reflect the rights of women in all of the relevant treaties to which Australia is a party, including CEDAW.\textsuperscript{30}

\begin{itemize}
  \item \textsuperscript{20} For example, see \textit{Homeground Services v Mohamed (Residential Tenancies)} [2009] VCAT 1131 (6 July 2009).
  \item \textsuperscript{21} DPP v Brian Pottinger [2010] VCC.
  \item \textsuperscript{22} CL (a minor) v Tim Lee [2010] VSC 517.
  \item \textsuperscript{23} Secretary, Department of Human Services v Sanding [2011] VSC 42 in which an appeal of a lower court decision to revoke the order is dismissed.
  \item \textsuperscript{27} See VEOHRC, \textit{Emerging Change}, above n.\textsuperscript{24}.
  \item \textsuperscript{28} Ibid, 129.
  \item \textsuperscript{30} See also, ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation; ILO Convention (No. 155) concerning Occupational Safety and Health and the Working Environment and; ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities.
\end{itemize}
57. VEOHRC’s 2010 Occasional Paper, ‘Advancing women’s rights – exploring the relationship between the Charter of Human Rights and Responsibilities and the Convention on the Elimination of All Forms of Discrimination Against Women’, highlights many concerns about Victoria’s failure to protect women’s rights. In particular, it describes gaps in Victoria’s laws to address systemic discrimination against women, cumulative or ‘intersectional’ discrimination and discrimination against women in rural areas.

58. Building on the prohibition against sex discrimination and reflecting rights in international treaties, the Charter should provide for a right of employees to request flexible working arrangements, to accommodate family or carer responsibilities and the protection of working parents for a period before and after childbirth. The protection of women from violence through possible elaborations on, for example, the right to life and the right to health, should also be considered.

59. The LIV has expressed its disappointment at government amendments to reforms to Victoria’s equal opportunity laws that would have ensured better protections against systemic discrimination against all people, including women. The failure to improve Victoria’s equal opportunity laws makes it even more crucial that women’s rights are better protected under the Charter.

Limitations on rights

60. Under international law, some human rights cannot be limited (‘absolute’ rights) or cannot be limited in times of public emergency (so-called ‘non-derogable’ rights). Most rights can, however, be limited in certain circumstances, such as times of public emergency. Some civil and political rights also have ‘built-in’ limitations: for example, people can be deprived of their right to liberty provided it is done in accordance with the law. Human rights protected under the ICESCR can be subject to ‘such limitations as are determined by law only in so far as this may be compatible

36 Article 4(2) of the ICCPR states that no derogation is permitted from articles 6 (right to life), 7 (torture or to cruel, inhuman or degrading treatment or punishment), 8 (paragraphs I (the right to liberty and security of person, prohibition on arbitrary arrest or detention) and 2 (informed of charges upon arrest)), 11 (no imprisonment for inability to fulfil a contractual obligation), 15 (no retrospective crimes), 16 (right to recognition everywhere as a person before the law) and 22 (freedom of association), 25 (public participation). In addition, Australia has made reservations which limit some rights under the ICCPR.
with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.39

61. Unlike the differentiated limitations of rights in, for example, the ICCPR, the Charter contains a general limitation on rights in section 7(2) which states that a ‘human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors’ including ‘any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve’. In addition, the Charter retains some, but not all, of the ‘built-in’ limitations on rights in the ICCPR.40 Finally, the Charter contains a provision (s.31) that allows Parliament to declare that a statutory provision has effect despite being incompatible with human rights (‘override provision’).

62. The LIV considers that the limitation of rights in the Charter should be consistent with international law. It may be that, properly construed, s7(2) achieves this by reference to the phrase ‘the nature of the right’ and the test that it imposes in permitting limitations only if the limit is reasonable and can be demonstrably justified in a free and democratic society. However, greater clarity could be achieved if section 7(2) of the Charter were amended to reflect the fact that some rights cannot be limited under international law. In addition, ‘built-in’ limitations should be reinstated for all human rights that contain built-in limitations under international law.41 The relationship between those sections with built-in limitations and s.7(2) should be clarified in s.7(2). Finally, the general override provision should be removed because it is inconsistent with our international law commitments to the extent that human rights cannot be abrogated except in limited circumstances. If retained, the override provision should be amended so that it does not apply to rights that are absolute or which cannot be limited in times of emergency under international law.

Terms of Reference Question 2.

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

63. Consistent with the findings of the Victorian Equal Opportunity and Human Rights Commission’s consultation with the Victorian Indigenous community,42 the LIV considers that the right to self-determination should be included in the Charter.

64. Recognised in both the ICCPR and the ICESCR, the right to self-determination applies to everyone but has particular relevance to Australian Indigenous Peoples who have long been denied the right in Australia, including in Victoria. The right is clearly expressed in the ICCPR and the ICESCR as: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’43 The right to

39 ICCPR, art 4; ICESCR, art 4.
40 For example, free expression in section15 has a built-in exception from article 19(3) of the ICCPR but section16 (assembly and association) does not have the built-in exceptions of articles 21 and 22(2) of the ICCPR.
43 ICCPR, art1; ICESCR; art 1.
self-determination is also included in the United Nations Declaration on the Rights of Indigenous Peoples, an instrument endorsed by Australia.44

65. The rights of Aboriginal persons are recognised in the Preamble to the Charter and are protected in terms of ‘cultural rights’ under section 19(2) of the Charter. Section 19(2) states:

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

a) to enjoy their identity and culture; and
b) to maintain and use their language; and
c) to maintain their kinship ties; and
d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

66. The relevant preambular paragraph and s.19(2) are significant acknowledgements of the rights of Victoria’s Indigenous Peoples. The cultural rights in s.19(2) reflect, however, only some of the rights of Victoria’s Indigenous Peoples. To comply with international law, the right to self-determination should also be protected under the Charter.

67. During the international discussions of the then draft United Nations Declaration on the Rights of Indigenous Peoples, Australia stated that:

‘Events in all parts of the world show us that the concept of self-determination must be considered broadly, that is, not only as the attainment of national independence. Peoples are seeking to assert their identities, to preserve their languages, cultures, and traditions and to achieve greater self-management and autonomy, free from undue interference from central governments.’45

68. The right to self-determination has been described by the now Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people as having two aspects,46 related respectively to:

a) the right of peoples to ‘freely determine their political status’, requiring ‘that individuals and groups be accorded meaningful participation, commensurate with their interests, in procedures leading to the creation of or change in the institutions of government under which they live’.47

b) the right to ‘freely pursue their economic, social and cultural development’, requiring ‘a governing institutional order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis’.48

69. A subsequent definition in the Australian Human Rights Commission 2002 Social Justice Report describes the right to self-determination in the following terms:

‘[Self-determination is] an ongoing process of choice for the achievement of human security and fulfilment of human needs with a broad scope of possible...

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47 Ibid.
outcomes and expressions suited to different specific situations. These can include, but are not limited to, guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity.49

70. In the Explanatory Memorandum that accompanied the Charter Bill, it is stated that the right to self-determination was omitted because (1) it is ‘a collective rights of peoples’ and (2) ‘there is a lack of consensus both within Australia and internationally on what the right to self-determination comprises.’ The LIV did not agree with those reasons at the time that the Charter was enacted and does not agree with them now.

a) First, the experience in other countries demonstrates that it is possible to protect and promote collective rights, particularly with respect to Indigenous Australians who are readily identified as a ‘peoples’. It might, in any event, be appropriate to conceive of the right as an individual right.50

b) Secondly, there is consensus as to what self-determination comprises. This consensus has been confirmed since the Charter came into force with Australia’s endorsement of the 2007 United Nations Declaration on the Rights of Indigenous Peoples. Importantly, the inclusion of the right to self-determination in the Charter need not raise concerns about any threat to the state’s sovereignty as a matter of international law.51

71. Despite some legal protections for Indigenous Victorians in the Charter and elsewhere, the 2010 Victorian Government Indigenous Affairs Report states that the estimated 36,700 ‘Indigenous Victorians are more likely than other Victorians to experience disadvantage in areas including early childhood development, life expectancy, education, employment and justice.’52 This gap illustrates the ongoing failure of Victorian government programs and laws to protect the human rights of Indigenous Peoples. Recognition of the right to self-determination in the Charter would help to improve the situation for Indigenous Peoples in Victoria.


50 On individual rights see generally Anaya, Indigenous Peoples in International Law.


Terms of Reference Question 3.

Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?

72. The LIV supports mandatory regular reporting by and auditing of public authorities to assess compliance with human rights. However, given that the Charter has been in operation for only four years, it might be appropriate to defer consideration of mandatory auditing until the eight-year review anticipated in 2015.

73. Reporting and auditing will drive compliance, making public authorities publicly accountable for their compliance, and it will document and publicly demonstrate the impact of the Charter. As a practical matter, reports by public authorities on compliance with human rights could, for example, be provided in the context of annual financial audits. We note that a majority of Victorian public authorities already refer to their Charter obligations in their annual reports although the nature of the reporting on those obligations varies. A mandatory requirement that gave guidance on reporting could promote consistency in reporting. A body, such as the Victorian Equal Opportunity and Human Rights Commission, the Ombudsman or the Auditor-General, could then conduct audits of a fixed number of reports on a rolling basis so that public authorities are audited for compliance every 3 to 5 years.

74. Reports on compliance would need to be appropriately detailed. The reports should ensure that public authorities are meeting a standard of due diligence in their compliance with human rights. Due diligence will help to ensure that human rights matters are addressed on a systemic basis and should reduce the number of complaints against public authorities proceeding to courts and tribunals.

75. We note that the VEOHRC is currently empowered under the Charter to review the compatibility of a public authority’s programmes and practices with human rights at the request of the public authority. We also note that the Auditor-General is empowered to undertake ‘performance audits’ on its own motion or other audits at the request of an authority under the Audit Act 1994 (ss 15 and 16E respectively). Regular mandatory auditing of public authorities for compliance with human rights could be undertaken in a similar manner to existing VEOHRC reviews or Auditor-General performance audits, with necessary resources assigned to that function.

Terms of Reference Question 4.

Whether the Charter should include further provisions with respect to legal proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by the Charter?

76. The Charter does not provide for a direct cause of action or remedies for a violation of a public authority’s obligation to comply with human rights. Instead, the Charter provides that a Charter violation may be raised only in connection with another cause of action and states that no damages can be awarded for a Charter breach (s.39). The full range of remedies available with respect to that other cause of action remains including, for example, declaratory relief or damages.

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54 For example, declarations in Kracke v Mental Health Review Board & Ors (General) [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) and compensation awarded in Halwood Corp (in Liq) v Roads Corp [2008] VSC 28. At para 801 Kracke states (footnotes omitted) ‘As to remedies, the Charter is not a toothless tiger. It confers power on the Supreme Court of
77. The nature of proceedings and remedies under the Charter differs from other jurisdictions that have enacted specific human rights legislation. For example, both the Human Rights Act 2005 (ACT)55 and the Human Rights Act 1998 (UK)56 give people the option of (1) bringing proceedings against public authorities who they claim have breached their human rights or (2) relying on human rights in any legal proceedings. UK courts can grant such relief or remedy within their powers as they consider just and appropriate in relation to an unlawful act of a public authority.57

78. In the LIV’s view, the Charter’s limitation on proceedings and damages is inappropriate and unclear. It has caused confusion, for example, as to the jurisdiction of VCAT.58 The LIV submits that a person who claims that a public authority has violated its obligations under the Charter (s.38) should have the option under the Charter of either bringing proceedings based solely on the Charter against that authority in an appropriate court or tribunal or, as is currently the case, to raise the protection of human rights in connection with other proceedings.

79. In either case, courts and tribunals should be empowered under the Charter to grant such relief or remedy, or make such order, within their powers as they consider just and appropriate. In this respect, the LIV proposes that the broad powers to grant relief in the UK Human Rights Act 1998, be adopted in the Charter. While declarative remedies are important, the availability of other remedies such as compensation would clearly reinforce the importance of human rights protection. The inclusion of a right to an effective remedy in the Charter would be consistent with the Universal Declaration of Human Rights (Article 8) and the ICCPR (Article 2).59

80. Experience in the UK suggests that compensation would rarely be awarded for Charter breaches.60 However, if amended to include a right to damages for Charter breaches, the Charter should also include a provision equivalent to s8(3) of the UK Act to ensure that relief in the form of damages is not a remedy of first resort.61 Like the ACT and UK Acts and similar in effect to s39(4) of the Charter, the Charter should also ensure that any right to damages for a breach of the Charter does not affect any right a person may have to damages apart from the operation of Charter.

81. In addition, the LIV submits that it might be appropriate for the court or tribunal to be able to refer any matter to conciliation by, for example, the Victorian Equal Opportunity and Human Rights Commission. It might, in our view, also be appropriate to provide for non-judicial complaints mechanisms and relief which could be used before resorting to a court or tribunal. Either the Victorian Equal Opportunity and Human Rights Commission or the Victorian Ombudsman might be an

Victoria to make a declaration of inconsistent interpretation. [938] It extends the power of courts 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. It expressly preserves the existing powers of courts or tribunals to grant relief or remedies, including declarations of unlawfulness, in respect of the acts or decisions of public authorities. The existing powers of the tribunal to grant any remedies or relief in proceedings before it is thus in no way limited by the provisions of the Charter (except to the extent that granting any such remedy or relief itself might be incompatible with human rights).

55 Human Rights Act 2005 (ACT), s 40C(4), as inserted by the Human Rights Amendment Act 2008 (ACT). See also Simpson v Attorney-General [1994] 3 NZLR 667 (Baigent’s Case) in which the New Zealand Court of Appeal implied a right of action and entitlement to a remedy for human rights breaches.


57 Ibid, s8(1). Such relief may include damages, but only where the court otherwise has a power to award damages in civil proceedings, and taking into account principles applied by the European Court of Human Rights s 8 (2)-(4).

58 Director of Housing v Sudi [2010] VCAT 328 (31 March 2010).


61 Subsection (3) of the Human Rights Act 2008 (UK) states, ‘[n]o award of damages is to be made unless, taking account of all the circumstances of the case, including— (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made’.

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appropriate body to manage a complaints mechanism, although it would require adequate resources and powers. Appeals could be made to the Victorian Civil and Administrative Tribunal.

82. As demonstrated in the UK and elsewhere, a direct cause of action is unlikely to lead to a large and burdensome number of complaints or an unsustainable drain on government resources. The UK and New Zealand experience to date suggests that such an expansion will not lead to any flood of litigation. There are a number of compelling reasons for providing such a freestanding cause of action for breaches of rights, including the need to ensure individuals are empowered to obtain relief directly against a public body or authority which infringes their rights, and the importance of imposing on public bodies and authorities the requirements necessary to encourage compliance with the protection of rights. A free standing cause of action would also encourage people to consider the human rights implications of any complaint from the outset, which promotes efficiency in the resolution of disputes.

D. CHARTER IN PRACTICE

83. Questions 5 and 6 in the Terms of Reference are, in our view, relevant to the experience of applying the Charter in practice. We make the following general observations about these questions:

a) The Charter review is of four years of the Charter’s operation: four years is a relatively short time over which to evaluate the full effects of a law seeking to implement extensive reforms in law, policies and public services.

b) Many of the effects are undocumented or unavailable to the public: the LIV is not, for example, able to point to documented evidence of the effects of the Charter on the drafting of laws prior to their introduction as Bills into Parliament, nor can the LIV specify the costs associated with implementing the Charter.

c) The documented information that is available comes in the form of, for example, Statements of Compatibility, SARC reports, ministerial responses, parliamentary debate, reported cases and reports of the Victorian Equal Opportunity and Human Rights Commission.

d) The LIV questions the basis upon which it is possible to embark upon an analysis of the costs and benefits of compliance with human rights: it may be possible to assign a financial value to costs but it is extremely difficult and inappropriate to assign a financial value to the benefits of protecting human rights. We would question the probative value of any attempt to weigh those benefits against the financial costs.

e) Independently of the Charter review, the LIV has commenced a research project on the impact of the Charter on legal practice: the outcome of that research, including a survey of the LIV membership, will be available by August 2011.

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63 For example, in the UK, an initial increase in the number of human right cases immediately after the Human Rights Act was introduced in 2000 until 2002-03 has been followed by a gradual decline: see Sweet and Maxwell, ‘UK courts see further decline in the use of Human Rights arguments’ (Press Release, 19 February 2007), available at https://www.smlawpub.co.uk/pressroom/2007/190207.html#table.
84. We have prepared our responses to TOR questions 5 and 6 on the basis of publicly available information and the experience of some of our members. It is not an exhaustive description of the Charter in practice over four years but seeks to identify illustrative examples of the Charter’s effects. We would urge SARC to examine in detail all of the material on the Charter’s operation and to seek information from people with experience relevant to these questions. It would, for example, be useful for SARC to invite contributions to the review from public servants who can speak to the impact of the Charter on internal government processes and standards.65

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**Terms of Reference Question 5. (a)**

**What have been the effects of the Charter Act on the development and drafting of statutory provisions?**

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85. One purpose of the dialogue mechanisms adopted in the Charter is to create a feedback cycle that ensures that the Charter is taken into account in preparing laws and that Bills or laws will be amended to comply with or override the Charter following parliamentary scrutiny and debate and, where relevant, a declaration of the Supreme Court is made that a law is inconsistent with the Charter.

86. The Charter’s impact might be publicly evident at different stages in the development and drafting of statutory provisions: in policy documents, inquiry reports, exposure drafts of Bills, Bills introduced into Parliament, Statements of Compatibility,66 explanatory memoranda, SARC practice notes and, ultimately, amendments to legislation. The policy makers, Chief Parliamentary Counsel’s Office67 or others engaged in drafting Bills, the Scrutiny of Acts and Regulations Committee68 and the relevant Minister or member will take account of the Charter in the development and drafting of statutory provisions. Views on the relevance of the Charter will be reflected in Statements of Compatibility, SARC reports and Ministerial responses where relevant, reports on inquiries and submissions from the public where relevant, and parliamentary debates.

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65 We note, for example, that the Homeless Persons Legal Clinic, the Eastern Community Legal Centre, Youthlaw and Tenants Union of Victoria, and the Mental Health Legal Centre are also each well placed to provide relevant information.

66 Statements of compatibility, prepared by members of Parliament in accordance with section 28 of the Victorian Charter, accompany each new Bill. The Statements of Compatibility state the members’ opinions as to whether their Bills are compatible with human rights. To the extent that Statements of Compatibility indicate where provisions have been included or designed to take account of human rights, they provide insights into the effects of the Charter on the development and drafting of statutory provisions.

67 At an event titled ‘Legal experts share their insights’ at RMIT University on 26 August 2009, the Chief Parliamentary Counsel, Victoria, shared an account of how parliamentary counsel set about the task of drafting legislation, drawing particular attention to the importance of the Charter of Rights in the preparation of legislation at [http://www.rmit.edu.au/print;ID=qzm9zarw7e67;LOCATION=News%252520and%252520Events%252520News%252520Business%252520by%252520title%252520%25253BID%25253Dqzm9zarw7e67%25253BSp1%25253Dqzm9zarw7e67%25253BSTATUS%25253DA;STATUS=A](accessed 24 June 2011).

68 Pursuant to the Victorian Charter, above n 4, s 30.
87. Based on the Registers of Statements of Compatibility compiled by the Victorian Equal Opportunity and Human Rights Commission, we note that the percentage of Bills considered in the Statements of Compatibility to engage or otherwise affect human rights steadily increased over the four years from 63% in 2007, to 81% in 2008 and in 2009 and 98% in 2010, with an average over the four years of 78%. The extent of the analysis justifying the view taken in the Statements of Compatibility varied from Bill to Bill, ranging from what SARC, Parliament or the public might have considered inadequate to extensive analysis of compatibility with human rights. Different views were expressed by SARC, Parliament or the public as to the compatibility of the Bills with human rights in some instances.

88. The increase in Bills found to engage human rights over the four years could indicate an increased awareness and understanding of human rights impacts over that time. It is possibly an indication of a growing culture of human rights in government. The fact that almost all Bills introduced into Parliament in 2010 engaged human rights is also an indication of the fundamental significance of human rights to policy and law-making in Victoria.

89. In the following paragraphs, we consider some select examples of Bills or Acts in terms of the effects of the Charter on the development and drafting of statutory provisions.

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69 VEOHRC Register of Compatibility Statements
(accessed at 24 June 2011).

70 Of those deemed in the Statements of Compatibility not to raise human rights issues, a different view was taken by SARC or Parliament with respect to a minimal number of Bills: 10% of those found not to raise human rights issues or 2% of the total number of Bills over the four years.

90. One law of particular relevance to the effect of the Charter on the development and drafting of statutory provisions is the Statute Law Amendment (Charter of Human Rights and Responsibilities) Act 2009 (Vic) (Charter Amendment Act). The Charter Amendment Act represents at least the initial conclusions of the then government’s review of the compatibility of Victorian laws with the Charter. It amends seven Acts to make them compatible with human rights in the Charter: amendments are made to four Acts to address ‘reverse onus’ provisions that breached the presumption of innocence (s.25(1) of the Charter), one Act that breached the right to equality (section 8 of the Charter), and two Acts that breached the right to freedom of expression (s.15 of the Charter).

91. Amendments to only seven Acts after a review of all Victorian laws might represent a very conservative view of the compatibility of Victorian laws with human rights. There are, for example, many reverse onus provisions in Victorian laws passed before the enactment of the Charter. However, the action of the then government not to amend reverse onus provisions in other Acts can and has been the subject of legal challenge. The Supreme Court of Appeal made its first declaration of inconsistency under section 36 of the Charter with respect to one such reverse onus provision and it is possible that other reverse onus provisions will be challenged and found inconsistent in the future.

92. It can be concluded that the effect of the Charter on the development and drafting of statutory provisions has been significant, leading to amendments of existing laws and, eventually, it should lead to action on a declaration of inconsistent interpretation. We note that the Charter has been central to the reviews of other laws – such as the Mental Health Act 1986 (Vic) and the Guardianship and Administration Act 1986 (Vic) – and expect that it will have ongoing relevance to reviews and updates of old laws.

Magistrates’ Court and Coroners Acts Amendment Act 2007 and the Coroners Act 2008

93. Amendments made to the Coroners Act 1985 (Vic) and the subsequent enactment of the new Coroners Act 2008 (Vic) is an instructive example of the effects of the Charter on the development and drafting of statutory provisions. The Magistrates’ Court and Coroners Acts Amendment Act 2007 (Vic) (Coroners Act Amendment Act) inserted into the Coroners Act 1985 a new provision (s.51) empowering a coroner to make a coroner’s file available to any person during the course of an investigation and requiring that the coroner’s file and record be open to public access after an investigation is completed unless the coroner directed otherwise. The new provision mirrored a regulation that had been revoked on the recommendation of the Victorian Parliament Law Reform Committee which had been concerned by the provision’s broad scope and potential for misuse.

94. The Statements of Compatibility that accompanied the Coroners Act Amendment Act when it was introduced as a Bill stated that, as a result of the new provision, ‘[i]t is likely that the files and records which will be made accessible will contain information of a personal nature regarding any number of individuals and may be capable of identifying such persons. The amendment constitutes a prima facie limitation on the right to privacy. With reference to the importance of the competing right to receive information (s.15 of the Charter), the Statements of Compatibility went on to conclude that the limitation on the right to privacy was demonstrably justified under s.7(2) of

71 R v Momcilovic [2010] VSCA 50 (17 March 2010), currently on appeal to the High Court of Australia
72 Following R v Momcilovic, ibid.
the Charter. The Statements of Compatibility said that the ‘limitation is designed to ensure that information obtained by the coroner, which may have implications for the community, can be released to the community’ and that ‘[n]o other means are considered reasonably available to achieve the purpose of the restrictions placed on a person’s right to privacy or reputation.’

95. As expressed in a submission to the Attorney-General at the time, the LIV opposed the introduction of the new provision and strongly disagreed with the Attorney-General’s assessment of the limitation as being demonstrably justified. The LIV considered that the potential consequences of breaching a person’s right to privacy warranted better protection, consistent with protections in the Health Services Act 1988 (Vic), the Mental Health Act 1986 (Vic), the Health Records Act 2001 (Vic) and the Health Privacy Principles.

96. Ultimately, the Coroners Act 2008 (Vic) was passed with sections 8(e), 73 and 115 placing controls on the public disclosure of personal or health information. The Statements of Compatibility that accompanied the Coroners Act 2008 as a Bill deemed the limitations on human rights demonstrably justified, noting that ‘[d]isclosures under these clauses [115] are subject to discretion and subject to clause 8 [privacy principles] of the Bill and section 38 of the Charter. Further, the release of all documents can be the subject of conditions.’

97. The provisions protecting privacy that were subsequently enacted in the Coroners Act 2008 demonstrate that there were less restrictive means reasonably available to those contained in the Coroners Act Amendment Act. The Statements of Compatibility that accompanied that earlier Act was nevertheless a transparent statement of the government’s view on the balance of rights that provided a basis for criticism by parliamentarians and members of the public which ultimately led to a better law being enacted in the form of the Coroners Act 2008. In our view, the enactment of a law more compatible with human rights can be attributed, at least in part, to the Charter and noted as a positive impact on the development and drafting of statutory provisions.

Summary Offences and Control of Weapons Acts Amendment Bill 2009

98. The Summary Offences and Control of Weapons Acts Amendment Bill 2009 (Control of Weapons Act) sought to introduce new police powers and offences to control ‘the growing incidence of drunkenness, disorderly behaviour and violence’ in the Victorian community. The Bill significantly extended coercive powers available to police to search and apprehend Victorians without any need for suspicion on reasonable grounds about the commission of an offence.

99. In the Statements of Compatibility that accompanied the Bill, the government acknowledged that the Bill was partially incompatible with the Charter, to the extent that it provided new powers for police to randomly search persons and vehicles in public places within designated areas but did not seek to justify this incompatibility in accordance with s7(2) of the Charter which provides that certain human rights may be subject only to such ‘reasonable limits as can be demonstrably justified in a free and democratic society’. Nor did Parliament use the override declaration in section 31 of the Charter in passing the Bill into law.

100. The Charter’s effect in this instance was useful to framing the debate on the relevant law but had a limited effect on the development and drafting of statutory provisions. However, that debate is part of the public record.


101. Under the presently in force Equal Opportunity Act 1995 (the 1995 Act), section 75 provides that religious bodies can legally discriminate where the action conforms to the doctrines of the religion or is necessary to avoid injury to the religious sensitivities of the people of the religion. Following a three year process that included an extensive review of the 1995 Act, a parliamentary review of the exceptions and exemptions under the 1995 Act and consultation on the Equal Opportunity Bill 2010 (the 2010 Bill), the Victorian Parliament enacted the Equal Opportunity Act 2010 (the 2010 Act) which is due to enter into force in August 2011.

102. Under the new 2010 Act, section 75 of the 1995 Act is largely preserved (in new s.82(2)) but two elements have been added which represent a less restrictive limitation on the right to equality in s.8 of the Charter:
   a) a requirement that the discrimination be ‘reasonably’ necessary to avoid injury to religious sensitivities (ie making it an objective test) and
   b) a stricter ‘inherent requirement’ test applying to discrimination on religious grounds in employment.75

103. In the Statements of Compatibility that accompanied the 2010 Bill, the then Attorney-General acknowledged that allowing discrimination on religious grounds (s.82(2)) ‘limits the right to equality’ but stated that, with the inclusion of an objective test and excluding employment, ‘these provisions represent an appropriate balance between the right to freedom of religion and the right to equality.’ He concluded that the limitation on the right to equality was ‘reasonable and justifiable under s 7(2) of the Charter.’76

104. On 3 May 2011, the government introduced the Equal Opportunity Amendment Bill 2011 (2011 Bill) into Parliament. It was passed into law in June 2011 after the government took extraordinary steps to expedite its enactment.77 There was no formal public consultation on the 2011 Bill. Among other things, the 2011 Bill removes the inherent requirements test from the 2010 Act.

105. In the Statements of Compatibility that accompanied the 2011 Bill, the Attorney-General acknowledged that the removal of the inherent requirements test ‘limits the right to equality in section 8(3) of the charter’ but stated that ‘the amendments strike the appropriate balance between the right to equality in section 8 of the charter act and the rights to freedom of religion in section 14 and freedom of association in section 16(2).’ He concluded that the ‘limitations are reasonable and justifiable within the meaning of section 7(2) of the Charter act and that ‘the Bill is compatible with the Charter of Human Rights and Responsibilities Act 2006.’

106. Two Attorneys-General have considered Bills where one has included a provision that the other deletes and both have deemed the relevant provisions compatible with the Charter. This shows that opinions on human rights compatibility and the balancing of competing rights can differ and that the difference of views can be accommodated by the terms of the Charter. The strength in the Charter is the fact

75 See Equal Opportunity Bill 2010 (Vic) at http://www.parliament.vic.gov.au/static/www.legislation.vic.gov.au-bills.html (accessed 24 June 2011). In the case of employment, a religious body can, pursuant to the new section 82(3) legally discriminate in employment where (a) conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position; and (b) the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity means that he or she does not meet that inherent requirement. Similar provisions and changes apply to religious schools (pursuant to the former section 76 or the new section 83), and discrimination by people on religious grounds (pursuant to the former section 77 or the new section 84).
76 Ibid.
that the Charter requires, through Statements of Compatibility, that the views of our elected representatives be articulated publicly and subject to scrutiny so that they may be held to account for the conclusions they reach on human rights compatibility.

**Assessment of Charter’s effect on development and drafting of statutory provisions**

107. In the LIV’s view, the Charter has had a significant impact on the development and drafting of statutory provisions. Views on human rights compatibility of statutory provisions can be variable and there is room for legitimate difference of opinion as to compatibility. The transparency, public debate and accountability promoted by the articulation of those views is very valuable in a free and democratic society and strengthens democratic institutions of government and of responsible government. Statements of compatibility provide a basis upon which government can be held to account for decisions that, without them, would otherwise be considered internally within government without public scrutiny.

108. The LIV notes that the override provision in the Charter (s.31), allowing Parliament to declare that a statutory provision has effect despite being incompatible with human rights, has not been used to date. By its terms, the override provision is to be used by Parliament in only exceptional circumstances (s.31(4)). As noted above, the LIV considers that the override provision should be removed. It is inconsistent with international commitments: it should at least be amended so that it does not apply to absolute or non-derogable rights.

109. If the override provision in s31 is retained, the LIV would prefer to see it used instead of using sub-s7(2) of the Charter to excuse unjustifiable limitations of rights. An override declaration in such cases is more transparent and instructive. It would make it clear to the public when human rights have been abrogated by Parliament. It might be appropriate to provide guidance on the distinction between a ‘reasonable limitation’ and an abrogation of rights for the purposes of understanding the relationship between sub-s7(2) and s31.

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**Terms of Reference Question 5. (b)**

What have been the effects of the Charter Act on the consideration of statutory provisions by Parliament?

110. The effects of the Charter on the consideration of statutory provisions by Parliament is evident, for example, in the reports of SARC and in parliamentary debates on Bills. Based on VEOHRC’s Registers of Statements of Compatibility, SARC has made a significant contribution to human rights considerations of statutory provisions. It has prepared detailed reports on most if not all of the Bills deemed by Statements of Compatibility to engage human rights. It has also reported on some Bills deemed by the Statements of Compatibility not to raise human rights issues. SARC is well placed to examine the effects of its own work under the Charter on statutory provisions.

111. VEOHRC’s Registers of Statements of Compatibility in 2009 and 2010 are a good indication of the effects of the Charter in parliamentary debates in the relevant years. There was parliamentary debate on human rights aspects of Bills for 20% and almost

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78 For example, the Control of Weapons Act, above para 86.

60% of all Bills introduced into Parliament in 2009 and 2010 respectively.\(^80\) It is unlikely that any such debate about human rights would have occurred in the absence of the Charter. It can be concluded that the Charter helped to identify issues and provided a frame of reference to guide the debate with consistent themes.\(^81\)

112. By way of example, there was extensive parliamentary debate on each of the Bills or Acts discussed above in our response to Terms of Reference Question 5(a).

113. In the case of the *Magistrates’ Court and Coroners Acts Amendment Bill 2007*, a member for the Greens Party tabled an amendment to the Bill that would have removed the new provision that the Bill proposed to insert into the *Coroners Act 1985* to give open access to coronial files. The Greens amendment was rationalised on human rights grounds under the Charter but was not passed. Nevertheless, the Charter provided a basis for the debate on the Greens amendment and the debate is likely to have contributed to the then government’s decision to introduce privacy protections into the subsequently enacted *Coroners Act 2008*.

114. In the case of one Bill – the *Abortion Law Reform Bill 2008* – the government took the view that s.48 of the Charter operated to exclude the application of the Charter to the Bill and there was no Statements of Compatibility prepared for that Bill.\(^82\) There was, however, significant debate about human rights and the application of the human rights protected under the Charter to the Bill.\(^83\) These examples highlight the significance of a human rights framework to parliamentary debate and demonstrate that no law can be excluded from the possibility of human rights scrutiny.

115. Finally, we note that parliamentary debate on a Bill is typically adjourned for at least 2 weeks after the second reading speech (where the Statements of Compatibility is tabled under s.28 of the Charter). We consider that this leaves insufficient guarantees of time for SARC’s consideration and report to Parliament under s.30 of the Charter. It also leaves insufficient time and opportunity for public submissions on the human rights compatibility of Bills before they are debated in Parliament. One of the purposes of the Charter is to ensure that human rights are appropriately considered in developing laws: debating Bills in Parliament without adequate time for scrutiny undermines the impact and benefit of the Charter.

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\(^{80}\) This represents approximately 25% and 60% of Bills deemed in the Statements of Compatibility Register to engage human rights in 2009 and 2010 respectively.


\(^{82}\) See Minister for Women’s Affairs, Victoria, Second Reading Speech on *Abortion Law Reform Bill 2008*, Legislative Assembly, (19 August 2008).

Terms of Reference Question 5. (c)

What have been the effects of the Charter Act on the provision of services, and the performance of other functions, by public authorities?

116. Examples of effects of the Charter on the provision of services by public authorities are being collected and documented. Catalogues of the effects of the Charter on the provision of services by public authorities include:


   b) Victorian Equal Opportunity and Human Rights Commission. 'Your Rights, Your Stories';85

   c) Human Rights Law Centre, Case Studies: How a Human Rights Act can promote dignity and address disadvantage;86

   d) Human Rights Law Centre, Australian Human Rights Register.87

117. We do not consider it necessary to duplicate the extensive information available from the above sources. We note, however, the extent and range of effects that have been documented. Instances of improved services range from those benefiting individuals and groups in society that they represent (e.g. a child with autism gaining access to disability assistance) to systemic reform (e.g. the inclusion of human rights in planning by local government).88

118. One of the most recent and comprehensive catalogue of effects of the Charter on the provision of services by public authorities is available in the Victorian Equal Opportunity and Human Rights Commission’s ‘Talking Rights: Compilation Report’ published in May 2011 (VEOHRC Compilation Report).89

119. The VEOHRC Compilation Report describes developments in the setting of standards for public authorities guided by the Charter, annual reporting by public authorities on Charter obligations, the incorporation of Charter responsibilities into the strategic documents of a range of public authorities and Charter impacts on policy design and development.90

120. We also note the work undertaken by the PILCH Homeless Persons’ Legal Clinic to identify the myriad of laws, policies and service standards that might be relevant at any given time to a person experiencing homelessness.91 Public authorities applying the Charter should be developing or revising internal service standards to make them consistent with the human rights that are engaged by the activities of those public authorities in the exercise of their functions. Those standards should be designed to

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89 See VEOHRC Compilation Report, above n 53.
90 VEOHRC Compilation Report, above n 53, part 1.
91 A person experiencing homelessness may receive services that are subject to at least 5 pieces of legislation (not including the Charter) and 18 standards, codes and policies, see Annexure B. Submission from the PILCH Homeless Persons’ Legal Clinic to the Inquiry into the Charter of Human Rights and Responsibilities (7 June 2011) 69 at http://www.pilch.org.au/Assets/Files/HPLC%20-%20Charter%20Review%20Submission.pdf, (accessed 24 June 2011)
promote rather than undermine human rights. The advantage of the Charter is that it provides a framework to inform service standards, promoting consistency in practice and facilitating compliance with human rights.

121. The VEOHRC Compilation Report also examines actions and decisions of public authorities, citing examples of internal policy reviews conducted by public authorities and other activities such as a report of the Office of the Public Advocate highlighting the need for improvements to the Supervised Treatment Order regime to comply with human rights and a briefing note prepared by the Office of Housing in the Department of Human Services which gives guidance on Charter compliance, particularly with respect to evictions.92

122. We note the important role that the Charter can play in informing and guiding decisions of public authorities to deliver positive results for people and keep matters out of complaints procedures and the courts. Cases have been documented, for example, where government authorities have considered human rights under the Charter to reach a decision which has avoided the need for costly and stressful cases before tribunals and courts.93

<table>
<thead>
<tr>
<th>Terms of Reference Question 5. (d)</th>
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<td>What have been the effects of the Charter Act on litigation and the roles and functioning of courts and tribunals?</td>
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123. The Charter has had an important but measured effect on litigation and the roles and functioning of courts and tribunals.

**LIV audit of Charter cases**

124. The LIV has identified and reviewed 209 Victorian cases, representing 195 matters,94 in which Charter issues have been raised or addressed from 26 September 2006 to 15 June 2011. The cases examined are contained in the table in the Appendix 1 to this submission (LIV case audit).95

125. The cases in the LIV case audit generally reflect decisions that have been reported or are otherwise available to the public. The audit does not, for the most part, identify or examine cases in which the Charter has been raised or addressed but which have not been reported. There are limitations on court resources to report decisions and the reporting of some decisions is restricted. Nor does it include a number of cases where the Charter was cited in passing.96 It does not include matters resolved prior to

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93 For example, VEOHRC Human Rights Charter Case Register ‘Your Rights, Your Stories’, above n 85 cites the following example from Tenants Union of Victoria, March 2009, “[p]eople living in public housing who are not tenants (on the lease) can apply in certain circumstances to have the tenancy created in their own name, but this requires an application to VCAT. One person applied for such an order after the actual tenant, with whom they had been living for some time, passed away. The person’s advocates raised a range of human rights concerns with the relevant government department, which subsequently granted the tenancy on the day before the case was due to be heard by the tribunal, thereby saving the person the unnecessary stress of having to appear in court’. See also cases study summaries of negotiated outcomes in Annexure A to the Submission from the PILCH Homeless Persons’ Legal Clinic to the Inquiry into the Charter of Human Rights and Responsibilities 7 June 2011, above n 91.
94 This is referring to the fact that some cases in the table are the same matter at different stages in the proceeding. Note that, in addition, two related but different proceedings are listed as separate decisions: DPP v Piscopo [2010] VSC 498 and DPP v Rukandin [2010] VSC 499; DPP v Nguyen & Anor [2008] VSC 292 (7 August 2008) and DPP v Duncan & Anor [2008] VSC 292 (7 August 2008).
95 Charts based on the data are contained in Appendix 2 and some are included in the body of this submission.
96 Approximately 40 cases were identified which fall into this category, such as Ambridge Investments Pty Ltd (in liq) (recvr app’td) v Baker & Ors (No 3) [2010] VSC 545 (8 December 2010), Coastal Estates Pty Ltd v Bass Coast SC & Ors [2010] VCAT 1807 (9 November 2010) and Bairami v Susan Day Cakes & Anor [2010] VCC 512 (27 May 2010).
hearing or final judgment. Finally, it does not include cases heard by non-Victorian courts which have referred to the Charter.97

126. Of the 209 cases reviewed in the LIV’s case audit, there has been a steady but unremarkable increase in the numbers of cases raising or addressing the Charter in a calendar year with, for example, 49 in 2008, 55 in 2009 and 66 in 2010. The majority of those cases were heard at VCAT (44%) and the Supreme Court and the Court of Appeal (combined 42%) although, as noted above, cases from other courts and tribunals are not necessarily as frequently reported.

127. We have assigned a ranking to the cases, with ‘0’ representing a case in which the Charter had the least impact and ‘4’ representing a case in which the Charter had the most impact. Specifically, the categories are:

- 0 Charter mentioned but not relied on or not applicable;
- 1 Charter argued, considered either not applicable or rights not engaged, or unnecessary to determine Charter issue;
- 2 Charter raised, considered applicable, but found to reinforce or be consistent with existing law;
- 3 Charter raised, considered applicable or rights engaged, but no breach / justified limitation on rights found;
- 4 Charter raised, considered applicable or rights engaged, and decision turned on the Charter.

128. The LIV acknowledges that the rankings involve a degree of subjective assessment and that it could be argued that a different ranking should be assigned to any given case. Moreover, rankings ‘2’ and ‘3’ correlate to cases raising s.32 (interpretative) issues and cases raising s.38 (public authority acting incompatibly) issues respectively and do not necessarily reflect a higher or lower impact of the Charter.

129. The rankings have been made on the face of the decision. They do not reflect any broader impact of the Charter resulting from the decision. For example, the decision in CL (a minor) v Tim Lee [2010] VSC 517 is ranked as ‘0’ because the Charter was deemed not to apply. However, the Charter arguably contributed to the Court recommending legislative change and proposing guidelines for the County Court in cases involving children.99 The Charter could accordingly be described as having been useful in identifying a gap in court procedure that was inconsistent with the rights of children. Similarly, the ranking of ‘1’ in Valentine v Emergency Services Superannuation Board [2010] VCAT No G585/2008 (29 July 2010) does not reflect the fact that the claim for superannuation benefits was resolved, at least in part, by legislative amendment which might have been prompted or influenced by the bringing of the complaint invoking the Charter.100

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98 Note two cases have been assigned an ‘N/A’ ranking.

99 CL (a minor) v Tim Lee [2010] VSC 517, Paras 81-86.

130. The rankings also do not reflect the extent to which a decision is significant in terms of developing jurisprudence on how the Charter is applied and, importantly, when it does not apply.101

131. Of the 209 cases, 12% were ranked ‘0’ and 9% were ranked ‘4’, with the larger proportion of cases being ranked ‘1’ (35%) or ‘3’ (29%). The number of cases at the extremes of the ranking scale are comparable, with 97 (47%) cases with a ‘0’ or ‘1’ ranking and 78 (38%) with a ranking of ‘3’ or ‘4’. This means that there have been almost as many cases in which the Charter had a high impact as there are cases in which the Charter’s impact was low.

132. Of the 20 sections in the Charter that prescribe substantive human rights (ss8-27), the most frequently invoked section (26% of cases) has been s.13 on the right to privacy and reputation (non-interference with privacy, family, home and correspondence and no unlawful attacks on reputation). The right to equality in s.8 was raised in 19% of cases, the right to a fair hearing in s.24 was raised in 19% of cases and rights concerning criminal process in s.25 were raised in 14% of cases.

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101 See further below.
133. Other sections with relatively frequent citation include s.15 (freedom of expression and information), s.17 (protection of families and children), s.21 (right to liberty and security of person), s.12 (freedom of movement) and s.10 (protection from torture, cruel, inhuman or degrading treatment). The only section not cited in the cases reviewed is s.11 (freedom from forced work).
Reliance on the Charter is not limited to individuals seeking to assert their rights under the Charter. However, of the cases in the LIV case audit, individuals raised or relied on the Charter in over half the cases (57%). Others to raise or rely on the Charter were the relevant court or tribunal, intervenors, public authorities and, amicus curiae (‘friends of the court’).
135. We identified 21 areas of law in which the Charter was cited. Civil Procedure and Discrimination accounted respectively for 14% and 13% of the cases. Planning, Administrative Law, Residential Tenancies and Mental Health cases were each 6 or 7% of cases. Crime-related cases addressed Criminal Procedure (10% of all cases), Bail, (5% of all cases), Regulation of Sex Offenders (3% of all cases), Criminal Law in general (3% of all cases), Sentencing (2% of all cases) and Motor Vehicle offences (1% of all cases). The remaining areas were Freedom of Information, Disability, Real Property, Occupation and Business Regulation, Coronial Procedure, Tort, Adoption, Trade Practices and Constitutional Law.

Areas of law in which Charter was considered

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102 Note that the ‘crime-related’ areas of law included here do not include: Real Property cases that concern the Confiscation Act 1997 (Vic) such as DPP v Ali & Anor (No 2) [2010] VSC 503 (10 November 2010), DPP v Nguyen & Anor [2008] VSC 292 (7 August 2008), DPP v Duncan & Anor [2008] VSC 292 (7 August 2008), DPP v McEachran [2006] VSCA 286 (14 December 2006), Motoroney v Attorney-General of Victoria and DPP [2010] VCC 481 (19 May 2010)); Residential Tenancies cases that concern notices to vacate upheld for illegal use, for example, Director of Housing v Turcan [2010] VCAT Ref No R201011652 (Unpublished, 4 May 2010) and Director of Housing v T (Residential Tenancies) [2009] VCAT 1732 (26 June 2009); Administrative Review cases that concern, for example, parole or prison matters (Allen v Secretary to the Department of Justice [2008] VSC 286, Castles v Secretary to the Department of Justice [2010] VSC 310 (9 July 2010), R v Rich (Ruling No 20) [2008] VSC 24 (8 February 2009)); Civil Procedure cases that concern compensation under the Sentencing Act (Kortel v Mirik and Mirik [2008] VSC 103 (4 April 2008)).
Overall, 76% of the cases in which the Charter was cited concerned administrative or civil law-related areas and 24% of cases concerned crime-related areas.

**Significant cases**

The significance of particular cases can be considered from different perspectives. As explained in detail below, some are significant in terms of how they have elaborated on the meaning of the human rights contained in the Charter, or the meaning of terms such as ‘public authority’ defined in s.4. Some cases develop the understanding of how rights may or may not be limited or balanced under s.7 of the Charter. Other cases are significant for describing the circumstances in which the Charter does not apply, including when rights are not engaged or limits on the retrospective application of the Charter. Others develop our understanding of how the Charter should be applied and the circumstances in which the Charter applies to courts and tribunals.

In terms of decisions that elaborated on the meaning of certain Charter rights, cases have elaborated on the meaning of the right to privacy in section 13(a), considering for example what is meant by ‘arbitrarily interfered with’ and finding that it does not encompass the right to become a genetic parent and thereby found a family. It has been found that section 15(2) of the Charter contains a positive right to obtain access to government-held documents. Section 20 of the Charter does not, according to one decision, provide a right to just compensation for compulsory acquisition of land. Significantly, the Supreme Court found that the right to humane treatment when deprived of liberty in section 22 extends to the protection of prisoner health. Cases have also clarified the meaning of the rights in criminal proceedings in section 25 finding, for example, that the rights do not extend to disciplinary proceedings, explaining what is meant by the requirement to be tried without ‘unreasonable delay’ and elaborating on the presumption of innocence.

Under several cases, the understanding of what constitutes a ‘public authority’ under section 4 of the Charter and when entities and agencies of the state, therefore, are bound by the obligation to act compatibly with or give consideration to human rights in section 38 has been clarified. We know, for example, that VCAT and some other Victorian tribunals are public authorities when they are acting in an administrative capacity. In the area of government service delivery private landlords providing public housing are public authorities. VCAT has also given guidance on how to apply the Charter. The Supreme Court jurisprudence has addressed when the Charter has been misapplied by a lower court or tribunal and on the nature of the interpretative obligation in s.32 of the Charter.

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103 See below paragraphs 146-147 where comparisons are made with overall caseload of the courts and tribunals.
104 For example, see Director of Housing v KJ (Residential Tenancies) [2010] VCAT 2026 (16 December 2010).
105 Castles v Secretary to the Department of Justice [2010] VSC 310 (9 July 2010).
108 Castles v Secretary to the Department of Justice [2010] VSC 310 (9 July 2010).
112 Metro West v Sind [2009] VCAT 2025 (9 October 2009); Homeground Services v Mohamed (Residential Tenancies) [2009] VCAT 1131 (6 July 2009); Note universities might be public authorities McCadam v Victoria University & Ors (Anti-Discrimination) [2010] VCAT 1429 (3 September 2010) and telecommunications entities such as Telstra might not be public authorities Drummond v Telstra Corporation Limited (Anti-Discrimination) [2008] VCAT 2630 (23 December 2008).
113 Kracke v Mental Health Review Board [2009] VCAT 646 (23 April 2009) overturned in part (as to the interpretative obligation in s.32) by R v Momcilovic [2010] VSCA 50 (17 March 2010) which is on appeal to the High Court of Australia.
115 R v Momcilovic [2010] VSCA 50 (17 March 2010) on appeal to HCA.
140. Many cases enhance the understanding of when limitations of rights are justified under section 7 of the Charter, including: discrimination on the basis of race in employment for defence-related products justified on the basis of national security;\(^{116}\) possible limitations on the right to privacy or right to seek information justified on the basis of public interest;\(^ {117}\) limitations on the rights to take part in public life, privacy and property justified in the context of planning decisions;\(^ {118}\) justified breach of the right to privacy and other rights by the granting of administration, guardianship or supervised treatment orders for people with disabilities.\(^ {119}\) These cases can be contrasted with those that found that a limit on a Charter right was not justified and remedies followed.\(^ {120}\)

141. The question of how to balance competing rights under section 7(2) of the Charter has also been the subject of several decisions. Several cases, for example, have considered the question of balancing rights in granting exemptions under the \textit{Equal Opportunity Act} 1995 to sporting facilities seeking to provide exclusive swimming times for women. In these cases, it was considered reasonable to preference the rights of women, specifically women with religious or cultural beliefs that prevented them from swimming with men, over the rights of men.\(^ {121}\) Exemptions sought by schools seeking to preference the intake of girls over boys to facilitate gender balance has also been found to be a justifiable limitation on the general right to equality. A preferencing of women over men has also been considered justified under section 7 of the Charter in granting exemptions under the \textit{Equal Opportunity Act} to sporting facilities or clubs wanting to offer single-sex sporting environments.\(^ {122}\)

142. The cases in which Charter rights have been found not to have been engaged or not breached, or where the Charter is found not to apply, for example because of the Charter’s bar to retrospective application,\(^ {123}\) are important to the understanding of the limits to the Charter’s provisions and its application.\(^ {125}\) Equally with the decisions in


\(^{117}\) \textit{Simpson v VicRoads (General)} [2011] VCAT 321 (28 February 2011); see also \textit{Director of Housing v Turcan} [2010] VCAT Ref No R201011922 (Unpublished, 4 May 2010), \textit{Director of Housing v T (Residential Tenancies)} [2009] VCAT 1732 (26 June 2009) and \textit{Director of Housing v IF} [2008] VCAT 2413 (18 November 2008).

\(^{118}\) \textit{Tarwin Valley Coastal Guardians Inc v Minister for Planning & Anor} [2010] VCAT 1226 (28 July 2010); \textit{Glen Eira C60 (PSA)} [2010] PPV 79 (27 July 2010).


\(^{120}\) See below in context of remedies flowing from Charter in Review Term of Reference 5(e).


which the Charter does apply, these decisions about the limits of the Charter guide decision-makers and rights-holders on how to use and not use the Charter. There are now authoritative decisions stating that a summons to produce documents is not a breach of the right to privacy and that statutory rates or levies do not breach the right to property. Also significant are decisions dealing with laws that provide justifiable limitations on human rights, such as the case in which it was found that crimes concerning destruction to property restricted a graffiti artist's freedom of expression but that the limitation was justified. Cases that decide matters on a non-Charter basis are also significant in that they demonstrate the extent to which the common law is able resolve human rights matters and where it is for Parliament to balance the competing policy considerations in a manner compatible with human rights.

Finally, the cases have been important in explaining how the Charter applies to courts and tribunals. Cases before VCAT have confirmed that VCAT is a public authority and bound by the Charter when acting in an administrative capacity but not when acting in a judicial capacity. There are some areas where the divide between administrative and judicial capacities remains unclear, but this could be clarified by future case law or an amendment to the Charter. VCAT cases have also determined when VCAT has jurisdiction to hear Charter arguments. Cases have considered how the right to a fair hearing in s.24 and rights in criminal proceedings in s.25 of the Charter apply to court or tribunal procedure noting, for example, that the right to a fair hearing demands a degree of specificity in a party's claims but that the right to a fair hearing does not require VCAT to conduct hearings in the same manner as courts. The Supreme Court has also confirmed that the Charter applies to the Children's Court in its capacity as a court, finding that exercising its procedural discretion to conduct a 'submissions contest' rather than a full hearing was in best interests of the children and not inconsistent with the right to a fair hearing in s.24 of the Charter. Some issues of application of the Charter to court and tribunal procedure remain to be resolved.
Overall assessment of effects of the Charter on litigation

144. The effect of the Charter on litigation has been important. The LIV case audit shows that decisions in at least 9% of the Charter cases turned on the Charter but it does not account for cases where a result turning on the Charter might have been achieved through negotiation or settlement. The wide range of areas in which the Charter has been cited suggests that the Charter has been relevant to Victorians in many different contexts. The Charter’s effect on criminal proceedings has not been more significant than other areas of law, with reliance on crime-related sections of the Charter such as s.25 (rights in criminal proceedings) being less frequent than the right to privacy and the right to equality.

145. Based on the numbers of decisions in the LIV case audit that were brought in three years from 2008 to 2010, there has been an average of 57 decisions a year in which the Charter has been cited in Victorian jurisdictions. This would appear to be a small number of cases and does not represent the opening of the ‘floodgates’ of litigation that some had feared. For example, VCAT finalised a total of 81,186 cases in the 2008/2009 financial year yet the LIV case audit contains only 21 decisions heard in VCAT over that period (0.03% of cases). Figures are similar for the 2009/2010 financial year (0.04%). Some VCAT Lists appear to have had a higher percentage of Charter-related decisions than others, but the percentages are still low. For example, VCAT’s Anti-Discrimination List appears to have had the highest percentage of Charter-related decisions: it finalised a total of 331 cases in the 2008/2009 financial year compared with the 6 discrimination matters in the LIV case audit for that period (almost 2%). The LIV case audit suggests only a small increase in the percentage of Charter-related discrimination matters in 2009/2010 financial year (318 cases finalised compared with 9 Charter-related decisions concerning discrimination amounting to almost 3%).

146. Percentages of Charter-related decisions compared with total cases in the Victorian Supreme Court and the Court of Appeal also appear to be small (less than 1%). For example, the Victorian Supreme Court Trial Division finalised 5054 cases overall compared with the 19 Charter-related decisions in the LIV case audit (0.38%) for the 2008/2009 financial year. The following financial year saw the Court’s Trial Division finalise 5796 cases compared with only 13 Charter-related decisions in the LIV case audit (0.22%) over the 2009/2010 financial year. The percentage of overall cases finalised in the Court of Appeal compared with the Charter-related decisions in the LIV case audit in that court are also modest at 0.94% and 0.69% respectively for the 2008/2009 and 2009/2010 financial years.

147. Acknowledging that reference to decisions of reported cases does not necessarily capture the frequency of reliance on the Charter in inferior courts or tribunals or in the interlocutory stages of all proceedings (where reporting is less frequent), the relatively small number of Charter-related cases would appear to indicate that the Charter is being applied in moderation. We also acknowledge that as people and...
their legal representatives become more familiar with the Charter and its relevance to legal argument, the number of cases might increase. We would expect, however, that as the jurisprudence develops and settles the law concerning the Charter, the number of any unmeritorious claims made would decrease. While questions around the Charter’s application in particular instances remain, the jurisprudence will continue to develop and provide guidance on the Charter’s application, either resolving uncertainties or identifying areas in need of legislative reform.

Terms of Reference Question 5. (e)

What have been the effects of the Charter Act on the availability to Victorians of accessible, just and timely remedies for infringements of rights?

148. Remedies for infringements of human rights come in different forms and at different stages in a decision-making process. In dealing with public authorities, individuals might raise concerns about their personal experience of a particular public service. An individual might use the Charter as frame of reference in their discussions with that public authority: they might say that a particular decision is a breach of their human rights under the Charter. The relevant person making the decision for the public authority might then reconsider the matter and reach a different conclusion, or there might be an internal review process that leads to a different decision. The new decision is a remedy for what might otherwise have amounted to an infringement of someone’s human rights. The matters discussed in response to Terms of Reference Question 5(c) (the effects of the Charter on the provision of public services) are in many cases, examples of the effects of the Charter on the availability of remedies.

149. If individuals’ concerns about the protection of their human rights cannot be resolved in direct dealings with relevant public authorities, an individual might look to a third party – a tribunal or a court – to review the protection of their human rights in the context of complaint about a given decision by a public authority. The cases discussed in response to Terms of Reference Question 5(d) (the effects of the Charter on litigation) also give examples of accessible, just and timely remedies for infringements of rights.

150. Remedies in the course of or following litigation come in many forms. The Charter has helped people successfully challenge administrative orders. For example, four Aboriginal sibling children challenged a decision to place them in separate non-Aboriginal homes – a decision to revoke the order was upheld on appeal. Treatment orders placing restraints on people being treated for mental illness or for people with a disability have been revoked or altered in light of the human rights protected by the Charter. Decisions to evict people from public housing have been reversed and overruled on the basis of Charter rights.

151. The Charter has helped to justify favourable discrimination designed to facilitate employment of Indigenous people or to give women and girls access to sporting, recreational or education facilities. Compensation has been awarded following

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146 See further below in context of Review Term of Reference 6.
147 Secretary, Department of Human Services v Sanding [2011] VSC 42.
149 Directors of Housing v Sudi, above n 58; Metro West v Sudi [2009] VCAT 225 (9 October 2009); Homeground Services v Mohamed [Residential Tenancies] [2009] VCAT 1131 (6 July 2009).
150 Department of Human Services & Department of Health (Anti-Discrimination Exemption) [2010] VCAT 1116 (9 November 2010); for example, see The City of Whittlesea - Thomastown Recreation and Aquatic Centre (Anti-Discrimination) [2011] VCAT 250 (22 February 2011); Kensington Community Recreation Centre (Anti-Discrimination) [2010] VCAT 2058 (30 December 2010); Hobsons Bay City Council & Anor (Anti-Discrimination Exemption) [2009] VCAT 1188 (17 July 2009); YMCA – Ascot Vale Leisure Centre (Anti-Discrimination Exemption) [2009] VCAT 765 (4 May 2009); Preshil, The Margaret Littler
findings of discrimination in light of Charter rights. The Charter has also informed findings of unjustifiable discrimination, such as an attempt to sell property only to people over 55 years old. The Charter has also informed decisions that limit discrimination.

152. The Charter has contributed to interpretations of laws or recommendations for legislative reform to make laws more consistent with human rights. A court recommended, for example, that laws inappropriately restricting the jurisdiction of the Children’s Court be reformed. The Charter also contributed to a finding that the new Coroners Act 2008 (Vic) applied in particular circumstances that ensured a greater preventative focus with respect to level crossing deaths. Legislation found to breach the presumption of innocence (a basic common law right and a human right now protected by the Charter) has been declared inconsistent with the Charter. Legislation interpreted to be consistent with the Charter has also delivered protections for individuals, such as derivative use immunity, and the right to have a decision reviewed. Access to medical treatment has been provided in light of human rights protected by the Charter.

153. Court and tribunal procedures have been structured to accommodate people’s human rights under the Charter. The Charter helped, for example, guide courts on how to adjust court procedures to accommodate the needs and rights of children. A case has been expedited in light of the Charter. Perspex screens in court have been removed following a finding that they diminished the human right to be presumed innocent protected under the Charter.

154. The Charter has also helped people in the interlocutory or procedural stages of court or tribunal hearings. VCAT’s jurisdiction in relation to Charter claims has been confirmed. The rights of unrepresented litigants to a fair hearing have informed a decision to require specificity in detailing claims by a bank. Decisions to grant bail have been informed by human rights under the Charter. Less restrictive measures designed to keep a party to bankruptcy proceedings from leaving the jurisdiction have been taken with reference to the Charter. Inquest documents have been suppressed in light of Charter considerations. Sentencing and other restrictions of people found guilty of a criminal offence have been informed by the Charter.


158 CL (a minor) v Tim Lee [2010] VSC 517; DPP v Brian Pottering [2010] VCC.


162 Guss v Aldy Corporation Pty Ltd & Anor (Civil Claims) [2008] VCAT 912 (1 May 2008).

163 Castles v Secretary to the Department of Justice [2010] VSC 310 (9 July 2010).

164 CL (a minor) v Tim Lee [2010] VSC 517; DPP v Brian Pottering [2010] VCC.

165 Castles v Secretary to the Department of Justice [2010] VSC 310 (9 July 2010).

166 R v Berbrika & Ors (Ruling No 12) [2007] VSC 524 (12 December 2007).


170 Inquest into the death of Tyler Cassidy: Ruling on suppression application by the Chief Commissioner of Police pursuant to section 73(2)(b) of the Coroners Act 2008 (Vic) (Unreported, 8 November 2010).

171 Secretary to the Department of Justice v AB [2009] VCC 1132 (28 August 2009).
155. As noted in response to Terms of Reference Question 4, claims under the Charter can be raised only in the context of other existing claims for relief or remedy. It is therefore difficult to determine the extent to which Charter claims based on a failure by a public authority to act compatibly or to consider human rights under s.38 of the Charter have provided access to remedies that would not otherwise have been available. However, the Charter has assisted people in framing and substantiating their arguments. Through the interpretative obligation in s.32, the Charter has led to human rights-compliant applications of laws and procedures, all of which have helped to avoid infringements of human rights or provide accessible, just and timely remedies for any infringements of rights found to have occurred.

156. However, as noted in response to Terms of Reference Question 4, the LIV considers the absence of a direct cause of action for an infringement of human rights under the Charter to be a barrier to accessible, just and timely remedies for infringements of people's basic human rights. For the reasons stated in response to Question 4, people should have the option of raising Charter concerns where it is relevant to any matter before a tribunal or court but they should also be able to bring proceedings based solely on human rights grounds.

Terms of Reference Question 6.

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

157. The Charter has been an important first step towards better protection and promotion of human rights in Victoria. The LIV considers that the Charter has generated benefits in terms of a greater awareness of human rights within public bodies and the general community. The Charter has also facilitated the making of laws and decisions that are more sensitive and responsive to human rights concerns. It has improved the delivery, transparency and accessibility of public services and enhanced the accountability of the government and public service providers. With the Charter, Victorians have one 'language' that we can use to promote a consistent culture of care across the public sector.

158. Justice Bell’s observations are a useful articulation of the Charter’s benefits: ‘the Charter has communitarian purposes that go beyond the individual. These purposes include strengthening respect for the rule of law and our fundamental democratic institutions. This strengthens society itself, and every individual in society. Laws and public institutions that respect individual human rights are deserving of society’s respect.’\(^{169}\)

159. As noted above, the LIV does not think it is possible or appropriate to attempt to assign a monetary value to these benefits of the Charter. We would also be wary of any selective analysis of benefits and costs of one law – such as the Charter – as opposed to other laws.

160. The LIV is not able to comment on the financial costs of the Charter. We would note, however, that the development of Charter jurisprudence over time is likely to contribute to cost-savings in terms of guiding the decisions of public authorities in the first instance – leading to compliant decision-making which will lead to positive outcomes for people – as well as guiding people as to the merits of any challenge and ultimately reducing Charter claims.\(^{170}\)

161. We note that costs might be incurred in responding to unmeritorious or vexatious claims based on the Charter. There have been very few unmeritorious claims

\(^{169}\) Kracke v Mental Health Review Board & Ors (General) [2009] VCAT 646 (Unreported, VCAT, Bell J, 23 April 2009) [26].

\(^{170}\) See above in context of Review Term of Reference 5(d).
reported. Unmeritorious or vexatious claims are a risk in the application of any law. As with any law, as the jurisprudence develops and authoritative decisions are handed down which can be relied on in future cases, fewer unmeritorious or vexatious claims can be expected to be made and when they are they will be promptly dismissed. One case has, for example, determined that the right to privacy is not violated by a summons to produce documents: we would expect fewer claims of this nature being made in the future as a result of that authoritative decision of the Victorian Supreme Court of Appeal. We would also expect to see fewer cases where corporations seek to invoke human rights protections under the Charter as jurisprudence on s6(1) of the Charter (only persons have human rights) makes it clear that corporations do not have human rights.

162. We also note that, contrary to the concerns of some commentators, the Charter has not undermined the role of the Parliament as law maker. Parliament has continued to make laws and the judiciary has continued to interpret and apply the laws but now with the benefit of clear guidance from a single human rights instrument. As noted above, the LIV case audit has identified examples of cases in which courts and tribunals have highlighted the limits of the Charter and found it not to apply. Decisions in which the Charter has been found to apply have been modest in number and represent a fraction of the total litigation that occurs each year in Victoria courts and tribunals. In the words of the UK’s Lord Bingham, ‘the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself … [i]t is wrong to stigmatis[e] judicial decision-making as in some way undemocratic.’

163. The protections afforded by the Charter have been applied universally and are available to everyone, not just minorities or particular groups. It has, however, been of significant benefit to some groups, such as children and young people. Indigenous peoples have not necessarily experienced particular benefits as a result of the Charter, perhaps pointing to a need for better engagement with Indigenous Peoples in Victoria on the issue of human rights protection.

E. STRENGTHENING THE CHARTER

164. The LIV supports the Charter. We recognise, however, that it is not perfect and that there are several areas in which amendments should be made to strengthen the Charter, rather than weaken or repeal it. Our proposed amendments are set out below in response to Terms of Reference Question 7. Paragraphs 165 – 173 summarise the proposals for reform that have been addressed in our responses to earlier Terms of Reference Questions. Paragraphs 174 – 185 are proposals based on our observations of the effects of the Charter in practice.

171 Of the cases in the LIV case audit, we note that the Court in Slaveski v State of Victoria [2009] VSCA 6 concluded that the Charter arguments were "objectively hopeless" and in Kent v R [2008] VSC 431 (20 October 2008) that the Charter argument was "doomed to failure".
173 Western Suburbs Legal Service Inc v DOJ (General) [2010] VCAT 2009 (3 December 2010); Geelong Community for Good Life Inc v Environment Protection Authority & Anor (General) [2009] VCAT 2429 (17 November 2009); Bank of Cyprus Australia Limited v The Registrar of Titles & Ors [2008] VSC 327 (13 August 2008).
174 See above in context of Review Term of Reference 5(d).
175 A (and Ors) v Secretary of State for the Home Department [2004] UKHL56, [42].
**Terms of Reference Question 7.**

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

**Inclusion of all human rights, including economic, social and cultural rights**

165. The Charter should be amended to include all the human rights under the two principal international human rights instruments to which Australia is a party, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). It should include ICCPR rights that were omitted from the Charter, such as the right to self-determination and the right to birth registration, or substantively modified in a way that is inconsistent with international law. The language of all of the human rights included in the Charter should be modified to reflect plain English and gender neutrality and may require changes to reflect the distribution of powers between the Commonwealth and Victoria.

166. The other human rights recognised in Australia and protected under other international human rights agreements to which Australia is a party, including the *Convention on the Rights of the Child* (CRC) and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) (highlighted in TOR question 1(b) and (c)), should also be protected under the Charter. If it is not practical to list all rights protected under international agreements to which Australia is a party, they could be incorporated by reference.

167. With a view to promoting consistency between Victorian and Commonwealth laws, it would be appropriate to include in the Charter at least those human rights included in the proposed Commonwealth law, the *Human Rights (Parliamentary Scrutiny) Bill 2010*.

**Limitations on human rights should be consistent with international law**

168. The limitation of human rights in the Charter should be consistent with international law. Section 7(2) of the Charter should be amended to reflect the fact that some rights cannot be limited under international law. In addition, ‘built-in’ limitations should be reinstated for all human rights that contain built-in limitations under international law. The override provision should be removed or, if retained, it should be amended so that it does not apply to rights that are absolute or which cannot be limited in times of emergency under international law.

169. If, however, the override provision is retained, the LIV would prefer to see the override provision used instead of reaching inappropriate conclusions as to the limitation of rights under s.7(2) of the Charter. An override declaration in such cases is more transparent and instructive and would make it clear to the public when their human rights have been abrogated. It might be appropriate to provide guidance on the distinction between a ‘reasonable limitation’ and an abrogation of rights for the purposes of understanding the relationship between ss.7(2) and 31 of the Charter.

**Regular reporting and auditing of compliance**

170. The LIV supports mandatory regular reporting by and auditing of public authorities to assess compliance with human rights. However, given that the Charter has been in operation for only four years, it might be appropriate to defer consideration of mandatory auditing until the eight-year review anticipated in 2015.

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**Direct proceedings and remedies**

171. The option currently in the Charter of raising the protection of human rights in the Charter in connection with other proceedings should be preserved. In addition, a person who claims that a public authority has violated its obligations under the Charter (s.38) should be entitled under the Charter to bring proceedings against that authority in an appropriate court or tribunal, such as the Victorian Civil and Administrative Tribunal.

172. That court or tribunal should be empowered under the Charter to grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. The inclusion of a provision equivalent to s8(3) of the UK Human Rights Act would ensure that relief in the form of damages is not a remedy of first resort. Like the ACT and UK Acts and similar in effect to s39(4) of the Charter, the Charter should also ensure that any right to damages for a breach of the Charter does not affect any right a person may have to damages apart from the operation of Charter.

173. It might be appropriate for the court or tribunal to be able to refer any matter to conciliation by, for example, the Victorian Equal Opportunity and Human Rights Commission. It might also be appropriate to provide for non-judicial complaints mechanisms and relief which could be used before resorting to a court or tribunal. Either the Victorian Equal Opportunity and Human Rights Commission or the Victorian Ombudsman might be an appropriate body to manage a complaints mechanism, although it would require adequate resources and powers. Appeals could be made to the VCAT.

**Charter’s application to all laws**

174. In the LIV’s view, no laws should be excluded from the Charter’s application. Section 48 should be removed.

**Unqualified application to courts and tribunals**

175. The definition of a ‘public authority’ under section 4 of the Charter includes public officials, entities exercising public functions, the police, local councils and councillors and ministers. Excluded from the definition of 'public authority' is ‘a court or tribunal except when it is acting in an administrative capacity’ (s4(1)(j)). In addition, some tribunals such as the Adult Parole Board, are excluded from the Charter’s application.

176. Similar to the UK Human Rights Act (s.6(3)(a) HRA), courts and tribunals should be included in the definition of public authority, regardless of whether they are acting in an administrative, judicial or quasi-judicial capacity. Similarly, the application of the Charter to courts and tribunals should not be limited by section 6(2)(b) of the Charter which provides that the Charter applies to courts and tribunals only ‘to the extent that they have functions under Part 2 and Division 3 of Part 3. We also submit that tribunals specifically excluded from the Charter’s application, such as the Adult Parole Board, should be subject to the Charter. Any such amendments would, however, have to take account of the need for finality of litigation.

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178 Subsection (3) states, “[n]o award of damages is to be made unless, taking account of all the circumstances of the case, including—(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made”.

179 Until December 2013 pursuant to the Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009 (Vic), ss 5–6.

Voluntary assumption of obligations by private entities

177. Entities, including private entities, should have the option of assuming the obligations of public authorities under the Charter. An ‘opt-in’ provision equivalent to s.40D of the ACT Human Rights Act could be included in the Charter. Many private businesses seek to integrate human rights compliance into their operations. They might see competitive benefits to assuming human rights obligations in a formal manner.181

Detailed Statements of Compatibility

178. Under the Charter (s.28(3)), Statements of Compatibility accompanying new legislation must explain in detail whether or not, and if so how, the legislation is compatible with human rights. Assessments of compliance with the Charter in a Statement of Compatibility must be a genuine, comprehensive and properly described. They should not be a ‘rubber stamp’ or an after the fact endorsement of draft laws: the assessment process must be genuine and allow for any appropriate amendments to be made before the draft legislation is introduced to Parliament. We note that some Statements of Compatibility have not adequately addressed human rights issues or properly reflected on the limitation of those rights under s.7(2) of the Charter. Further guidance should be provided (in regulations or other instrument) on matters to be addressed in a Statements of Compatibility.

Timeframes for debate

179. The LIV is concerned that the timeframes in which Statements of Compatibility are tabled, SARC’s reports to Parliament as to a Bill’s compatibility with human rights are prepared and made, and parliamentary debate do not allow for proper consideration of human rights issues or proper public participation. The Charter should be amended to require or enable SARC to request an adjournment of parliamentary debate for a specified period (e.g. four weeks) where it considers that a Bill raises a human rights matter of significant public importance. In these circumstances, the public should have a formal opportunity under the Charter to make submissions to SARC on the human rights compatibility of a Bill and public submissions should be documented in SARC’s report to Parliament under s.30 of the Charter. SARC needs appropriate resources to be made available to assist it in its role.

Notification

180. Under the Charter, parties to a proceeding must notify the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission if Charter issues arise in a case before the Supreme Court or the County Court unless the State or VEOHRC are already a party to the proceeding.182 In our view, the notification provision has been useful in encouraging parties to address Charter matters in a planned and reasoned manner and alerting the Attorney-General and VEOHRC to matters in which they may wish to intervene. It is, however, a burdensome requirement which, if not complied with, excludes consideration of Charter issues.183 In addition, parties to proceedings in other courts and tribunals, such as the Victorian Civil and Administrative Tribunal, might also wish to notify the Attorney-General and the VEOHRC of matters on a voluntary basis. Guidance in those jurisdictions – such as the Supreme Court’s practice note – could be useful in those circumstances.


182 Charter of Human Rights and Responsibilities Act 2006 (Vic), s 35.

183 For example, see Pravidur v Scental Pacific Pty Ltd [2010] VSCA 144 (22 June 2010); General Television Corporation Pty Ltd v DPP & Anor [2008] VSCA 49 (26 March 2008); R v Bembiika & Ors (Ruling No 20) [2008] VSC 80 (20 March 2008); Slaveski v State of Victoria & Ors [2009] VSCA 6 (10 February 2009).
181. The LIV considers that the notification requirement should be retained, at least until the 8 year review of the Charter. In the meantime, however, s.35 should be amended to give the courts the discretion to dispense with the notification in the circumstances of a particular case. Similar to s.78B(5) of the Judiciary Act 1903 (Cth), where notice is provided, s.35 should be amended to state that the courts may nevertheless proceed without delay to hear and determine proceedings where the court thinks it necessary in the interests of justice to do so.\footnote{Judiciary Act 1903 (Cth), s 78B(5).} Whether the matter is interlocutory or finally determinative of the issue in the proceedings should be a factor that the court takes into consideration but should not be decisive. Ultimately, the notification requirement could be removed, at least for County Court proceedings or first instance proceedings, but provided as an option in all courts and tribunals at the court or tribunal’s discretion. All courts and tribunals could be encouraged to develop guidance to parties seeking to notify either the Attorney-General or the VEOHRC of Charter issues arising in proceedings.

**Intervention**

182. Under the Charter, the Attorney-General or the VEOHRC have the right to intervene, or be joined as a party to, proceedings before any court or tribunal in which Charter issues arise whether or not the state is a party to the proceeding (ss 34 and 40 respectively). It has been desirable while Charter jurisprudence in Victoria has been developing to have both the Attorney-General and VEOHRC being able to make submissions and it has assisted the courts. The LIV submits, however, that at the time of the 8 year review of the Charter, consideration should be given to whether the Attorney-General’s right of intervention should be removed and replaced with a right to apply for leave to intervene.

183. The Attorney-General need not have a right to intervene because the State of Victoria is often represented in the proceeding through a relevant department or other public authority. However, the Attorney-General might wish to apply to intervene in matters considered significant or if the interests or arguments of the Attorney-General are not likely to be represented or put by the respondent public authority (which might occur in the case of non-core public authorities and potentially in the case of public authorities that have a degree of institutional independence). No similar consideration applies in regard to the VEOHRC which should continue to have a right of intervention in all courts and tribunals. VEOHRC’s interventions assist the tribunal or court with countervailing submissions and, in a manner similar to a public advocate, assist applicants seeking to protect and uphold their rights against the state or public authority.\footnote{For example, see the role of VEOHRC in DPP v W, Director of Public Transport v XFJ [2010] VSC 319, Travel Sisters (Anti-Discrimination Exemption) [2009] VCAT A189/2009 (17 November 2009), Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381 (7 September 2009); Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption) [2008] VCAT 2415 (26 November 2008).}

**Register of cases**

184. It is in the interests of open justice and improved understanding of the Charter if the decisions in proceedings in which Charter issues are raised or addressed are readily identified and, unless otherwise restricted, made available to the public. However, it is possible that cases that have addressed the Charter in courts or tribunals that do not report all decisions will not be identified or made available to the public. It would be useful if courts and tribunals could be required to develop a process whereby cases in which Charter issues are raised or addressed are notified to a central register and, unless restricted, are reported or otherwise made available to the public.
Education and training

185. Education and training of public authorities and education and support to individuals is fundamental to strengthening the Charter. The LIV considers that adequate resources need to be available to the VEOHRC to fulfill its functions (s.41), particularly its function to provide education about human rights and the Charter. Adequate resources also need to be dedicated to the education and training of public authorities, particularly those public authorities that are private entities with public functions.

F. CONCLUSION

186. The LIV is committed to strengthening the Charter. We consider it a vital measure to better protect and promote human rights in Victoria. We recognise, however, that, even with those amendments, the Charter is not a panacea for addressing all human rights infringements. The Charter serves as a framework and a point of reference to guide understanding of the obligations of the state to the people it serves and to guide the state and its agencies in the performance of their public functions.

187. As a framework, the Charter informs public service standards, policies, public decision-making, laws and regulations. It provides a consistent thread to the standards of decision-making to be applied in individual cases. It is not a substitute for specific standards or law in a particular area, but a framework that brings laws and decision-making together to make them more consistent and fair.

188. Even with the guidance of the Charter, peoples’ human rights will be breached. This can occur through simple oversight or lack of awareness. We would expect, however, that over time there would be fewer breaches as public authorities are held to account for their actions. In the LIV’s view, the protection of human rights through a strengthened Charter is a sign of a confident government that welcomes and facilitates regular scrutiny of its actions by the people it represents.

189. As an organisation representing the Victorian legal profession and their colleagues in the legal sector, we consider ourselves well placed to provide input into the review. We welcome the opportunity to elaborate on the issues raised in our submission in person at the hearings anticipated in July 2011 and, on request, through further written submissions.