Human Rights Law Centre submission to the

Inquiry and Review of the *Charter of Human Rights and Responsibilities Act 2006*

Conducted by the Scrutiny of Acts and Regulations Committee

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1 July 2011
The Human Rights Law Centre would like to thank everyone who contributed to this submission.

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1. Introduction

1. The Human Rights Law Centre (HRLC) welcomes the review of the Charter of Human Rights and Responsibilities Act 2006 (Victorian Charter or Charter) and is pleased to provide this submission to the Scrutiny of Acts and Regulations Committee (SARC). The HRLC considers the review of the Victorian Charter to be an important opportunity to improve the protection and promotion of human rights in Victoria.

2. The HRLC has significant expertise and experience in the operation of the Victorian Charter and has been actively involved in its implementation. The Centre has undertaken a range of activities in relation to the Victorian Charter, including carrying out extensive education and training, providing legal advice and assistance, undertaking casework and litigation, and performing policy analysis and advocacy. Further details about the HRLC activities in relation to the Victorian Charter are in Appendix 1 to this submission.

3. This submission seeks to provide technical, evidence-based assistance on the content, operation and impact of the Victorian Charter. The submission also draws on the HRLC’s first hand experience using the Victorian Charter as an advocacy tool to protect and promote the rights of all Victorians, including marginalised and disadvantaged individuals and communities.

4. This submission contains an executive summary that identifies the HRLC’s view on the key impacts and outcomes of the Victorian Charter to date. The executive summary also contains an outline of the HRLC’s key recommendations for reform to strengthen and enhance the operation of the Victorian Charter. The body of the submission then addresses in some detail the terms of reference issued by the Committee.
2. Executive Summary

Recommendation 1:

This review should be used as an opportunity to strengthen the Victorian Charter and certainly not, in any way, to limit the legal protection of human rights in Victoria.

5. Respect for human rights is essential for a community that is fair, just and inclusive. There is strong evidence that where human rights are protected in law they are more likely to be respected in practice.\(^1\) This review should be used as an opportunity to strengthen the Charter and certainly not, in any way, to limit or abrogate human rights.

6. When Victoria enacted the Charter in 2006, after a considered public consultation led by constitutional lawyer Professor George Williams and including former Liberal Attorney-General Haddon Storey QC, it became the first Australian state to do so. The consultation demonstrated very strong support for the legal protection of human rights, with 94% of submissions supporting a Charter. This support was affirmed in the 2009 National Human Rights Consultation when 87% of submissions supported the introduction of a Human Rights Act. Having been the first Australian state to enact a human rights act, Victoria should not go down in history as one of the only jurisdictions in the developed democratic world to weaken or repeal one.

7. The Victorian Charter entered into full force on 1 January 2008 and, after less than four years of operation, is in its early days. Nonetheless, clear benefits of the Charter’s operation can be identified, which are likely to increase over time as understanding of the Charter further develops and its implementation is further enhanced.

8. The HRLC observes the following effects of the operation of the Victorian Charter to date:

\(^1\) UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [13]. See also Australian Public Service Commission, *Changing Behaviour: A Public Policy Perspective* (2007) 29, which found that “carefully planned, comprehensive, long-term approaches encompassing education and information, legislation and restrictive measures” are the most effective in producing normative and behavioural change.
Overall Impacts and Benefits

- The Charter’s mechanisms have encouraged Victoria’s strong democratic and legal institutions to give increased consideration to human rights in undertaking their roles and functions.

- While the Victorian Charter has by no means been a panacea to all forms of unfairness and injustice in Victoria, it has played an important role in ensuring that human rights are appropriately considered by all aspects of governmental activity. This includes in the development of laws and policies, in decision-making that affects every day Victorians, and in the role of courts and tribunals.

- The wide range of areas in which the Victorian Charter has played a role suggests that the protection of human rights is relevant to Victorians in many different contexts.

Impact on Legislative and Policy Formulation

- The Victorian Charter has substantially strengthened the consideration of human rights in the development and drafting of new legislation and policies.

- The Victorian Charter’s mechanisms for promoting the compatibility of new legislation with human rights – namely, the preparation of Statements of Compatibility and the review by SARC of all Bills introduced into Parliament – have improved the transparency and accountability of the Victorian Parliament and Government. Formal scrutiny processes have also ensured that the needs of all Victorians are more appropriately considered in legislative and policy formulation and that, generally speaking, limitations on rights have only been imposed after careful consideration as to their reasonableness, necessity and proportionality.

- The operation of the Victorian Charter has maintained Parliamentary sovereignty. Parliament has been able to pass legislation even where it may not be compatible with human rights. Where courts have interpreted legislation in a way that was not intended by Parliament, the Parliament has been free to amend the law if it chooses to do so.
Impact on Decision Making and Service Delivery

- The Victorian Charter has had its greatest practical impact at the interface between service delivery providers and decision makers and the Victorian community, particularly with respect to marginalised or disadvantaged individuals and groups.

- The decision-making framework provided by the Victorian Charter has offered useful guidance to public authorities and employees. This decision making framework promotes that appropriate consideration and weight be given to fundamental rights and freedoms, that these rights and freedoms are counterbalanced by other relevant public interest considerations, and that limitations on human rights are rational and proportionate.

- While it is still early days, the Victorian Charter has contributed to cultural change within public authorities and encouraged human rights — and the principles of freedom, respect, equality and dignity — to be embedded in their work.

Impact on Victorian Law

- There has been no “flood of litigation” or discernible increase in the number, length or complexity of cases being brought before Victorian courts and tribunals as a result of the Victorian Charter.

- Courts have taken a moderate approach to the application and interpretation of the Victorian Charter. Indeed, the actual impact of the Victorian Charter in the courtroom has been significantly less than many predictions or descriptions. Where the Charter has had an impact, it has overwhelmingly been in a beneficial way and has been successfully used to challenge arbitrary or unjust policies and decisions.

- The Charter has not altered the constitutional balance between the Victorian Parliament, Executive and Judiciary. The role played by courts and tribunals under the Victorian Charter has enhanced the dialogue between the three arms of government and strengthened accountability and checks and balances.

- The Victorian Charter has been considered across a wide range of civil litigation, but has arisen most often in relation to cases dealing with access to justice, housing and homelessness, equality and non-discrimination, and mental health.

- Decisions by Victorian courts regarding the Victorian Charter have had very little impact on criminal law, where the common law already entrenches many fundamental rights and protections.
Myths and Misconceptions

- Myths and misconceptions have the potential to damage perceptions about the role of the Victorian Charter and its operation and impact. Some myths have evolved as a result of partial, incorrect or, at times, sensationalist media reporting. For example, the myth that the legislation is a “criminals’ charter” or the misconception that sharia law could be incorporated into Victorian law via the Victorian Charter are unfounded and incorrect.

2.1 The Way Forward — Summary of the HRLC’s Key Recommendations

**Recommendation 1:**

This review should be used as an opportunity to strengthen the Victorian Charter and certainly not, in any way, to limit the legal protection of human rights in Victoria.

**Recommendation 2:**

The Victorian Government should remain fully committed to the protection and promotion of human rights and ensure that public authorities give appropriate consideration to human rights when developing laws and policies and making decisions. In particular, the legal obligation contained in section 38 must be retained to ensure the Charter’s effective operation.

**Recommendation 3:**

Courts and tribunals should continue to play an important role in enhancing the dialogue about human rights between the three arms of government and assisting to ensure that human rights are appropriately considered, while maintaining an appropriate constitutional balance. The current role played by courts and tribunals under the Victorian Charter should be retained to ensure the Charter’s effective operation.

**Recommendation 4:**

Statements of Compatibility are an important mechanism of the Victorian Charter. Their operation has assisted to increase parliamentary debate and scrutiny of proposed laws by reference to human rights principles. The detail and length of Statements of Compatibility should be commensurate with the human rights implications of the proposed legislation or legislative instrument.
Recommendation 5:
To enhance the consideration of statutory provisions by Parliament, section 30 of the Victorian Charter should be amended to:

(a) expand the size of SARC and perhaps establish a specialised Human Rights Sub-Committee with adequate resources;

(b) provide greater formal opportunity for public submissions and hearings on Bills that raise significant human rights concerns;

(c) provide that, other than in exceptional circumstances, legislation is not to be passed by parliament before SARC has provided its human rights report. The definition of “exceptional circumstances” should be confined to circumstances of public imperative or emergency, and should not extend to circumstances experienced in the natural processes of parliament, such as bipartisan support for a bill; and

(d) require the responsible Minister to respond substantively to any concerns raised by SARC prior to the passage of a Bill.

Recommendation 6:
Better education and training is required to educate public authorities and the community about their rights and responsibilities. Particular attention should be paid to groups, including Aboriginal peoples, who could benefit from greater awareness of and engagement with the Charter.

Recommendation 7:
The definition of “public authority” in section 4 should be enhanced by specifying certain functions that “are taken to be of a public nature” along similar lines to the ACT Human Rights Act.

Recommendation 8:
Section 6(2)(b) of the Victorian Charter should be amended and clarified so that the capacity of courts and tribunals to consider and enforce the human rights set out in the Charter is not restricted.
Recommendation 9:

Individuals must be able to access an effective remedy where their rights have been infringed. Section 39 is unnecessarily complex and unworkable and should be replaced with a provision that establishes a free-standing cause of action for breaches of protected human rights which is justiciable and enforceable in all appropriate courts or tribunals. An independent cause of action would strengthen the Charter’s operation and give individuals confidence that avenues exist to challenge policies and decisions that do not given proper consideration to human rights.

However, an application for a Declaration of Incompatibility should be required to be brought with another cause of action.

Recommendation 10:

The judicial remedies that are available under the Victorian Charter for breaches of protected human rights should be expanded to empower courts and tribunals to grant such relief or remedy, or make such order, within its powers, as is “just and appropriate”.

Recommendation 11:

A range of both legal and non-legal remedies must be available to individuals to ensure access to an effective remedy. Non-legal remedies must be in addition to providing access to legal remedies. In order to strengthen the operation of administrative remedies, the Victorian Charter be amended to empower the VEOHRC to receive and conciliate human rights complaints using a similar process to that available for discrimination complaints under the Equal Opportunity Act 2010.

Recommendation 12:

The Victorian Charter should protect the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community. The protected rights contained in the Victorian Charter should therefore be expanded to protect other fundamental rights enshrined in the International Covenant on Economic, Social and Cultural Rights, as well as the right of self-determination.
Recommendation 13:

All civil, political, economic, social and cultural rights in the Victorian Charter should be legally enforceable and justiciable. In respect of economic and social rights, the state should be obliged to take reasonable steps to ensure the progressive realisation of the right within the maximum of available resources, with the reasonableness of administrative action being subject to judicial review in the ordinary way.

As an alternative to providing judicial remedies for breaches of economic and social rights, the Victorian Charter could provide for the VEOHRC to receive complaints from individuals who allege a breach of their economic or social rights.

Recommendation 14:

Reporting and auditing frameworks are important to identify systemic and structural issues and to monitor and evaluate the effectiveness of actions taken to address such issues. The Victorian Charter should:

(a) require all public authorities to develop an action plan for the protection and promotion of human rights and compliance with the Victorian Charter;

(b) require that all public authorities undertake an annual audit of their human rights compliance, which should also include details of all complaints received, as well as any actions taken or, alternatively, the reasons for not taking remedial action; and

(c) vest the VEOHRC with an own motion power to inquire into and audit the compliance of a public authority’s policies, programs and practices with human rights.

Recommendation 15:

Section 7 should be amended to provide that the limitations clause is relevant only to the task of legislators under section 28 and the Supreme Court and Court of Appeal under section 36.

Recommendation 16:

Section 7 of the Victorian Charter should be amended to recognise that certain human rights are absolute by expressly stating which rights are absolute and that no limitation of absolute rights is permissible in any circumstances.

Recommendation 17:

Section 35 of the Victorian Charter requiring notices to the Attorney General and the VEOHRC should be repealed.
**Recommendation 18:**

Sections 34 and 40 of the Victorian Charter should be amended and replaced with the right of the Attorney-General and VEOHRC respectively to apply to the court or tribunal for leave to intervene as amicus curiae.

**Recommendation 19:**

The Victorian Government should continue with appropriate resourcing measures to engage, educate and empower the Victorian community about human rights and the operation of the Victorian Charter.

**Recommendation 20:**

Consideration should be given to whether the Victorian Charter should be amended to include an “opt-in” provision for the private sector.
3. The Effect of the Charter on the Role of Parliament

3.1 Consideration of Legislation by Parliament (Term of Reference 5b)

9. The Victorian Parliament, including through the work of parliamentary committees, has a critical role to play in promoting human rights and discharging the state’s legal obligation to respect, protect and fulfil human rights. The Victorian Charter establishes two key mechanisms for the scrutiny by Parliament of new legislation against the human rights protected in the Act:

(a) section 28 requires the member of Parliament responsible for a Bill to table a Statement of Compatibility at the time that the new Bill is introduced into Parliament; and

(b) section 30 requires SARC to consider any Bill introduced to Parliament and to report to the Parliament on the Bill’s compatibility with the protected human rights.

10. There is strong evidence that the Victorian Charter has increased and enhanced parliamentary dialogue about human rights in the consideration of new legislation. In its 2010 report, VEOHRC identified that there is a growing level of parliamentary debate and comment on human rights issues. The basis and framework for this debate can be directly attributed to the Victorian Charter and the requirements for Statements of Compatibility and review of all Bills by SARC for human rights compliance. The operation of these mechanisms has caused Parliament to give greater explicit consideration to human rights issues than was the case prior to the operation of the Victorian Charter.

(a) Operation of Statements of Compatibility

11. Statements of Compatibility are intended to strengthen parliamentary scrutiny of new laws for consistency with human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development. VEOHRC has found that the requirement of the tabling of a Statement of Compatibility has generated parliamentary debate and “highlights the value of the dialogue model established by the Charter”.

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3 Ibid, 43.
12. Following the introduction of the Victorian Charter, between 2008 and 2010 a total of 282 Statements of Compatibility were prepared. Of that number, 233 contained discussion of rights that are engaged by the proposed legislation and explanations of any limitations on those rights and how those limitations are permissible. In 2010 alone, 42 of the 90 bills debated in the Victorian Parliament triggered parliamentary comment on human rights issues.

13. The passage of the Summary Offences and Control of Weapons Acts Amendment Act 2009 (Vic) provides an example of the utility of Statements of Compatibility. The Act introduced new police stop and search powers and was the first law that the Victorian Government acknowledged was partially incompatible with the Victorian Charter. A number of community organisations expressed concern that the proposed amendments were incompatible with human rights. However, the Government, via the Statement of Compatibility, recognised that limitations were imposed on human rights and justified the amendments as being necessary to address community concerns about knife crime.

14. The HRLC considers that this illustrates how Statements of Compatibility can be used by Parliament to:

(a) increase parliamentary debate and scrutiny of proposed laws by reference to human rights principles;

(b) enable public participation on matters of important public interest;

(c) enhance transparency and accountability of government; and

(d) reinforce that the Victorian Charter absolutely retains parliamentary sovereignty.

15. This level of discussion of human rights issues also has an important instrumental and normative value in acculturating human rights in government processes.

16. The HRLC observes, however, that the discussion of human rights in some Statements of Compatibility has been overly technical and lengthy. For example, the Statement of Compatibility for the Confiscation Amendment Bill 2010 engaged in a detailed 10,538 word legal analysis even though no limitations were found. Similarly, the Statement of Compatibility for the Statute Law Amendment (Evidence Consequential Provisions) Bill 2009 was more than 5,000 words and addressed potential limitations already canvassed in the adoption of the Evidence Act 2008 (Vic), and even though only one of the rights discussed was subject to limitation.

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4 Note that this figure does not include Statements of Compatibility prepared in 2011.

5 VEOHRC, above n 2, 44.

6 Victoria, Confiscation Amendment Bill 2010 Statement of Compatibility, Legislative Assembly, 8 August 2007, 2569-2573 (Rob Hulls, Attorney-General).

17. Neither, however, should Statements of Compatibility be too brief or cursory.\(^8\) We consider that to best achieve the purpose of strengthening parliamentary scrutiny of new laws, Statements of Compatibility should not be too long, legalistic or technical as this detracts from their utility in informing Parliament’s dialogue about human rights issues. The detail and length of Statements of Compatibility should be commensurate with the human rights implications of the proposed legislation or legislative instrument.

\((b)\) Role of SARC

18. VEOHRC has observed that the review and reporting function vested in SARC under section 30 of the Victorian Charter “provides a sensible, balanced and transparent mechanism for assessing the human rights impacts of proposed laws and informing parliamentary debate”.\(^9\) In 2010, 43 of the 90 bills debated in the Victorian Parliament generated active exchange between SARC and the Member of Parliament tabling the Bill, including 40 requests that were made by SARC for responses from the relevant Minister on Charter issues raised by the Bill.\(^10\) This indicates that there has been a high level of exchange and interaction on human rights issues with proposed legislation that has been triggered by the role played by SARC.

19. However, in its 2010 report the VEOHRC also notes that this process could be improved, a view which is shared by the HRLC. In 2010, there were at least two instances when legislation was passed before SARC provided its report to Parliament. There was also one instance where SARC was asked to undertake an inquiry into possible human rights issues in proposed legislative amendments, but the Government introduced changes to the legislation before responding to the SARC report.\(^11\)

20. The HRLC is concerned that rushing Bills through Parliament without undertaking the important scrutiny processes established by the Victorian Charter has the effect of undermining the impact and benefit of the Charter’s operation. Often, legislation that is rushed through Parliament raises significant human rights concerns – the *Sentencing Amendment Act 2010* (Vic) being one such example. It is important that Parliamentary and community debate is able to take place around these matters of public interest and importance.

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\(^8\) See eg, *Victoria, Health (Fluoridation) Amendment Bill 2007 Statement of Compatibility*, Legislative Council, 10 October 2007, 3233 (Peter Kavanagh); *Victoria, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Bongs) Bill 2010 Statement of Compatibility*, Legislative Council, 5 May 2010, 1711 (Peter Kavanagh).

\(^9\) VEOHRC, above n 2, 45.

\(^10\) Ibid, 44.

\(^11\) Ibid, 43.
21. By comparison, the *Severe Substance Dependence Treatment Act 2009 (Vic)* is a good example of where the Victorian Charter led to an informed parliamentary discussion of the human rights issues associated with proposed legislation. The Statement of Compatibility tabled with the Bill recognised that aspects of the proposed laws engaged and limited a number of different human rights but that the Bill was compatible with the Charter because the limitations on those rights were reasonable and demonstrably justified. Similarly, SARC’s report on the Bill contained an important discussion of the human rights issues associated with the proposed legislation, including a number of questions which were responded to by the Minister. Importantly, SARC’s consideration of the Bill also included an opportunity for public submissions to be made. Ultimately, consideration of the Bill by Parliament was well informed by the Statement of Compatibility, SARC’s report and submissions made by the community sector.

22. Based on the operation of SARC to date, the HRLC submits that consideration of statutory provisions by Parliament would be enhanced by amending section 30 of the Victorian Charter to:

(a) expand the size of SARC and establish a specialised Human Rights Sub-Committee with adequate resources;

(b) provide greater formal opportunity for public submissions and hearings on Bills that raise significant human rights concerns;

(c) provide that, other than in exceptional circumstances, legislation is not to be passed by parliament before SARC has provided its human rights report. The definition of “exceptional circumstances” should be confined to circumstances of public imperative or emergency, and should not extend to circumstances experienced in the natural processes of parliament, such as bipartisan support for a bill; and

(d) require the responsible Minister to respond substantively to any concerns raised by SARC prior to the passage of a Bill.

23. *Override Declarations*

(c) Override Declarations

24. Section 31 of the Victorian Charter enables the Parliament, in “exceptional circumstances”, to expressly declare that an Act or a provision of an Act has effect despite being incompatible with the Charter. Override declarations are, in theory, the mechanism by which governments, in extraordinary circumstances, are able to pass laws that derogate from (meaning to temporarily suspend) human rights guarantees that it would otherwise recognise.

25. To date, the Victorian Parliament has not issued an override declaration.

24. The HRLC considers that section 31 of the Victorian Charter is redundant and should be repealed. An override declaration is unnecessary in the Victorian Charter because Parliament already has the ability to pass legislation that is not compatible with human rights, if it so intends. Typically, a derogation or override provision has relevance in a Constitutional Charter
model, such as in Canada, where the Charter otherwise prevents Parliament from passing laws that are incompatible with human rights.12

26. Further, the override provision is not necessary due to the operation of section 7(2) of the Charter. If there is a genuine state of emergency that threatens the life of the nation, then the performance of a limitations analysis would allow for the proper restriction of rights, taking into account the gravity of the situation the state faced.

27. Accordingly, the Victorian Charter does not need to provide Parliament with the power to pass an override declaration and the HRLC recommends that section 31 be repealed.

(d) Parliamentary Sovereignty

28. While the operation of the Charter has led to Parliament giving greater consideration to human rights, it has also operated in a way that preserves parliamentary sovereignty at all times. This is the way that the Victorian Charter, as a legislative model of human rights protection, is intended to operate.13 Despite the operation of the pre-legislative scrutiny mechanisms, the Victorian Parliament is still able to pass laws that are inconsistent with human rights if it so intends. Indeed, this was the case with the Summary Offences and Control of Weapons Acts Amendment Act 2009 (Vic), as discussed above.

(e) Greater Public Participation in Parliamentary Processes

29. In addition to the enhanced parliamentary consideration of statutory provisions discussed above, the HRLC observes that the Victorian Charter’s pre-legislative scrutiny processes have also provided increased opportunities for the Victorian community to participate in debates about important issues of public interest.

30. In particular, SARC’s reporting function under the Victorian Charter provides opportunities for individuals and community organisations to participate in the scrutiny of legislation by making written submissions. Indeed, SARC has invited public submissions in relation to a number of pieces of proposed legislation that raise significant questions of public interest and public policy, including the Research Involving Human Embryos Bill 2008, the Prohibition of Human Cloning for Reproduction Bill 2008, the Summary Offences and Control of Weapons Acts Amendment Bill 2009 and Control of Weapons Amendment Bill 2010, the Severe Substance Dependence Treatment Bill 2009, and the Equal Opportunity Bill 2010. In the HRLC’s own experience, we have provided submissions to SARC on a number of Bills raising human rights issues, including the Justice Legislation Amendment Bill 2007, exceptions and exemptions


31. It is apparent that public participation in parliamentary processes and debates about important public issues through the Charter’s mechanisms is facilitating better informed parliamentary debate and greater accountability and transparency in the development of legislation.

3.2 Development and Drafting of Legislation (Term of Reference 5a)

32. As discussed in the previous section, the scrutiny of legislation provisions contained in sections 28 and 30 of the Victorian Charter have played an important role in ensuring that all new laws are assessed against fundamental human rights standards. Importantly, the operation of these provisions not only ensures that this scrutiny takes place in Parliament but, perhaps most significantly, that human rights are appropriately considered in the earliest stages of legislative and policy development. In this respect, the Victorian Charter has played an important role in enhancing policy making and legislative development and, ultimately, in improving legislative and administrative protection and realisation of human rights. The HRLC considers that this has happened for a number of reasons, including that the Victorian Charter has:

(a) ensured that human rights are considered in the early stages of policy formulation and legislative development;

(b) contributed to developing a culture of human rights within the Victorian Government;

(c) increased the opportunities for community participation in policy formulation and legislative development; and

(d) led to a number of major reviews to ensure that Victorian legislation is more compatible with human rights.

33. These aspects are discussed further below.

(a) Ensuring Early Consideration of Human Rights

34. The requirement to develop Statements of Compatibility has led to the formalisation of processes within Government departments that encourage the early and ongoing consideration of human rights issues in policy and legislative development. As SARC has itself stated:14

> The requirement that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed.

35. This is reflected in the content of various Statements of Compatibility, which identify that particular provisions have been drafted for the express purpose of ensuring compliance with human rights. The development of the Corrections Regulations 2009 provides an example of

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the important role that the Charter played in the review of the existing regulations (which were due to expire) and the drafting of the new regulations.

Case Study: New Corrections Regulations 2009 (Vic)

The Corrections Regulations 1998 were due to expire in May 2009. Following consultations conducted by the Department of Justice, proposed new regulations, together with a Regulatory Impact Statement, were released for public comment on 22 January 2009.15

The Regulatory Impact Statement prepared for the new regulations stated that:

- many of the new regulations are due to “the change in the regulatory environment as a result of the operation of the Charter”;16
- Corrections Victoria had been reviewing its operational procedures in recent years to ensure that they are in line with the Charter and that the new regulations have been “updated to reflect these improved operational practices within the Victorian corrections system”;17
- the “introduction of the Charter and changes in the delivery and oversight of correctional services … have directly influenced the form of the Proposed Regulations”;18 and
- the new regulations “reflect a balance between the individual rights of prisoners, prison staff and members of the community, and between the individual rights of prisoners and the collective safety and security of the community”.19

A number of specific amendments were made to the Corrections Regulations that were “adopted to ensure compliance with the Charter”, including:

- requirements that restraints be applied for no longer than is necessary and that the use of any restraint must be reported to the Prison Manager;
- mandatory consideration of a prisoner’s medical and psychiatric condition when deciding placement or making a separation order;
- the introduction of a “checklist” to promote the right to a fair hearing in prison disciplinary proceedings;
- amendments to improve prisoner access to visitors and correspondence; and
- a requirement that an officer “believe on reasonable grounds” that a strip search is necessary in order for that search to be lawful.

16 Ibid 10.
17 Ibid 20.
18 Ibid 40.
19 Ibid 42.
36. The HRLC also observes that the Victorian Charter has its greatest impact when human rights are considered, and Statements of Compatibility prepared, early in the policy development process. The incorporation of human rights considerations into the early stages of policy and legislative development has a number of important benefits, including:


(b) providing a consistent framework for taking into account different policy factors and to assist in the drafting of legislation that appropriately balances competing rights interests;

(c) identifying areas of potential risk – whether legal or reputational – for the Victorian Government;

(d) encouraging and enabling policy-makers (and parliamentarians) to explore ways of achieving desired policy outcomes in ways which are compatible with human rights, such as by drawing on relevant international and comparative human rights principles; \footnote{21 For a discussion of the benefits of drawing on such jurisprudence, see \textit{Kracke v Mental Health Review Board & Ors} [2009] VCAT 646, [201] (per Bell J): “The rationale of s 32(2) is not parliamentary intention to enact legislation in conformity with international law, but the utility of referring to international law and judgments in understanding the relevant human right and how it may be reflected in or influence the interpretation of the statutory provision”.}

(e) ultimately, ensuring that Victorian laws and policies respect and give effect to human rights principles and standards.

37. Victoria’s system of responsible government ultimately means that parliamentarians are accountable to the electorate for their decision-making. However, requiring parliamentarians and policy and law makers to give appropriate consideration to human rights through the preparation of a Statement of Compatibility reduces the likelihood of human rights being inadvertently infringed. This point was made by the National Human Rights Consultation Committee in its 2009 report. \footnote{22 National Human Rights Consultation Committee, \textit{Report of the National Human Rights Consultation Committee} (2009), 174.}

Greater consideration of human rights is needed in the development of legislation and policy and in the parliamentary process in general. The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do not impinge on human rights or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community.

38. The VEOHRC notes that tendering Statements of Compatibility for new legislation is resulting in a “more considered approach to the impact of new laws, which has resulted in better drafting”. \footnote{23 VEOHRC, above n 2, 35.} For example, VEOHRC observed that consideration of the Victorian Charter
resulted in the *Public Health and Wellbeing Act 2008* (Vic) “being more explicit about the human rights principles underpinning the public health approach”, particularly in aiming to ensure any actions limiting personal freedom were reasonable and proportionate.24

(b) **Increased Community Participation and Processes of Participatory Democracy**

39. In addition to the discussion in the previous section on increased public participation in the consideration of human rights by Parliament, the Victorian Charter has also been a helpful vehicle for increased community consultation and engagement in the formulation of legislation. The VEOHRC noted an increase in Statements of Compatibility which reported on community consultation in the development of legislation, indicating that the government is “increasingly holding itself accountable for respecting the rights of Victorians”.25 The Victorian Charter is playing an important role in enhancing participatory government and ensuring that members of the Victorian community can participate in important democratic processes.

(c) **Major Reviews of Existing Legislation to Promote Human Rights Compliance**

40. The Victorian Charter has also been a catalyst for a number of major law reform inquiries and amendments to legislation. Examples of major legislation which has been reviewed by the Victorian Government include:

(a) the *Equal Opportunity Act 1995* (Vic);

(b) the review of the *Mental Health Act 1986* (Vic);

(c) the review of the *Guardianship and Administration Act 1986* (Vic);

(d) the *Corrections Regulations 2009* (Vic);

(e) the Victorian Law Reform Commission’s inquiry into Surveillance in Public Places; and

(f) the Victorian Law Reform Commission’s Civil Justice Review.

Many major law reform inquiries and amendments were initiated as a consequence of, or in large part due to, the operation of the Victorian Charter.

41. Many of these major law reform inquiries and amendments were initiated as a consequence of, or in large part due to, the operation of the Victorian Charter. For example, as discussed above a number of specific provisions contained the *Corrections Regulations 2009* (Vic) were specifically included “to ensure compliance with the Charter”.

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24 See generally VEOHRC, above n 2, 35.

**Recommendation:**

Statements of Compatibility are an important mechanism of the Victorian Charter. Their operation has assisted to increase parliamentary debate and scrutiny of proposed laws by reference to human rights principles. The detail and length of Statements of Compatibility should be commensurate with the human rights implications of the proposed legislation or legislative instrument.

**Recommendation:**

To enhance the consideration of statutory provisions by Parliament, section 30 of the Victorian Charter should be amended to:

(a) expand the size of SARC and perhaps establish a specialised Human Rights Sub-Committee with adequate resources;

(b) provide greater formal opportunity for public submissions and hearings on Bills that raise significant human rights concerns;

(c) provide that, other than in exceptional circumstances, legislation is not to be passed by parliament before SARC has provided its human rights report. The definition of “exceptional circumstances” should be confined to circumstances of public imperative or emergency, and should not extend to circumstances experienced in the natural processes of parliament, such as bipartisan support for a bill; and

(d) require the responsible Minister to respond substantively to any concerns raised by SARC prior to the passage of a Bill.
4. The Effect of the Charter on the Role of Public Authorities

This section of our submission addresses Term of Reference 5(c).

42. The HRLC observes that the Victorian Charter has exerted a positive and significant influence on the way that “public authorities” undertake their functions. In our assessment, this influence has happened in three key ways:

(a) through the development of internal processes of public authorities for ensuring compatibility of policies and decisions with the Victorian Charter;

(b) in response to advocacy and potential litigation, which has led to better outcomes and, in a number of circumstances, a systemic change in policy or a change in the method by which a particular policy or service is delivered to be more compatible with human rights; and

(c) through changes in culture and behaviour within public authorities, which have been driven by the introduction of the Victorian Charter and the necessity to comply with its operative provisions.

43. VEOHRC’s 2009 report on the operation of the Victorian Charter details clear evidence about the practical benefits provided by the Charter. It states:

Significant improvements have been made to the support provided to marginalised and vulnerable Victorians, including Indigenous Victorians, people with a disability and those with a mental illness. Consumers are being engaged more often and more effectively in designing and planning services. Human rights considerations are being used in diverse areas, from reviewing taxation policies for people affected by the February 2009 bushfires to improving pay equity in local councils and providing better protection for international students. Changes are being made to the daily operations and processes of many organisations that are making it easier for people to access information and services, and ensuring that services are fair and effective.26

44. In summary, the HRLC considers that the Victorian Charter has:

(a) provided a useful framework for:

(i) developing and reviewing policies, programs and practices; and
(ii) promoting public participation and fairness in government service-delivery;

(b) helped decision-makers and others to achieve common sense and rights-respecting decisions and outcomes;

(c) empowered people to take action where rights may have been infringed;

(d) contributed to cultural change within public authorities by working to embed human rights in everyday processes; and

26 VEOHRC, above n 20, 13.
enhanced the accountability of public institutions to the community.

These benefits are explained further in the following sections.

4.1 A Useful Framework for Public Authorities

The Victorian Charter’s “dialogue” model of human rights protection is intended to ensure that human rights are given proper consideration at the “front end” of legislative and policy development and decision-making.

There is considerable evidence that the Victorian Charter has played an important role in ensuring that decisions and actions of public authorities are made by reference to human rights principles and standards. The operation of section 38 of the Victorian Charter, which makes it “unlawful” for a public authority not to appropriately consider human rights, is central to ensuring that public authorities respect, protect and promote human rights. Most significantly, the availability of an effective remedy where public authorities fail to give proper consideration to human rights or act compatibly with human rights is an important safeguard to ensure that public authorities comply with this obligation.

Perhaps the Victorian Charter’s greatest utility is that it provides a single, clear framework for public authorities to ensure that respect for human rights is central to the way they operate. Since the introduction of the Charter, the VEOHRC has observed that:

(a) a growing number of public authorities are adopting a human rights approach to their operations. Authorities are taking human rights into account in advance, for example, at planning stages or in the development of policies, which translates to better outcomes for the community;

(b) many authorities have adopted a human rights approach that encourages community participation at an early stage. Many public authorities have established ways to better engage with the public and listen to their views, which in turn improves decision making and may build greater public trust and confidence;

The operation of section 38 of the Victorian Charter, which makes it “unlawful” for a public authority not to appropriately consider human rights, is central to ensuring that public authorities respect, protect and promote human rights. Most significantly, the availability of an effective remedy where public authorities fail to give proper consideration to human rights or act compatibly with human rights is an important safeguard to ensure that public authorities comply with this obligation.

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27 See generally VEOHRC, above n 2, 35-6.
28 Ibid, 33.
(c) the Victorian Charter encourages a human-rights based approach to service delivery, which is predicated on working with clients and communities on an equal basis, as distinct from a “welfare-based approach” which was common in the past. Public authorities have provided numerous examples to VEOHRC where human rights were taken into consideration which resulted in improved service delivery and continuous quality improvement;²⁹

(d) there is an increasing sophistication in public authorities’ use and application of the Victorian Charter. Information provided by public authorities to the VEOHRC indicates the Charter provides a valuable framework to help them understand and deliver on human rights obligations. Public authorities provided numerous examples where a human rights approach resulted in improved service delivery and continuous quality improvement;

(e) public authorities reported not only training and reporting on the Victorian Charter, but using the Charter to assist their decision-making processes, enhance accountability and raise service standards;³⁰ and

(f) public authorities value the Victorian Charter as a tool to provide a framework to balance competing rights in the community, through the provisions of section 7. For example, the Department of Health has reported the incorporation of rights considerations in policy development has strengthened policies which reduce restrictive interventions where possible.³¹

49. VEOHRC’s observations are confirmed by the HRLC’s own extensive experience and interaction with Government departments and public authorities in relation to our education and training and advice work.³² Many functional public authorities, such as the Salvation Army, St Vincent de Paul, South East Water and Western Water, Bentleigh Bayside Community Health and Municipal Associations Victoria, to name just a few, have requested training and advice in relation to their obligations under the Victorian Charter, organisational capacity-building and implementing a human rights-based approach to their activities and operations. Overwhelmingly, public authorities have related to the HRLC that the Charter provides a practical, common sense and common values framework for improved public service development, delivery and outcomes.

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²⁹ Ibid, 38.
³⁰ Ibid 9.
³² Further details about the HRLC’s training and education activities in relation to the Victorian Charter are outlined in Appendix 1.
4.2 An Advocacy Tool for Individuals

50. In the HRLC’s experience, the Victorian Charter has been a valuable tool for individuals and their advocates to encourage public authorities to give appropriate consideration to human rights. The key to the success of the Victorian Charter in this respect is the legal obligation imposed on public authorities pursuant to section 38 of the Victorian Charter. This provides individuals and their advocates with an instrument to challenge government decisions and unfair treatment.

Case Study: Child with Autism Gains Entitlement to Disability Assistance

A 13 year old boy with Asperger Syndrome was ineligible to receive disability support services because the Victorian Department of Human Services (DHS) did not consider Asperger Syndrome and other Autism Spectrum Disorders to be a “disability”. With the assistance of the HRLC and pro bono lawyers, the child’s mother applied to VCAT for a review of the DHS decision and advocated for an inclusive and contextual interpretation of “disability”, in light of the rights contained in the Victorian Charter.

Before the application proceeded to hearing, the Victorian Government issued a media release advising that it had decided to recognise Autism Spectrum Disorders (including Asperger Syndrome) as a disability under the Act and thereby entitle Victorians with autism to disability assistance. The Government committed to back this announcement by $2.75 million in additional funding.

The President of the Autistic Family Support Association commented that she did not think that the policy change would have occurred had the litigation not been initiated.\(^{33}\)

Case Study: Access to Health Care for Involuntary Mental Health Patient

An involuntary mental health patient was seeking access to medical treatment in relation to a liver condition. Advocates for the patient considered that a lack of adequate medical services may raise human rights issues under the Victorian Charter. The advocates raised the Charter arguments with hospital management and negotiated to arrange for a medical appointment for the inpatient.\(^{34}\)

Case Study: Young Man Allowed to Live with his Family

A 23 year old Iraqi refugee with a severe intellectual disability and autism was placed in unsuitable supported accommodation. There were no Arabic speaking workers in the accommodation facility and the young man’s ability to observe his religion (by, for example, eating Halal food) and contact his family were significantly limited. After a visit home, it became apparent that he was frightened of another resident with whom he shared a room and was otherwise lonely, bored and unhappy.

The young man’s advocate raised the Charter with the relevant public authority and he was not forcibly returned to the supported accommodation. Instead he was allowed to reside in his family home, where he wished to be.\(^{35}\)


\(^{34}\) Source: HRLC case work.
\(^{35}\) Source: Youth Affairs Council of Victoria.
52. These case studies illustrate the utility of the Victorian Charter in assisting to ensure that unfair or unreasonable decisions are revisited and that better outcomes can be achieved. The first case study also highlights that the ability to seek a remedy in the courts often provides an important impetus for the Victorian Government to make decisions that ultimately appropriately consider and give better effect to human rights, leading to better outcomes for Victorians.

4.3 Leading to Cultural Change within Public Authorities

53. Since the Charter’s inception, public authorities have put policies and procedures in place to meet their legal obligations under the Charter by actively integrating human rights principles across all aspects of their practice. The VEOHRC describes that “there is a cultural change taking place within government and that, for many agencies, taking human rights considerations into account in their work is becoming business as usual”. This use and application of the Charter is enhancing organisational accountability and raising service standards.

54. In its interaction with Victorian Government departments and public authorities, the HRLC observes that there has been an increased awareness and understanding of human rights since the introduction of the Victorian Charter. Particularly with respect to our advocacy work with government departments, we note that:

(a) many public service officials are familiar with the Victorian Charter and conversant with human rights and permissible limitations on rights;

(b) the introduction of the Victorian Charter has catalysed many public authorities to conduct a human rights review to improve their internal policies and practices;

(c) many public authorities have already taken steps to “institutionalise” the Charter into everyday business, including by incorporating relevant aspects of the Charter into policies, guidelines and business plans; and

(d) there has been an increased willingness to adopt a “client-centric” approach and discuss the human rights impacts on clients, rather than responding to concerns on the basis of “the application of a policy”.

36 VEOHRC, above n 2, 9.
Case Study: Contributing to Cultural and Organisational Change

A local disability provider implemented a new system in which its routine assessment of client needs included explicit consideration of their human rights through the use of a mandatory Human Rights Checklist. Any issues identified by staff were then referred to a Human Rights Committee for review, with the Committee making recommendations to the person’s case manager.

Through the implementation of these new processes, the service became aware of a number of people with intellectual disabilities whose ability to exercise their right to vote had been restricted. The service took immediate steps to support them to make individual decisions about how they would vote, even though this was often against the wishes of their carers.37

4.4 Contributing to Improved Decision Making

VEOHRC has found that, where it has been used well, the Victorian Charter has prevented possible human rights breaches by ensuring that human rights are taken into account by government and its agencies when delivering services, applying laws and making decisions.38 Information provided by public authorities indicates a growing focus on human rights monitoring of decisions, law, policies and service delivery, which is an effective means of managing risk and driving continuous quality improvement.

Case Study: Improving Decision Making by Guiding Discretion

The HRLC was contracted by Enforcement Operations, the enforcement arm of the Infringement Management and Enforcement Services business unit within the Department of Justice, to provide Charter training to every sheriff across Victoria. Participants at the training warmly welcomed the “common sense and common values” approach promoted by the Charter and the practical decision-making framework provided by section 7. Participants found that the framework was particularly useful where officers are provided with broad discretions to ensure that such discretions are exercised reasonably, proportionately and only where necessary.

Sheriff’s Operations now monitors potential breaches of human rights in the execution of warrants, with any issues reported and investigated.39

56. The HRLC observes that the Victorian Charter has also influenced changes in complaint-handling and monitoring mechanisms in parts of the public sector. As the case study below illustrates, the influence of the Charter can be central to redefining the relationship between service providers and individuals and, in many cases, result in services and decisions that give greater consideration to human rights.


38 VEOHRC, above n 2, 8.

Case Study: Appropriate Living Arrangements for Young People with Acquired Brain Injury

A rehabilitation centre operating as part of a public hospital was seeking to discharge several young people with acquired brain injuries because their two year contractual period had ended. However, the only alternative care facilities available were aged care facilities, which would not provide the social environment, or support services (such as speech therapy), needed for the young people to continue their recovery.

With the assistance of the HRLC, a disability advocate raised the Charter with the rehabilitation centre, which agreed not to move the young people until it had considered its obligations under the Charter. The rehabilitation centre took a collaborative approach and consulted with the young people and their families. The result was that all five young people were placed in accommodation that was acceptable to them, their families and the rehabilitation facility.40

The Charter has also been used as a framework to consider difficult situations and reach an outcome that takes into account all parties' relevant human rights.

Case Study: Service Provider Considers the Rights of a Difficult Client

A Victorian welfare organisation experienced problems with a client who had been violent and threatening towards staff. The initial response of the organisation was to exclude the client from the services provided and the premises. A direct care worker objected to the exclusion of the client on the basis that while staff had a right to be safe at work, the client's rights should also be considered. The care worker negotiated with management to allow the client to access some services and instituted a method for monitoring the client's behaviour to prevent safety risks to staff.41

4.5 Judicial Consideration of the Obligations of Public Authorities

This section of our submission discusses the way in which courts and tribunals have interpreted important operative provisions of the Victorian Charter that relate to the operation of public authorities, namely section 4 on the definition of “public authority” and section 38 on the legal obligations of public authorities.

(a) Definition of “Public Authority” under the Victorian Charter

The HRLC considers that the way that the definition of “public authority” in section 4 of the Victorian Charter has been interpreted by courts and tribunals has been appropriate and is an important positive aspect of the operation and impact of the Charter to date. Given the extent of private and community sector involvement in public service delivery, together with the diversity of organisational arrangements and structures to manage and deliver those services, the HRLC welcomes the broad view that has been taken of the definition of “public authority” to ensure that it has a broad application to a range of government services. The HRLC’s strong view is that a broad interpretation of what constitutes a public authority is important to

40 Source: HRLC case work.
the achievement of the underlying purpose of the Victorian Charter. The state’s obligation to respect human rights should not be contingent on the vehicle that the state chooses to deliver public services, just as an individual’s human rights should not be so contingent.

60. In the Victorian Charter’s operation to date, the provision of transitional housing for people who are homeless or at risk of homelessness on behalf of the government has been held on a number of occasions to amount to a function of a public nature. The HRLC welcomes the fact that the focus of the definition of a public authority has been on the nature of the function being undertaken by the entity. In Metro West v Sudi, in which the HRLC intervened as amicus curiae, Justice Bell stated that the matter of determining whether an entity is exercising a “public function” should be “approached as a matter of substance and not form or legal technicality”. Particular responsibility should be imputed to those entities which provide services to or for people who are vulnerable or disadvantaged, such as people with disability and people experiencing or at risk of homelessness.

61. It is vital that the Victorian Charter bind private entities in circumstances where those entities are exercising public functions. As Justice Bell identified in Metro West v Sudi:

> The state cannot shirk its human rights responsibilities by implementing its programs and policies through private entities acting on its behalf. Where private entities exercise public functions of a public nature on behalf of the State or a public authority, the functions come with unavoidable human rights responsibilities for the entity itself.

(b) The nature of the legal obligation of public authorities

62. The HRLC considers that the requirement contained in section 38 of the Victorian Charter both to act compatibly with human rights (the substantive obligation) and to give proper consideration to human rights when making decisions and implementing legislation (the procedural obligation) has played a crucial role in the Charter’s operation to date.

63. The procedural obligation contained in section 38 of the Victorian Charter requires a public authority to give “proper consideration” to relevant human rights when making decisions. The requirement to give proper consideration to human rights has been found by the Supreme Court to require “a decision maker to do more than merely invoke the Charter like a mantra” and to “seriously turn his or her mind to the possible impact of the decision on a person’s

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42 As Lord Nicholls observed in Aston Cantlow Parochial Church Council v Wallbank [2004] 1 AC 546 in relation to the comparable provision of the UK Human Rights Act, “[g]iving a generously wide scope to the expression ‘public function’ in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values...” (at [11]). See also Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48; [2001] EWCA Civ 595 at [58] per Lord Woolf CJ (for the Court of Appeal); and YL v Birmingham City Council [2008] 1 AC 95 at [4] per Lord Bingham.


45 Ibid.

46 Ibid.
human rights”. Proper consideration does not mean decision makers are required to undertake a sophisticated legal exercise, but they are required to give real, genuine and proportionate consideration to human rights and to understand:

in terms, which rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made.

64. The procedural requirement has also played a valuable role in the establishment of a human rights culture in Victoria. This is because it encourages proper consideration and integration of human rights in government administration. Merely being conscious of human rights and the effect of conduct and decisions on human rights should assist in protecting and upholding these rights.

(c) Application of the Charter to Courts and Tribunals

65. The Victorian Charter specifically excludes several entities from the definition of “public authority”, including courts and tribunals except when they are acting in an administrative capacity. The provision has received some judicial consideration, most notably in *Sabet v Medical Practitioners Board of Victoria* and *Kracke v Mental Health Review Board & Ors*, where it was held that whether a court or tribunal is acting in an “administrative capacity” depends upon whether the court or tribunal is exercising administrative or judicial power, in the sense those terms are used in constitutional law.

66. In relation to the operation of section 4 of the Charter, courts and tribunals have determined that:

(a) VCAT is acting in an administrative capacity when conducting a merits review;

(b) VCAT is acting in an administrative capacity when deciding whether or not to grant an exemption from the *Equal Opportunity Act*;

(c) VCAT is not acting in an administrative capacity when hearing applications for a possession order under section 344 of the *Residential Tenancies Act*;

(d) a court will not be acting in an administrative capacity when it is hearing an application for an adjournment of trial when the hearing date has already been determined;

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47 *Castles v Secretary to the Department of Justice* [2010] VSC 310, [186].
48 Ibid, [185].
51 [2009] VCAT 646.
54 *Director of Housing v Sudi* [2010] VCAT 328, [119].
(e) the Victorian Mental Health Review Board is only acting in an administrative capacity when conducting registry type functions, not when conducting hearings.  

67. The HRLC considers that it would also be useful for amendments to be made to the operation of section 6(2)(b) of the Charter. As identified by Bell J in Kracke, there is a need to reconcile the interpretation of section 4(1)(j), which excludes courts and tribunals from the definition of “public authority” except when they are acting in an administrative capacity, with section 6(2)(b), which makes the Charter applicable to courts and tribunals to the extent that they have functions under Part 2 of the Charter.

68. The preferable view is that, under the Charter, courts and tribunals have the “function” of protecting and promoting all of the rights set out in Part 2 of the Charter that are relevant or arise before the court or tribunal. The HRLC recommends that section 6(2)(b) be amended and clarified so that the capacity of courts and tribunals to consider and enforce human rights set out in the Charter is not restricted.

(d) Definition of “Public Authority”

69. The HRLC observes that, for the purposes of clarity and consistency, the Victorian Charter could be enhanced by specifying certain functions that “are taken to be of a public nature”. We note that this has been done in the ACT Human Rights Act, which was amended in 2008 to include the following functions:

(a) the operation of detention places and correctional centres;
(b) the provision of any of the following services:
   (i) gas, electricity and water supply;
   (ii) emergency services;
   (iii) public health services;
   (iv) public education;
   (v) public transport;
   (vi) public housing.

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56 09-085 [2009] VMHRB. However, the authorised psychiatrist in that case was a public authority for the purposes of the Charter and was bound to act and make decisions compatibly with the Charter rights of involuntary patients.
57 Human Rights Amendment Act 2008 (ACT) s 7. See, eg, ACT Human Rights Act s 40A(3).
Recommendation:

The Victorian Government should remain fully committed to the protection and promotion of human rights and ensure that public authorities give appropriate consideration to human rights when developing laws and policies and making decisions. In particular, the legal obligation contained in section 38 must be retained to ensure the Charter’s effective operation.

Recommendation:

The definition of “public authority” in section 4 should be enhanced by specifying certain functions that “are taken to be of a public nature” along similar lines to the ACT Human Rights Act.

Recommendation:

Section 6(2)(b) of the Victorian Charter should be amended and clarified so that the capacity of courts and tribunals to consider and enforce the human rights set out in the Charter is not restricted.
5. **The Effect of the Charter on the Role of Courts and Tribunals**

This section of our submission addresses Term of Reference 5(d).

70. The HRLC considers that courts and tribunals have played an important, although not to be overstated, function in the operation of the Victorian Charter to date. Courts and tribunals have ensured that the Victorian Charter has served its purpose to ensure a “dialogue” about human rights and that laws, policies and practices are developed with appropriate consideration to human rights.

71. This section of the submission examines:

(a) the effect of the Victorian Charter on litigation;

(b) the impact of the Charter on Victorian law; and

(c) the role of courts and tribunals in enhancing the dialogue about human rights while also maintaining an appropriate constitutional balance between the three arms of government.

5.1 **Effect of the Victorian Charter on Litigation**

72. Relatively speaking, there have only been a small number of decisions by courts and tribunals that have substantively considered the Victorian Charter. Despite some unsubstantiated claims to the contrary, there has not been any “flood of litigation” or a “lawyers’ picnic” following the Victorian Charter’s introduction.

73. There are no official statistics currently publicly available on the number of cases in which the Victorian Charter has been raised in Victorian courts and tribunals.

74. The HRLC has conducted an analysis of cases that have been reported on AustLII and our own caselaw database. 58 Although this data is not comprehensive, and while we acknowledge that a reference to a reported case does not necessarily capture the frequency of reliance on the Charter in inferior courts or tribunals or in the interlocutory stages of all proceedings, we offer the following analysis as an indication of the number of cases in which some consideration of the Victorian Charter has occurred.

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## Table A: Reported judgments on AustLII

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<td><strong>16778</strong></td>
<td><strong>249</strong></td>
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**Notes:** Figures have been obtained from reported judgments on the AustLII database from 1 January 2007 to 8 June 2011.

* Statistics are not on AustLII for Mental Health Review Board decisions for 2010 and 2011.
75. The HRLC has also kept our own online database of all Victorian cases in which the Charter has been substantively considered by a court or tribunal. In total, the Charter has been substantively considered in 97 cases. Graph 1 (on the next page) illustrates the thematic areas in which the Victorian Charter has been considered and Graph 2 (on the following page) identifies the rights contained in the Charter that have been engaged in these cases.

76. On the basis of the statistics derived from AustLII and from the HRLC’s database, the following observations can be made about the decisions of courts and tribunals for the period 1 January 2007 (since the Charter’s partial commencement) to 8 June 2011:

(a) the Victorian Charter has only been considered in 1.48% of all Victorian reported judgments and substantively considered in 0.58% of all cases;

(b) the Victorian Charter has been considered in 249 reported judgments and substantively considered in 97 of those judgments. The Victorian Charter is therefore substantively considered in around two-fifths of all cases that consider the Victorian Charter;

(c) the Charter has been raised the most in cases dealing with issues of access to justice (20% of cases in which the Charter is raised), housing and homelessness (15%), equality and non-discrimination (11%), and mental health (10%);

(d) there are only nine cases in which the Charter has been substantively considered in relation to criminal proceedings; and

(e) the rights that are most engaged in these cases that substantively consider the Victorian Charter are the right to privacy and reputation (section 13 of the Charter), the right to a fair hearing (section 24), the right to recognition and equality before the law (section 8) and freedom of expression (section 15).

Cases contained on the HRLC’s database are cases in which the Charter has been substantively considered in the judgment. In some cases, the court or tribunal’s consideration of the Charter is cursory but consequential and is therefore considered to be substantively considered.
Graph 1: Thematic areas in which the Charter has been substantively considered

- Access to Justice / Fair Hearing: 18%
- Children / Young People: 7%
- Disability: 7%
- Environment: 7%
- Equality / Non-Discrimination: 11%
- Freedom of Expression: 8%
- Housing / Homelessness: 13%
- Mental Health: 10%
- Police: 3%
- Prison / Conditions of Detention: 9%
- Privacy: 4%
- Remand / Bail: 3%
Graph 2: Rights engaged in cases in which the Charter has been substantively considered

- Section 8: Recognition and Equality Before the Law, 21%
- Section 9: Right to Life, 3%
- Section 10: Protection from Torture and Ill-Treatment, 4%
- Section 12: Freedom of Movement, 5%
- Section 13: Privacy and Reputation, 24%
- Section 14: Freedom of Thought, Conscience and Religion, 2%
- Section 15: Freedom of Expression, 10%
- Section 16: Freedom of Association, 1%
- Section 17: Protection of Families and Children, 7%
- Section 20: Property Rights, 1%
- Section 22: Humane Treatment in Detention, 7%
- Section 24: Fair Hearing, 22%
- Section 25: Rights in Criminal Proceedings, 7%
- Section 26: Freedom from Double Punishment, 1%
- Section 27: Retrospective Criminal Laws, 1%
5.2 Impact of the Charter on Victorian Law

77. As identified in the previous section, the impact of the Victorian Charter on litigation has been significantly less than many predictions or descriptions. In many instances:

(a) consideration of the Victorian Charter brought courts and tribunals to the same conclusion that they would have reached under existing laws, such as the common law or existing statutory interpretation;

(b) consideration of the Victorian Charter did not alter the outcome of the case because the decision or policy being challenged appropriately considered or reasonably limited human rights; or

(c) human rights arguments were rejected by the courts as either being misconceived or irrelevant to the case.

78. In other instances where courts and tribunals have considered the Victorian Charter, it has played an important role in ensuring that Victorian legislation is interpreted consistently with human rights and that acts and decisions of public authorities give due consideration to human rights. In these instances, the Victorian Charter has had a beneficial impact and has been used to challenge arbitrary policies and unfair decisions.

(a) Access to Justice

79. The Charter has been raised most often in cases relating to access to justice and the right to a fair hearing. Cases referring to the Charter that engage the right to a fair hearing or access to justice have been raised in a range of circumstances, including where the provision of legal aid has been withheld, where the duty of courts or tribunals to provide a self represented litigant with an explanation of their rights as an unrepresented litigant have been questioned, and in disputes where contractual terms existed to prevent one of the parties to a contract from initiating litigation against the other party unless provided security of costs to the other side’s solicitor. In the latter example, Vickery J in *Materials Fabrication Pty Ltd v Baulderstone Pty Ltd*[^60^] commented that such a clause may severely inhibit, if not preclude, the exercise of a legitimate right for a party to a dispute to conduct a trial of its cause before a court. Such examples illustrate that the Charter has played a role in assisting vulnerable or considerably weaker parties to access justice and receive a fair trial – a fundamental aspect of the operation of the legal system itself.

(b) Housing and Homelessness

80. Many of the cases raising the Victorian Charter relating to housing and homelessness issues have involved challenging eviction orders that have been sought by public housing authorities. Decisions by the courts and tribunals have looked at questions of whether public authorities have given appropriate consideration to human rights when exercising their discretion to issue

eviction notices. The cases of *Department of Housing v Sudi* 61 and *Homeground Services v Mohamed*, 62 for example, illustrate that the Victorian Charter has been relied on to prevent the eviction of vulnerable tenants, including children, into homelessness. The jurisprudence in this area has impacted on the way that housing authorities undertake their operations. As evidenced by the case of *Director of Housing v TK*, 63 the Victorian Charter has provoked the development of more flexible, effective and responsive policies by housing authorities.

**(c) Equality and Non-Discrimination**

81. The Charter has been referred to in a range of discrimination cases. Examples of cases engaging the Charter include a same-sex attracted youth group being denied access to an accommodation facility on the basis of the sexual orientation of the attendees, the unequal accessibility to adoption laws for same sex attracted couples and ensuring that a prisoner was not subjected to hardship beyond that which results from the deprivation of liberty.

82. In relation to the rights of prisoners, the applicant was permitted to exit prison for the purposes of obtaining IVF treatment. Considering section 22 of the Charter, the Court found in *Castles v Secretary to the Department of Justice* that “access to health care is a fundamental aspect of the right to dignity. Like other citizens, prisoners have a right to…a high standard of health. That is to say, the health of a prisoner is as important as the health of any other person.” 64 The Court further noted that its decision was influenced by the jurisprudence of prisoners’ rights in the European Court of Human Rights and other common law jurisdictions. The decision in *Castles* stands for the principle that prisoners have a right to a level of health that is equal to the rights to health available to other people in the community.

83. The Charter has also been used to limit certain rights, for the purposes of obtaining a positive outcome. In *Department of Human Services & Department of Health (Anti-Discrimination Exemption)* [2010] VCAT 1116, VCAT ordered that such a limitation was appropriate for the purposes of enabling the Department of Human Services and the Department of Health to employ Aboriginal people as part of a Victorian public sector employment and career program for Aboriginal people. The limitation was seen as necessary to increase the employment of Aboriginal Victorians and also encourage Aboriginal Victorians to remain at school for longer and enter university. In this case, and in the case of *Wesley College (Anti-Discrimination Exemption)* [2010] VCAT 247, where an educational institution was given an exemption to enroll female students in preference to male students so that a co educational target could be reached, the courts and tribunals have used section 7(2) of the Charter to limit certain rights, if such a limitation would redress an existing disadvantage.

64 *Castles v Secretary to the Department of Justice* [2010] VSC 310.
(d) Mental Health

84. Cases relating to mental health that have considered obligations under the Charter include the review of compulsory medical treatment, the involuntary administration of medication and the human rights issues engaged by the incarceration of someone found not guilty of a criminal offence. In *Kracke v Mental Health Review Board*, VCAT made a declaration that the Mental Health Review Board had breached Mr Kracke’s human right to a fair hearing under section 24(1) of the Victorian Charter by failing to conduct the reviews of his involuntary and community treatment orders within a reasonable time. In *R v White*, the incarceration of a person with a severe psychiatric condition found not guilty of murder was considered by the court to be contrary to the spirit of the Charter. It was submitted that imprisonment in these circumstances raised various issues under the Charter including the right to freedom from cruel treatment, the right to liberty and security and freedom from arbitrary detention, and the right to humane treatment when deprived of liberty.

(e) Criminal Law

85. The Victorian Charter has been engaged in only a small number of proceedings relating to the criminal law and has generally had a limited impact on the outcome of those cases. For example, in *Barbaro v DPP (Cth)*, the Court of Appeal held that “the Charter did not require any departure from the existing approach to the treatment of delay as an issue in bail applications”. In *Wells v The Queen (No 2)*, the Court of Appeal stated that the Court will not generally hear Charter arguments in interlocutory criminal appeals.

5.3 Courts and Tribunals are Enhancing the Dialogue about Human Rights

86. Decisions by courts and tribunals are providing emerging guidance on the practical application of the Victorian Charter to the conduct of public authorities. As the VEOHRC has found, this guidance plays an important part in strengthening the law and policy-making process and resulting in better outcomes for individuals.

87. For example, in *Re an application under the Major Crime (Investigative Powers) Act 2004*, Chief Justice Warren provided useful guidance to legislators on the consideration that should be given to limiting any human rights under section 7 of the Victorian Charter when passing new laws. Her Honour stated that the onus of demonstrably justifying a limitation rests with the party seeking to uphold the limitation and that the standard of proof is high. Chief Justice Warren recognised that in passing the legislation the Parliament must strike a balance between the principle against self-incrimination and the state’s interest in investigating

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69 VEOHRC, above n 2, 46-7.
organised crime offences. Her Honour stated that the evidence required to prove the elements contained in section 7 should be “cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit”.

88. In Castles,71 while the Charter did not determine the issue before the Court, the judgment provides valuable guidance on a range of issues, including the obligation to give proper consideration to human rights, the meaning of the right to humane treatment in detention and access to health services in prisons. For example, on the question of what constitutes “proper consideration” of human rights for the purposes of section 38(1) of the Victorian Charter, the Court held:72

proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

89. Following various VCAT hearings relating to issues of housing and homelessness, the VEOHRC observes that the Office of Housing developed a new briefing note which assists staff in making recommendations regarding VCAT proceedings. The note contains a specific section on the Victorian Charter which requires staff to demonstrate they have considered possible restrictions on human rights in the decision-making process, such as whether any limitations are reasonable and necessary.73

90. The VEOHRC has also observed that courts and tribunals have used the Charter to consider the content of the common law and the rights enshrined therein. Where the common law does not offer clear rights protection, the Charter can play a very useful role in providing a framework within which public authorities may operate.74

91. In the HRLC’s view, the above examples are illustrations of the important role that courts and tribunals are playing in the Victorian Charter’s “dialogue” model of human rights protection and assisting to ensure that human rights are appropriately considered by all arms of government.

5.4 The Charter has Maintained an Appropriate Constitutional Balance

92. The HRLC observes that the operation of the Victorian Charter to date has remained faithful to the “constitutional” balance and roles of parliament and courts. Despite the concerns expressed by some commentators, the Charter has not resulted in courts and tribunals having the power to invalidate or “strike down” any legislation that may be considered to raise human rights concerns. Rather, the operation of the Charter to date has demonstrated that tasks entrusted to courts and tribunals such as the interpretive provision (section 32) and the power to issue a Declaration of Inconsistent Interpretation (section 36) have played an important role...

72 Castles v Secretary to the Department of Justice & Ors [2010] VSC 310 (9 July 2010), [185].
73 VEOHRC, above n 2, 41.
74 Ibid, 47.
in maintaining an appropriate constitutional balance and contributing to a “dialogue” about human rights.

(a) Declarations of Inconsistent Interpretation

93. Since the introduction of the Victorian Charter, the Supreme Court has issued only one Declaration of Inconsistent Interpretation. In the case of R v Momcilovic, the Victorian Court of Appeal found that a reverse onus provision infringed the right to the presumption of innocence in a manner that could not be cured by section 32 of the Charter, nor justified by section 7, and accordingly the Court granted a Declaration of Inconsistent Interpretation.

In the HRLC’s view, this outcome is central to and exemplifies the Charter’s dialogue model of human rights protection. The Court did not invalidate the statutory provision but instead referred the question back to Parliament for its further consideration. Parliament is entirely free to respond as it sees fit, whether to maintain the law as it currently operates or alternatively to amend the law to ensure that it is more compatible with human rights.

94. In R v Momcilovic, the Court of Appeal noted that, contrary to the approach under the Human Rights Act 1998 (UK), such Declarations of Inconsistent Interpretation should not be seen as a “last resort” but rather, as reflected in parliamentary debates about the Victorian Charter, as “epitomising the intended relationship between the courts and the legislature” in the dialogue model. On this point, the Court of Appeal concluded that

the making of a declaration of inconsistent interpretation accords more closely with this conception of dialogue, and in particular with the avowed purpose of ‘giving Parliament the final say’, than would an expanded view of ‘interpretation’ which allowed courts to depart from the plain meaning of a statutory provision and the intent of Parliament thereby conveyed. Under the Charter, the concept of the ‘final say’ is given direct expression in the obligation of the responsible Minister to table in Parliament a written response to a declaration of inconsistency.

(b) Operation of the Interpretive Provision

95. The HRLC notes that, of the cases that have substantially considered the Victorian Charter, there have been 27 decisions that have engaged section 32 of the Victorian Charter. The leading cases that have considered the operation of section 32 include R v Momcilovic, Secretary to the Department of Justice v AB, Kracke v Mental Health Review Board and RJE v Secretary to the Department of Justice. Based on the approach that courts and tribunals have taken to section 32, arguments that the Victorian Charter has significantly

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75 See R v Momcilovic [2010] VSCA 50 (17 March 2010), although note that this matter is currently on appeal before the High Court of Australia.
79 [2008] VSCA 265, available at http://www.austlii.edu.au/au/cases/vic/VCC/2009/1132.pdf. Section 11 of the Act provides that an “Extended Supervision Order” may be made in respect of an offender if the Court is satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence if released into the community.
altered the constitutional balance by transferring powers from elected representatives to unelected judges are erroneous.

96. In *Momcilovic*, the leading case on the operation of the interpretive provision, the Court of Appeal stated that section 32 of the Charter does not create a “special” rule of interpretation. In this respect, the Court explicitly rejected the approach taken by the UK House of Lords in *Ghaidan v Godin-Mendoza*. Instead, the Court characterised section 32(1) as a “statutory directive” that requires all persons engaged in the task of statutory interpretation to “explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes Charter rights”. The Court distinguished this approach from that of the UK House of Lords in *Ghaidan*, concluding that:

> our view that s 32(1) does not permit a departure from the intention of the enacting Parliament is reinforced by the fact that s 32(1) requires provisions to be ‘interpreted’ compatibly with human rights. ‘Interpretation’ is what courts have traditionally done.

(c) **Courts have an appropriate role to play in the interpretation of laws**

97. One of the core tasks of courts is to interpret the meaning of laws that are passed by Parliament and to apply those laws in specific situations. The separation of powers principle, upon which our system of government in Victoria and Australia is based, acknowledges and requires that the Judiciary has a crucial role to play in the operation of government.

98. One concern often raised is that human rights legislation transfers power from parliamentarians to unelected judges and therefore is undemocratic. There are two key fallacies associated with this proposition:

(a) first, it misconceives the role that the judiciary plays in relation to the separation of powers doctrine. Courts are equal partners with the executive and the parliament in a system that requires checks and balances in relation to each arm of government. Courts therefore are an important bulwark against the excesses of the other two arms of government; and

(b) second, through the introduction of the Victorian Charter as legislation, the Parliament is directing the courts to play a particular role in the interpretation of legislation and review of executive decisions and policies. In other words, the role that courts and tribunals play under the Victorian reflects the will of the parliament itself. It therefore cannot be said that human rights legislation is undemocratic.

99. Instead, the operation of the Victorian Charter ensures that the well-established common law principles that any ambiguity in legislation should be construed in favour of human rights and that legislation should not be deemed to abrogate fundamental rights without clear and express words evincing that intention are codified into Victorian law. This has long been regarded as an appropriate, and indeed fundamental, role of the judiciary.

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(d) Courts have displayed deference to the Parliament and Executive

100. Courts and tribunals have recognised that there is an area of judgment where the judiciary will defer to the legislature or executive, particularly where the court is satisfied that the procedural obligation imposed on public authorities has been substantially complied with. This approach by the courts conforms to the intended operation of the Victorian Charter that human rights be appropriately considered, especially at the “front end” of legislative and policy development and decision-making.

101. In *Castles v Secretary to the Department of Justice*, the Supreme Court of Victoria commented that it is not in a position to “second guess” correctional authorities when it comes to prison security arrangements and deferred to the Secretary to the Department of Justice on questions of resource availability.81 Considering the complexities involved in reviewing a public authority’s compliance with the procedural and substantive obligations and the expertise of public authorities, courts have generally given them a “margin of appreciation” in carrying out their public functions and recognise that there is a “discretionary area of judgment” for public authorities. Therefore, as long as there is evidence that a public authority has given serious consideration to relevant human rights and the decision is considered to be within the authority’s “discretionary area of judgment”, courts may decline to find that the public authority has acted unlawfully.82 Courts may also defer to the opinion of the legislature, executive or public authority when particularly sensitive issues, such as national security, criminal justice and economic policy, are involved.

(e) Parliamentary Sovereignty

102. The HRLC observes that operation of the Victorian Charter to date has preserved an appropriate constitutional balance between the Victorian Parliament, the Executive and the Judiciary. Courts are not empowered to “strike down” any legislation that is inconsistent with the human rights protected in the Act. Rather, courts play a role in identifying particular issues that may require re-consideration by the Parliament while maintaining parliamentary sovereignty.

103. The case of *Momcilovic*, as discussed above, is a good example of the Charter’s dialogue model in action. While the Court identified that the reverse onus provision contained in the relevant legislation infringed the right to the presumption of innocence, by issuing a Declaration of Inconsistent Interpretation it remitted the provision to Parliament for its reconsideration. Ultimately, the decision on whether or not to amend the provision is entirely a matter for Parliament.

81 *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310 (9 July 2010), [143] and [173].
104. Another example of the Charter’s “dialogue model” at work is amendments that were made by parliament to section 11 of the Serious Sex Offenders Monitoring Act 2005 following the Court of Appeal’s decision in *RJE v Secretary to the Department of Justice*. \(^83\) Parliament considered that the Court had not interpreted section 11 in a manner that Parliament intended. It subsequently amended the provision to clarify its desired intention that a lower threshold be applied to section 11 of the Act, an outcome which maintains parliamentary sovereignty.

Recommendation:

*Courts and tribunals should continue to play an important role in enhancing the dialogue about human rights between the three arms of government and assisting to ensure that human rights are appropriately considered, while maintaining an appropriate constitutional balance. The current role played by courts and tribunals under the Victorian Charter should be retained to ensure the Charter’s effective operation.*

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83 [2008] VSCA 265. Section 11 of the Act provides that an “Extended Supervision Order” may be made in respect of an offender if the Court is satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence if released into the community.
6. Access to Remedies Under the Victorian Charter

Terms of Reference 4 and 5e

105. Individuals must be able to access an effective remedy where their rights have been infringed. "Effective remedy" is a broad term, encapsulating a range of reparations that can be made to individuals whose rights have been violated. Such reparations may include:\textsuperscript{84}

- restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

106. In general, the availability of an effective remedy requires that "individuals be able to seek enforcement of their rights before national courts and tribunals."\textsuperscript{85} However, in some circumstances, an effective remedy may be administrative in nature. Depending on the nature and gravity of the breach, different types of remedies may be appropriate in different circumstances.

107. Accordingly, it is essential that the Victorian Charter provide for a range of judicial and non-judicial remedies for breaches of the rights under the Act. Remedies for a person whose human rights have been infringed should range from:

(a) seeking redress in the courts; to
(b) engaging in dispute resolution processes such as conciliation and mediation;\textsuperscript{86} to
(c) lodging a complaint with a Human Rights Commissioner or Ombudsman;\textsuperscript{87} to
(d) seeking redress with the violating public authority (for example, by requesting an internal review where appropriate).

108. It is important to recognise that access to remedies is a matter of last resort where other mechanisms and processes have failed to give proper consideration to human rights. In these instances, access to an effective remedy is an essential aspect of protecting and promoting human rights, including by operating as an incentive and deterrent to ensure that human rights breaches do not occur in the first place.

\textsuperscript{84} Human Rights Committee, \textit{General Comment 31}, above n 1, [6].


\textsuperscript{87} Ibid, 122.
6.1 The Need for a Free-Standing Cause of Action

109. Currently, section 39 of the Victorian Charter requires individuals to establish an existing cause of action before being able to rely on the human rights protected in the Victorian Charter in legal proceedings. The HRLC’s view is that section 39 is unnecessarily complex and unworkable. The result is that for some individuals, access to appropriate remedies for infringements of their rights remains illusory.88

110. The HRLC considers that section 39 should be replaced with a provision that:

(a) establishes a free-standing cause of action for breaches of protected human rights which is justiciable and enforceable in all appropriate courts or tribunals;89 and

(b) empowers the court or tribunal to grant such relief or remedy, or make such order, within its powers, as is “just and appropriate”, including making an award of damages where appropriate.90

111. The Victorian Charter should provide a free-standing cause of action for breaches of the rights protected by the legislation. An independent cause of action will ensure that, where necessary, individuals are able to access effective remedies for human rights breaches. One exception, however, to the free-standing cause of action is an action for a Declaration of Incompatibility. The HRLRC considers that an application for a Declaration of Incompatibility should be required to be brought with another cause of action to minimise the chances of it being considered to be a request for an advisory opinion of the court.

(a) Section 39 is Unnecessarily Complicated

112. The HRLC observes that the requirement in section 39 of the Charter to establish an existing cause of action in order to bring a complaint has led to much confusion and unnecessary complication. The complexity of establishing a cause of action for a breach of the Victorian Charter, particularly for individuals who may not be able to access legal advice or representation, often acts as a barrier to such individuals being able to access an effective remedy for a breach of their rights.

113. Ultimately, this increases the difficulty of bringing court proceedings where human rights have been breached and, in some circumstances, has the effect of preventing individuals from being able to bring proceedings at all.

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88 For a comprehensive analysis and criticism of section 39 of the Victorian Charter, see Jeremy Gans, ‘The Charter’s Irremediable Remedies Provision’ (2009) 33 Melbourne University Law Review 105. Gans argues that the provision is entirely unsatisfactory and that it should be replaced with the remedies provision that was adopted in the ACT’s Human Rights Act.

89 The ICCPR enshrines the right to an “effective remedy” which requires the availability of accessible, enforceable, judicial remedies: ICCPR arts 2(3)(b) and (c); Arhuaco v Columbia, UN Doc CCPR/C/56/D/612/1995, [5.3]; Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (2nd ed; 2005), 64.

90 The right to an effective remedy requires and “generally entails” appropriate compensation: see, eg, Human Rights Committee, General Comment 31, above n 1, [16]; cf section 39(3) of the Charter.
Case Study: No Access to Remedy for Arbitrary Eligibility Requirements for IVF Treatment

The Assisted Reproductive Treatment Act 2008 (Vic) (ART Act) requires applicants for IVF treatment to submit to a criminal records check before being approved for treatment.

The ART Act does this by:
(a) requiring all applicants for ART to attend a counselling session;
(b) requiring the counsellor to cite a criminal record check for each applicant for ART; and
(c) stating that a presumption against treatment arises in cases where the woman or her partner have certain types of criminal convictions.91

This eligibility requirement engages, among other things, the right to privacy under the Victorian Charter. Arguably the disclosure of criminal records in order to receive health treatment is unnecessary and irrelevant and is not a reasonable limitation of Charter rights. The criminal record check does not just expose a person’s serious criminal offences (which is the basis for rejection for treatment), it also exposes any findings of guilt against the person, with or without conviction, and any other matters that a police member considers relevant. The eligibility requirement may therefore constitute an arbitrary invasion of privacy in a way that, for example, the requirement of a statutory declaration declaring only relevant offences would not.

For people whose privacy is violated by the provision of a criminal record check, there is no remedy in the Charter. This is because the presumption against treatment is a mandatory provision of the ART Act and does not involve any exercise of discretion by the counsellor that might be subject to review.92

114. The lack of an available remedy limits the effectiveness of the Victorian Charter in addressing human rights breaches and enforcing human rights obligations. It also has the effect of creating an impression that human rights will not be treated with the seriousness and importance that they deserve. Indeed, the complicated nature of the operation of section 39 has led many people to mistakenly think that there are no legal remedies available for breaches of the Charter. This misperception causes much damage to the potential impact of the Charter because:

(a) many individuals whose rights may have been infringed do not end up using the Victorian Charter because they mistakenly believe that there is no remedy available to them; and

(b) some public authority officials do not give appropriate consideration to human rights because they think that no legal action may be taken to challenge their decision and so they take the requirement to give proper consideration to human rights less seriously.

91 Under s 15 of the ART Act, a person who applies for treatment and is denied on the basis of the results of their criminal record check is entitled to apply to the Patient Review Panel for a review. The Patient Review Panel may decide that there is no barrier to the person undergoing treatment procedures.

92 Source: HRLC case work.
115. The HRLC submits a separate cause of action would avoid such complexity and confusion and create a simpler way for aggrieved individuals to be able to access a court or tribunal.

(b) **Ensuring an available and effective remedy in all circumstances**

116. In some circumstances, only allowing an aggrieved person to seek relief for a human rights breach if that person already has a cause of action other than under the Victorian Charter does not provide an effective remedy. While there have not been a large number of situations where, in the HRLC’s experience, an alternative cause of action was not available, we are strongly of the view that creating an independent cause of action would also ensure that a remedy is available in all circumstances.

117. Guidance can be gleaned from the **Human Rights Act 2006 (ACT)** and the **Human Rights Act 1998 (UK)**, both of which provide for an independent cause of action. Both of these pieces of legislation enable individuals to:

(a) initiate proceedings directly against public authorities who they claim have breached their human rights; or

(b) rely on human rights in any legal proceedings.

118. In the UK, for example, a person can initiate court proceedings seeking a remedy on the sole basis that his or her protected human rights have been breached, thus providing an independent cause of action.93 Similarly, the ACT’s **Human Rights Act 2004** was amended such that from 1 January 2009 an aggrieved individual can institute proceedings against the state or a public authority as a result of a failure to comply with its Charter obligations.94

(c) **Concerns about Further Litigation**

119. The HRLC acknowledges the concern expressed by some that a free-standing cause of action could “open the floodgates” of litigation and could be costly for the government and public authorities as a result of awards of compensation against them.95 However, in reality the “floodgates” argument is simply not borne out by the evidence and experience in other jurisdictions which have enacted an independent cause of action for human rights violations. This has certainly not been the case in either the United Kingdom or the Australian Capital Territory. The Human Rights Acts in both the UK and the ACT provide for a free-standing cause of action for a breach of human rights and in New Zealand courts have implied a right of action and entitlement to a remedy for a breach of

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93 UK Human Rights Act, section 7.
94 ACT Human Rights Act pt 5A, as inserted by the Human Rights Amendment Act 2008 (ACT).
human rights.\textsuperscript{96} Although the UK did experience an increase in the number of human rights cases immediately after the introduction of the Human Rights Act in 2000 until 2002-2003, there has since been a gradual and steady decline since that time.\textsuperscript{97} Courts report that the UK’s Human Rights Act has not resulted in an overall increase in the length or cost of litigation.\textsuperscript{98} On the contrary, the number of human rights cases before the courts has halved in the last eight years.\textsuperscript{99} There has similarly been no discernable increase in human rights litigation subsequent to the amendments to the ACT Human Rights Act.

120. The HRLC observes that any concerns about an increase in litigation are obviated by the fact that, as discussed in previous sections, the primary purpose of the Victorian Charter is to ensure that human rights are considered at the front end of legislative and policy development and decision making, thereby preventing human rights violations from occurring in the first place. Accordingly, any concerns about an increase in litigation are likely to be exaggerated.

(d) Administrative Remedies are Important but not Sufficient Alone

121. The HRLC also highlights the importance of having a range of non-legal remedies available to individuals. However, such non-legal remedies must be in addition to providing access to legal remedies. The mere availability of administrative mechanisms, such as making a complaint to the Ombudsman, rather than binding remedies “cannot be considered an effective remedy”.\textsuperscript{100} Further, many non-government public authorities bound by the Victorian Charter are not subject to the jurisdiction of the Ombudsman or other Victorian complaint and dispute resolution bodies, meaning that the accountability that is provided by the Victorian Charter is even more important.

\textsuperscript{96} Ibid.

\textsuperscript{97} 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. It states: “The number of reported cases on Sweet & Maxwell’s Lawtel & Westlaw service employing Human Rights arguments peaked during 2002-2003 with 541 cases making use of the Act, but over the past three years there has been a gradual decline.”


\textsuperscript{100} While administrative mechanisms, such as an Ombudsman, are important components of an effective framework of human rights protection, “hortatory” remedies “cannot be considered an effective remedy”: see, eg, Brough v Australia, UN Doc CCPR/C/86/D/1184/2003, [8.7]; C v Australia, UN Doc CCPR/C/76/D/900/1999, [7.3].
122. Effective legal remedies must remain available in relation to acts or decisions of public authorities that are made unlawful by virtue of section 38 of the Victorian Charter. Ultimately, voluntary codes of conduct and standards are not binding and in many instances do not afford an effective remedy to an individual whose rights have been infringed.

123. The HRLC observes, however, that non-judicial processes also play an important role in ensuring that individuals are able to challenge situations in which their human rights may not have been appropriately considered. For example, the Victorian Charter was central to a number of recent Ombudsman Victoria investigations and reports into systemic issues in Victoria, including in relation to child protection\(^{101}\) and juvenile justice.\(^{102}\)

124. In order to strengthen the operation of administrative remedies, the HRLC recommends that the Victorian Charter be amended to empower the VEOHRC to receive and conciliate human rights complaints using a similar process to that available for discrimination complaints under the *Equal Opportunity Act 2010* (Vic).

### 6.2 What Remedies Should be Available?

125. The HRLC submits that the judicial remedies that are available under the Victorian Charter for breaches of protected human rights should be expanded to include such remedies as are “just and appropriate”\(^ {103}\). Such judicial remedies are available under domestic human rights frameworks in South Africa, Canada, New Zealand, the United States and the United Kingdom.

126. Judicial remedies should include damages or compensation where there is no effective or appropriate alternative remedy.\(^{104}\) While some may be concerned about allowing for a breach of the Victorian Charter to result in damages, that concern is unfounded. The UK Human Rights Act extends the power to award damages for a breach to any court that has the power to order payment of damages or compensation in a civil case.\(^ {105}\) However, damages are rarely awarded under the UK Human Rights Act, with judicial review and declaratory and injunctive relief more often providing effective remediation of breaches or proposed breaches of human rights. Nevertheless, the UK courts do retain the discretion to award damages where it is just and appropriate to do so. In the UK, there were only three cases under the Human Rights Act between 2000 and 2006 which resulted in the payment of compensation.\(^ {106}\)

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\(^{101}\) Ombudsman Victoria, *Investigation into the failure of agencies to manage registered sex offenders* (2011).

\(^{102}\) Ombudsman Victoria, *Investigation into conditions at the Melbourne Youth Justice Precinct* (2010).

\(^{103}\) See, eg, UK Human Rights Act section 8.

\(^{104}\) See, eg, *Simpson v Attorney General (NZ)* [1994] 3 NZLR 667; UK Human Rights Act, s 8. The UNHRC has stated that ‘States Parties [are required to] make reparation to individuals whose … rights have been violated. Without reparation to individuals whose … rights have been violated, the obligation to provide an effective remedy, which is central to efficacy of art 2, paragraph 3 is not discharged’: UNHRC, *General Comment 31*, above n 1, [16].

\(^{105}\) UK Human Rights Act section 8.

\(^{106}\) *R (Bernard) v Enfield Borough Council* [2003] HLR 111; *R(KB) v Mental Health Review Tribunal* [2004] QB 936; and *Van Colle v Chief Constable of Hertfordshire* [2006] EWHC 360.
127. The HRLC submits that the Victorian Charter should adopt the UK approach. Where damages are awarded, they should be available to cover actual financial loss, for example loss of earnings, loss in the value of property or loss of employment prospects. Damages should also be available for non-pecuniary loss such as anxiety or distress. This is consistent with the general principle that damages be awarded for other wrongs or violations of contractual property or other rights.

**Recommendation:**

*Individuals must be able to access an effective remedy where their rights have been infringed. Section 39 is unnecessarily complex and unworkable and should be replaced with a provision that establishes a free-standing cause of action for breaches of protected human rights which is justiciable and enforceable in all appropriate courts or tribunals. An independent cause of action would strengthen the Charter’s operation and give individuals confidence that avenues exist to challenge policies and decisions that do not given proper consideration to human rights.*

*However, an application for a Declaration of Incompatibility should be required to be brought with another cause of action.*

**Recommendation:**

*The judicial remedies that are available under the Victorian Charter for breaches of protected human rights should be expanded to empower courts and tribunals to grant such relief or remedy, or make such order, within its powers, as is “just and appropriate”.*

**Recommendation:**

*A range of both legal and non-legal remedies must be available to individuals to ensure access to an effective remedy. Non-legal remedies must be in addition to providing access to legal remedies. In order to strengthen the operation of administrative remedies, the Victorian Charter be amended to empower the VEOHRC to receive and conciliate human rights complaints using a similar process to that available for discrimination complaints under the Equal Opportunity Act 2010.*
7. Overall Benefits and Costs of the Charter

This section of our submission addresses Term of Reference 6.

128. As identified throughout this submission, the HRLC considers that the Victorian Charter has had an overall beneficial impact on policy and legislative formulation and decision making across the Victorian Government and public authorities. While the Victorian Charter is only four years old, the time that public authorities have invested in building human rights processes into their operation is beginning to make a difference. There is good evidence that, overall, the Victorian Charter has had a positive impact on:

(a) legislative and policy development, including through enhanced scrutiny and by integrating human rights considerations and safeguards into laws and processes; and

(b) public service delivery and outcomes, both in effecting systemic reform and in individual cases concerning the rights and dignity of vulnerable and disadvantaged people.107

129. However, the Victorian Charter has not been, nor should it be expected to have been, a panacea to disadvantage or a remedy or prevention for every human rights breach since its commencement in 2007. Rather, the Victorian Charter provides a necessary, complementary and supplementary layer of accountability, and assists to fill gaps in human rights protections in an efficient and cost-effective way.108

7.1 Increased Awareness and Discussion of Human Rights

130. As identified throughout this submission, the operation of the Victorian Charter’s “dialogue model” of protection of human rights has promoted greater discussion of, and therefore consideration of, human rights across all aspects of government. In order to ensure and enhance this dialogue, the Victorian Charter’s effectiveness is derived from the entrenchment of legal rights, process of pre-legislative scrutiny and legal duties imposed on public authorities.


108 Based on the operation of the Victorian Charter and the ACT Human Rights Act, together with independent analysis by The Allen Consulting Group, the National Human Rights Consultation Committee found that a human rights act can ‘provide a resilient thread in the…quilt of human rights protection’ and be ‘useful and cost-effective’: above n 22, 377.
Case Study: Increased Awareness of Aboriginal Cultural Rights

An Aboriginal community services organisation noticed in its dealings with state and local government partners that, since the introduction of the Charter, there has been a shift in thinking around cultural diversity and the inclusion of Aboriginal people in programs. One senior staff member who has been working with the Government on a project aimed at developing the health, development, learning and wellbeing of Indigenous children commented that ‘the Victorian Charter seems to have influenced the way Government works with Aboriginal people. They are certainly aware of cultural rights’.109

131. The increased awareness of human rights has also translated into various parts of the community and contributed to an increased discussion about human rights between public authorities and members of the Victorian community, as illustrated by the following case studies.

Case Study: Human Rights Inform Primary School Redevelopment

A medium-sized primary school in Victoria used human rights principles to inform its policies and processes around the re-design and development of the school building. Input was sought from all relevant stakeholders, including students, parents and teachers. For example, three different response forms were distributed to match the literacy levels of all students. In addition, the needs of people with disabilities were given special consideration and a local Indigenous co-operative was consulted.

The Principal of the school has reported that: “[a] simple walk through of the new building gives the message that this is your school, your community and you own the space equally with all others who use it, it generates excitement, ownership and buy-in from all.” She also noted that the process had a positive effect on the students and broader school community through the development strong relationships and positive, supportive community cultures.

Case Study: Including Human Rights in Local Government Planning

A local council released a draft copy of its four-year community plan that identifies community needs, priorities and strategies; and actions for new and improved community services, facilities and programs to be implemented by the council over the life of the plan.

A local community group expressed concern that nowhere did the draft plan refer to human rights or the council’s obligations in relation to rights. The group recommended that council include explicit reference to rights and included particular reference to rights in relation to age, Indigenous identity and disability.

The council adopted most of the group’s recommendations and as a result:

(a) undertook to review its decision-making processes;
(b) considered its obligation to ensure equality in the provision of, and access to council services and facilities;
(c) reviewed its code of conduct for staff and councillors; and
(d) considered how best to proactively promote consultation and feedback opportunities via a range of accessible means.110

109 Source: Victorian Aboriginal Community Services Association Ltd (VACSAL)
7.2 Improved Law-Making and Government Policy

132. According to former High Court Chief Justice Brennan:

> The exigencies of modern politics have sometimes led Governments to ignore human rights in order to achieve objectives which are said to be for the common good.\(^\text{111}\)

133. In the HRLC’s assessment, the Victorian Charter has improved the quality of many laws by making the consideration of human rights part of all law-making and policy development processes. While we do not consider that the Victorian Charter has gone so far as to prevent the Victorian Government and public authorities from acting contrary to human rights in all circumstances, we consider that the Victorian Charter has played a vital role in ensuring that human rights are appropriately considered. In this way, the Victorian Charter has made it “more difficult for Parliament to compromise those rights unreasonably”,\(^\text{112}\) whether deliberately or inadvertently.

7.3 Improving Public Service Delivery

134. The case studies and evidence identified in section 4 of this submission demonstrate that the Victorian Charter has improved public service delivery and outcomes in many areas. Specifically, the Victorian Charter has in many particular circumstances:

(a) provided a useful framework for developing and reviewing policies, programs and practices;
(b) promoted public participation and fairness in government service-delivery;
(c) helped decision-makers and others to achieve common sense and rights-respecting decisions and outcomes;
(d) contributed to cultural change within public authorities by embedding human rights in everyday processes; and
(e) enhanced the accountability of public institutions to the community.\(^\text{113}\)

135. Importantly, it has also empowered people to take action where their rights may have been infringed.

136. While it is still early days in the operation of the Victorian Charter, these benefits are likely to become more widespread once the Victorian Charter becomes more institutionalised and acculturated.

7.4 Protecting the Human Rights of All Victorians

137. The legal protection of human rights provided by the Victorian Charter applies universally and is available to all Victorians, not just minorities or particular groups. There is no doubt, however, that the Victorian Charter has had a particular relevance for some groups, such as children and young people, people with disability and mental illness, and those at risk of homelessness. Indeed, many of Victoria’s most socially and economically marginalised and disadvantaged people are the most likely to come into contact with government services.\(^{114}\) Given their high level of interaction with public services, such vulnerable people are also more likely to suffer violations of their human rights than people in majority groups or people with the means to protect their own interests.

138. The case studies and evidence identified throughout this submission demonstrate that the Victorian Charter has:

(a) provided a framework for the development of more effective, efficient and holistic public and social policy;

(b) promoted more flexible, responsive, individualised and therefore more “consumer friendly” public and social services;

(c) empowered marginalised and vulnerable individuals, communities and groups; and

(d) been used to challenge poor treatment and thereby improve the quality of life of marginalised and disadvantaged individuals and groups.

139. The Charter provides all Victorians with a single statement of the rights and responsibilities that are afforded to them and which are required to be given appropriate consideration by the Parliament, the Executive and the Judiciary.


VEOHRC have indicated that there is strong support for protection of human rights through a mechanism such as the Victorian Charter. The consultations show that:

(a) the Victorian Charter is perceived to have helped bring about a positive cultural shift in government in the way that policy issues are analysed and made government more transparent and accountable;

(b) this positive impact has not necessarily fully flowed through to frontline functions;

(c) the Charter is having a positive impact on the way laws are being interpreted by courts and tribunals and breaches remedied;

(d) the Charter is having a positive influence on community attitudes by “getting the human rights conversation moving” through encouraging and developing human rights dialogue in schools, communities and between communities and government; and

(e) the Charter is credited with delivering better, fairer outcomes for Victorians.

7.5 Cultural Change – Towards a Human Rights Culture

140. In the HRLC’s assessment, perhaps the most important impact of the Victorian Charter to date has been the cultural change that is beginning to take place with government and public authorities to develop laws and policies and make decisions that appropriately consider human rights. The Victorian Charter is a clear statement of Victoria’s human rights responsibilities, which contributes to a culture with a greater awareness of, and respect for, human rights, within government and throughout the community. In this respect, the Victorian Charter serves an important educative function, articulating those standards, rights and responsibilities that are necessary in a free, democratic and inclusive society. This includes the promotion of a culture of human rights at a very local level.

141. Although it is acknowledged that the full operation of the Victorian Charter is only relatively recent, there is growing evidence of cultural change in Victoria. The VEOHRC’s 2009 report on the operation of the Victorian Charter records some of that change within government:

    Bearing in mind that Victoria is only three years into a process of extensive cultural change around human rights, progress has been considerable… Importantly, the Charter is contributing to enriched public discourse around a range of issues. In some instances, the Charter assists in illuminating success and progress, helping to identify why certain initiatives work particularly well and providing guidance for emulating these initiatives. In other cases, evaluation against the Charter may be a source of discomfort and raise difficult questions, but this is one of the strengths of the Charter and the human rights dialogue model – with debate around “difficult” issues identifying more effective responses to these issues and encouraging improvements in services and practices across government.


116 See VEOHRC, above n 2.

117 VEOHRC, above n 26, 13.
142. Various VEOHRC reports also set out many initiatives from across the Victorian Government, including case studies of how a human rights framework is being incorporated into departmental systems. For example, the State Revenue Office’s integrated human rights considerations in its review of taxation policies for Victorians affected by the February 2009 bushfires and the Global Financial Crisis. The Office sought to “balance our responsibility to collect tax with an approach that is fair and equitable”. The right to privacy, family and home, and the protection of families and children were cited by the State Revenue Office as particularly relevant.118

143. The growing body of case studies from Victoria highlighted throughout this submission illustrate how human rights are being used outside of courtrooms to change not only the culture of government action and decision making, but also the approach of service users and their advocates.

7.6 Economic Costs and Benefits Associated with the Victorian Charter

144. The HRLC notes the short time for providing submissions to this review and the difficulty that this presents in providing a comprehensive quantitative or monetary analysis of the benefits of the Victorian Charter’s operation to date. In general, quantifying the benefits associated with social policy, including the protection of human rights, is a difficult task. In many ways, the task of quantifying the benefits of the operation of the Victorian Charter to date is not possible.

145. A report by produced by Deloitte Access Economics remarks that the benefits of the Victorian Charter are difficult to identify and measure.119 However, the report goes on to say that this does not mean that the benefits are any less important; rather, they are just more challenging to encompass with an analytical and measurement framework.

146. Nonetheless, based on the content and outcomes of other reports that have considered the quantitative — and qualitative — benefits that flow from the legal protection of human rights, the HRLC offers the following information and observations relating to the economic costs and benefits associated with the Victorian Charter.

(a) Short Term Benefits

147. The Victorian Charter has already delivered a range of direct benefits in the short term, including many of the impacts of the Charter discussed throughout this submission and the specific cases and examples. The short term benefits relate generally to the increased opportunities provided by the Victorian Charter for the consideration of human rights in government processes, and the options that are individuals and groups in the community to raise human rights issues. As greater understanding of human rights has developed in the Charter’s short operation to date, we have already seen the beginnings of cultural change with government departments and public authorities.

118 Ibid, 42.
(b) **Longer Term Benefits**

148. The HRLC observes that many of the benefits arising from the operation of the Victorian Charter are likely to increase over time. At the same time, as explained further below, the costs associated with the ongoing operation of the Victorian Charter are likely to decrease over time after the initial start up and implementation costs have already been expended.

149. The longer term benefits of the Charter relate to the organisational changes within government and public authorities that arise out of giving appropriate consideration to human rights. Benefits will also arise as legal precedents develop and provide greater guidance to public authorities and also the community on the content of rights.

(c) **Start-Up Costs**

150. The costs associated with implementing the Victorian Charter related initially to the design of the Charter. Following the outlay of these costs, there are costs associated with transitioning the public sector from their status prior to the existence of the Charter to being post Charter implementation compliant. These costs include the development of training and educational materials to government departments and public authorities and the review of guidelines and processes to ensure Charter compliance.\(^{120}\)

151. While these costs are obviously essential in the development and early implementation of the Victorian Charter, they are also irrecoverable or sunk costs. Accordingly, only the ongoing and long term costs associated with the Victorian Charter’s operation should have a bearing on the decisions relating to its future.\(^{121}\) Any assessment of the impacts of the Charter to date is likely to be cost heavy when compared with the ongoing implementation and compliance costs. The costs of the Charter’s operation are therefore likely to decrease once the initial start-up costs have been expended.

(d) **Implementation and Compliance Costs**

152. Once start-up costs have been expended, the ongoing costs associated with the Charter relate largely to compliance. One of the concerns expressed about legislative instruments protecting human rights is the costs associated with compliance. However, the Law Council of Australia noted that the cost of public service training is outweighed by the quality of services and avoidance of litigation and investigation through breaches of human rights.\(^{122}\)


\(^{120}\) Ibid.

\(^{121}\) Ibid.

(e) **Economic Value Add**

153. The HRLC notes that the broad range of benefits associated with human rights protection includes the economic value add provided by such protection. There is clearly an economic cost associated with policies that do not effectively protect the human rights of individuals. For example, Access Economics conducted a study of the costs of domestic violence to the Australian economy where it was estimated that in 2002-03 the total cost of domestic violence was $8.1 billion.  

154. In addition, there is an increasing body of economic research which demonstrates that there is a strong correlation between effective and equitable social policy on the one hand, and economic development and growth on the other. For example, when the Productivity Commission conducted a review of the *Disability Discrimination Act 1992* (Cth) (*DDA*), it found that the benefits of the Act in the community fell into two broad categories, one of which was the productive capacity of the economy. It stated:

> First, reductions in discrimination can lead to an increase in the productive capacity of the economy. For example, reducing discrimination can enhance the participation and employment of people with disabilities in the workforce. In turn, better employment prospects can provide incentives to students with disabilities to improve their educational outcomes, making them more productive members of the community.

> Second, an effective DDA that improved the acceptance and integration of people with disabilities in society would benefit the community in less tangible but not less significant ways, by promoting greater trust and mutual cooperation.

155. Indeed, although difficult to quantify, the Productivity Commission found that the impact of the DDA had been to produce a net benefit to the community. It stated:

> …taking a broad view of all costs and benefits flowing from the Act, the Productivity Commission considers that the DDA is very likely to have produced a net community benefit in the period since its introduction.

156. Similar economic benefits have also established in the context of addressing discrimination. A VicHealth report in 2008 found that addressing discrimination through the protection of human rights ensures that all individuals are able to realise their potential to participate in the Victorian economy.

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126 Ibid, 152.

157. The benefits to commercial organisations through cost savings as a consequence of employee satisfaction and increased motivation has also been recognised by the Australian Chamber of Commerce and Industry:

…cost benefits to employers in achieving recognition as an employer with a “discrimination-free culture” – such as in staff well being, the quality of job applicants, productivity, lower absenteeism, fewer conflict issues requiring resolution, and higher rates of retention.\(^{128}\)

158. Failure to protect rights has been attributed to the following problems:

(a) reduced organisational productivity;\(^{129}\)
(b) reduced workplace morale;\(^{130}\)
(c) higher rates of staff turnover and the associated costs of recruiting and inducting new staff;\(^{131}\)
(d) high costs of responding to grievances through formal processes. Responding to grievances through formal complaints mechanisms is estimated to cost $55,000 per case;\(^{132}\)
(e) reduced productivity and absenteeism, with 70% of workers exposed to violence, harassment or discrimination taking time off work as a result;\(^{133}\) and
(f) the considerable resources required to deal with the consequences of discrimination through treatment and rehabilitation and income support payments.\(^{134}\)

159. Alternatively, where there is more employment there is improved productivity, increased sales revenue, more customers, greater market share and greater relative profits. By extension, fewer human rights breaches will also reduce compliance based costs associated with litigation under the Victorian Charter.

160. The economic benefits of closing the gap in life expectancy between Indigenous and non-Indigenous Australians have also been confirmed. An Access Economics report states that there is clear economic justification for reducing Indigenous disadvantage, including

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\(^{129}\) VicHealth, Building on our strengths: A framework to reduce race based discrimination and support diversity in Victoria (2009) 22.

\(^{130}\) Ibid.

\(^{131}\) Blank, Dabady and Citro (eds), Measuring Racial Discrimination, (2004).


\(^{133}\) Ibid.

\(^{134}\) VicHealth, above n 129, 22.
improving government budgets by $8.3 billion per year and boosting national income by $10 billion.135

161. In relation to the Victorian Charter, while the quantification of such value in financial terms may be difficult to undertake, it is highly likely that the effective operation and implementation of the Charter yields substantial economic benefit.

(f) The Victorian Charter is the most cost effective way to protect and promote human rights

162. The Allen Consulting Group cost-benefit analysis, commissioned by the National Human Rights Consultation Committee, found that a Human Rights Act would provide high benefits to stakeholders at moderate risk. Although there would be implementation costs associated with a Human Rights Act, the Allen Consulting Group noted that there are ongoing detrimental costs associated with maintaining current human rights arrangements.136

163. The Victorian Charter provides a comprehensive statement of rights which operates as a minimum standard to which all public authorities must adhere. Such a statement is necessary to prevent the breach of any person’s rights from slipping through the gaps that would exist in an otherwise patchwork of laws and protections. Indeed, as Lord Goldsmith noted during his recent visit to Australia, specific laws necessarily can not cover all circumstances and, as social conditions change and problems arise, if you do not have some broader document which outlines and protects people’s rights then they are likely to be overlooked.137

7.7 Concerns about Restrictions on Religious Freedoms are Unfounded

164. In its first four years of operation, there is no evidence to suggest that the Victorian Charter has eroded the right to religious freedom. Nevertheless, the National Human Rights Consultation Committee’s report recounts that ‘[m]any Victorians with church affiliations were worried about three distinct aspects of the state’s Charter of Human Rights and Responsibilities Act 2006.’138


136 National Human Rights Consultation Committee, above n 22, 351-352.


138 National Human Rights Consultation Committee, above n 22, 48.
165. These concerns (each of which is discussed below) are based on a misunderstanding of the impact of the Victorian Charter. As Fr Frank Brennan has acknowledged:139

[the Victorian charter has not caused any of these problems, uncertainties or disputes for religious Victorians. Its application might even help to protect the right to freedom of thought, conscience, religion and belief, which is included in the charter.]

(a) Religious Vilification: The Catch the Fire Ministries Case

166. In 2004, the Islamic Council of Victoria brought an action against the Catch the Fire Ministries in response to publications and statements made at a seminar that were deemed contrary to the religious exercise of the Muslim faith. VCAT determined that the seminar and articles incited hatred of Muslims because of their Islamic faith and the association was found in violation of the Racial and Religious Tolerance Act 2001 (Vic).140 In 2006, the VCAT decision was appealed and overturned.141

167. The Victorian Charter was not in force at the time the Racial and Religious Tolerance Act 2001 was passed, or when the matter was determined in the Victorian courts. It is therefore incorrect to cite the case as an example of human rights legislation operating to restrict religious freedom. In fact, had the Charter been in force, it may have provided additional protection for religious freedom and freedom of expression.

(b) Religious Exceptions to the Equal Opportunity Act

168. Some religious organisations have expressed concern about the role of the Victorian Charter in the review of the permanent exceptions — including those for religious individuals and groups — in the Equal Opportunity Act 1995 (Vic). While the review was not precipitated by the Victorian Charter, it is true that SARC was asked to consider the Charter compliance of the permanent exceptions.

169. Contrary to much of the misinformation about the SARC inquiry, the Charter-based recommendations for reform made by various human rights advocates and organisations, including the HRLC, would not have resulted in a situation where a person or organisation could never discriminate in order to comply with their religious beliefs. Christian churches would not have been required to hire a Satanist to teach Sunday school.

170. Rather, the repeal of the exceptions would have simply meant that before discrimination is deemed permissible, regard must be had to the particular circumstances of the case and there must be consideration of the arguments for and against allowing the discrimination. All groups that do not receive special protection from a permanent exception in the Equal Opportunity Act are already subject to this process.

171. Ultimately, the amendments contained in the Equal Opportunity Act 2010 continued to allow religious groups and individuals to discriminate on the basis of sexuality and marital status if it

is in accordance with their religious beliefs in circumstances where conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position.

172. In any case, the relevant amendments contained in the Equal Opportunity Act 2010 have been repealed by the Equal Opportunity Amendment Act 2011, once again demonstrating the maintenance of parliamentary sovereignty under the Victorian Charter.

(c) Abortion Law Reform

173. Many religious groups have also expressed concern about the Victorian Charter’s application to the Abortion Law Reform Act 2008 (Vic). That Act includes a requirement that a medical practitioner with a conscientious objection to abortion refer patients to practitioners known not to have that objection. A concern has been raised that the clause would compel Catholic health practitioners to act in a manner inconsistent with their religious beliefs.

174. The question of whether the referral clauses are in fact a violation of religious freedoms aside, the Victorian Charter explicitly does not apply to the Abortion Law Reform Act. Section 48 of the Charter, which provides that nothing in the Charter “affects any law applicable to abortion or child destruction”, was included on account of the Catholic Church’s lobbying efforts.142

175. The Victorian Charter’s failure to impact upon the referral provisions in the Abortion Law Reform Act does not demonstrate that the Charter is ineffective or “worthless”.143 On the contrary, it demonstrates the potential unintended consequences of excepting certain areas of law from the general operation of the Victorian Charter.

7.8 Implementing Australia’s International Obligations

176. Australia is already a party to many human rights treaties. The Victorian Charter affirms that Victoria is committed to providing its own people with human rights standards, in accordance with Australia’s legal obligations in the international community. The UN Human Rights Committee (HRC) recently called upon Australia to enact comprehensive legislation to give effect to human rights across all states and territories to ensure that Australia’s domestic system is compatible with international standards.144 In this respect, Victoria is a leading example among Australia’s states and territories.

144 Human Rights Committee, Concluding Observations: Australia, UN Doc CCPR/C/AUS/CO/5, 2 April 2009, [23].
8. Options for Reform and Improvement

This section of our submission generally addresses Term of Reference 7.

177. In light of the strong evidence that where human rights are protected in law they are more likely to be respected in practice, this review should be used as an opportunity to strengthen the Victorian Charter and certainly not, in any way, to limit or abrogate human rights.

178. The United Kingdom Government has recently established an independent commission of experts to “investigate the creation of a UK Bill of Rights”. The Terms of Reference instruct that any model should “incorporate and build on all our obligations under the European Convention on Human Rights, ensure that these rights continue to be enshrined in UK law, and protects and extend our liberties”. The British Commission is tasked to engage in broad consultations and report by no later than the end of 2012. As is plain, the terms of reference envisage that the legal protection of human rights in the United Kingdom will be strengthened, not diminished.

179. The Victorian Charter is not perfect. It is not a panacea to human rights breaches or bad government. This review is an opportunity to enhance the protection of fundamental rights and freedoms and to improve transparency and accountability in government and public services in Victoria. As with the UK review, the Victorian inquiry should commit to build on Australian’s international human rights obligations and to enshrine these rights in Victorian law.

180. The proposals for reform set out below are designed to achieve this end.

8.1 Inclusion of Additional Human Rights (Terms of Reference 1 and 2)

181. It is appropriate and imperative that the Victorian Charter protect the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community. Currently, the Victorian Charter protects twenty civil and political rights only, largely derived from the International Covenant on Civil and Political Rights (ICCPR). The protected rights contained in the Victorian Charter should therefore be expanded to protect other fundamental rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the right of self-determination.

145 See, for eg, the Victorian Equal Opportunity and Human Rights Commission, Talking Rights: Consulting with Victoria’s Indigenous Community about self-determination and the Charter (2011) and Talking Rights: Consulting with Victorians about economic, social and cultural rights and the Charter (2011) which examine the need and support for the Charter to enshrine economic, social and cultural rights in the Victorian community.
(a) Why Should Additional Rights be Protected?

182. The HRLC makes this recommendation for the following reasons:

(a) economic and social rights are the rights that matter most to many Victorians and yet are also the rights that are the most vulnerable;

(b) the comprehensive recognition and protection of all rights is vital because human rights are interdependent and indivisible;

(c) the right of self-determination has a particularly meaning and resonance for Victoria’s Aboriginal peoples;

(d) the protection of economic and social rights and the right of self-determination is likely to lead to better policy development and decision making by government and, as a result, play an important role in addressing disadvantage and creating a fairer and more equal Victorian community; and

(e) the inclusion of economic and social rights and the right of self-determination would ensure that Victoria plays its role in fulfilling Australia’s international human rights obligations.

183. Each of these points is discussed further below.

(i) Economic and Social Rights are the Most at Risk

184. The HRLC observes that in many instances the Victorian Charter has had its greatest relevance and impact to date in relation to economic and social rights. For example, as identified in section 5.2, two of the most significant areas where courts and tribunals have considered the Victorian Charter are housing and homelessness and mental health – areas which fall squarely within the purview of economic and social rights.

185. The report of the National Human Rights Consultation Committee in 2009 confirms that “for most Australians the main concern is the realisation of primary economic and social rights, such as the rights to education, housing and the highest attainable standard of health.”146 Indeed, these rights matter most to Australians “because they are the rights at greatest risk, especially for vulnerable groups in the community”.147 VEOHRC has also released a publication, based on research conducted by Colmar Brunton Social Research, which identifies that the majority of people surveyed support the inclusion of economic, social and cultural rights in the Charter.148

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146 National Human Rights Consultation Committee, above n 22, 365.
147 Ibid, 344.
148 [See also the Victorian Equal Opportunity and Human Rights Commission, Talking Rights: Consulting with Victorians about economic, social and cultural rights and the Charter (2011).]
(ii) Human rights are interdependent and indivisible

186. The comprehensive recognition and protection of all rights is vital because human rights are interdependent and indivisible. The enjoyment of many rights is contingent on, and contributes to, the enjoyment and reinforcement of other human rights. Any piecemeal recognition of human rights, such as the protection of civil and political rights only, is inconsistent with basic human rights principles and threatens their effective implementation.

187. In this respect, the HRLC observes that the Charter’s operation to date reveals that:

(a) many of the decisions of courts and tribunals and case studies on how the Charter has been used by advocates relate primarily to economic and social rights matters; and
(b) some of the civil and political rights in the Charter have been used for economic and social ends.

188. For example, the Charter’s right to 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.

189. These examples illustrate the interdependent and indivisible nature of all human rights. In the HRLC’s view, it would be more direct and transparent to protect economic and social rights under the Charter. Indeed, there is strong evidence that legal protection of human rights is an important factor contributing to their practical realisation. Recognising this, the Victorian Charter should be amended to enshrine all fundamental civil, political, economic, social and cultural rights.

(iii) Protecting Economic and Social Rights Would Enhance Laws, Policy and Practice

190. The HRLC strongly considers that the inclusion of economic and social rights — and the right of self-determination (see further below) — is highly likely to enhance the development of laws and policies and decisions that are made by public authorities. This is especially the case given the Victorian Charter’s emphasis on ensuring that human rights are appropriately considered in the development and application of laws, policies and practices. The inclusion of economic and social rights the right of self-determination will ensure that these rights are appropriately considered and taken into account at the front end of law and policy making.

191. Currently under the Victorian Charter, laws, policies and decisions relating to areas such as housing, health and education must be assessed and scrutinised against a civil and political rights framework, including by reference to rights such as the right to privacy and protection of families and children. However, if such scrutiny also included reference to and consideration

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of the essential aspects of economic and social rights then much more guidance and assistance would be provided to policy makers and decision makers in undertaking such tasks. There would also be much greater transparency in the way that laws and policies are drafted.

192. In the same way that the protection of civil and political rights in the Victorian Charter has had a positive impact on the way that laws and policies have drafted to date (see discussion in section 3.2), the HRLC considers that the benefits of the Victorian Charter are likely to be substantially increased by the inclusion of economic and economic rights, such as the right to adequate housing, the right to health and the right to education, as well as the right of self-determination.

193. The inclusion of economic and social rights would also have a particular meaning and resonance for many marginalised and vulnerable individuals and groups in the Victorian community. For someone who is at risk of homelessness, or who is unable to access adequate health care, or whose child with a disability is not able to access education on an equal basis with other students, the distinction between civil and political rights that are currently included in the Victorian Charter and, on the other hand, economic and social rights has very little meaning or relevance. The rights-holder is still likely to feel a strong sense of unfairness and that they have been treated without respect, equality or human dignity.

194. In order to strengthen the operation of the Victorian Charter, as well as ensure that it has meaning and relevance for the vulnerable and disadvantaged, the Charter should be expanded to also protect economic and social rights.

(iv) Right of Self-Determination

195. VEOHRC’s recent consultation with Victoria’s Aboriginal community found that the inclusion of the right to self-determination was generally supported by that community.\(^\text{152}\) It was considered relevant and significant as a fundamental principle which could aid the further acknowledgement of the status of Indigenous people and the unique status and rights they hold. The right was viewed as both complementary to existing (and possibly future) Charter rights, and could provide an opportunity to strengthen the relevance and application of these rights for Indigenous people.

196. The consultation process identified that although the right was supported, genuine concerns were raised as to how the right may be included, the risk of such inclusion being seen as tokenistic, and the need for informed consent on presented options for inclusion. The Report noted inclusion of the right should not be undertaken without further extensive consultation and engagement with the Indigenous community, as such an approach will go towards

\(^{151}\) See footnote 1.

obviating views the inclusion is tokenistic and ensuring consideration and use of the Charter.  

(v) Australia’s International Legal Obligations

197. Australia has ratified the ICESCR, as well as other major human rights treaties, and therefore has legal obligations under international law to incorporate the rights contained in these treaties into its domestic law. Part of this commitment involves taking all necessary legal and administrative steps to respect, protect, promote and fulfill the rights therein. At a minimum, this requires the establishment of effective legislative development and scrutiny processes to ensure that Australia’s domestic laws are not inconsistent with Australia’s international human rights obligations.

198. Despite Australia’s federal structure, this legal obligation extends to states and territories in respect of all treaties. Incorporating the rights contained in the ICESCR into the Victorian Charter would therefore ensure that Victoria is fulfilling the international legal obligations to which Australia is subject.

(b) How Should Additional Rights be Protected?

(i) Justiciability of Economic and Social Rights

199. All civil, political, economic, social and cultural rights in the Victorian Charter should be legally enforceable and justiciable. The HRLC acknowledges that there are concerns as to how economic and social rights might be interpreted by the courts in the event that the Victorian Charter provides for such rights to be directly enforceable. However, consistent with the international human rights framework, the Victorian Charter should provide “appropriate means of redress…to any aggrieved individual or group”, whether the redress is for a breach of economic, social or cultural rights or civil and political rights. The right to an available and accessible remedy is discussed in further detail in section 6.

200. The HRLC’s strongly preferred position would be for the Victorian Charter to provide for directly enforceable economic and social rights protections, in accordance with internationally accepted principles of the interdependence and indivisibility of human rights. In respect of economic and social rights, the state should be obliged to take reasonable steps to ensure the progressive realisation of the right within the maximum of available resources, with the reasonableness of administrative action being subject to judicial review in the ordinary way.

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153 Ibid, 6-7.
154 For example, article 50 of the ICCPR states that the provisions of the Covenant ‘shall extend to all parts of federal States without any limitation or exception’.
156 CESCR, General Comment 9, above n 85, [2].
201. The HRLC observes that in jurisdictions where such rights are enforceable, judicial challenges to economic and social rights are more likely to result in the courts providing government with a range of reasonable options that are considered to be rights-compliant (and findings of breach will be largely left to the starkest factual circumstances).

202. The protection of ESC rights under the South African Constitution provides useful guidance as to how economic and social rights should be protected. The South African experience illustrates that economic and social rights can be tested before the courts and resolved without placing unreasonable demands on government resources. The South African Constitution requires the state to take only “reasonable” measures within “available resources” to achieve the progressive realisation of ESC rights.

203. The HRLC also notes that some ESC rights are already protected in the Charter, including the protection of cultural rights (section 19) and the right to property (section 20).

(ii) Role of the Victorian Equal Opportunity and Human Rights Commission

204. As an alternative to providing judicial remedies for breaches of economic and social rights, the Victorian Charter could provide for the VEOHRC to receive complaints from individuals who allege a breach of their economic or social rights. The Commission could consider all complaints received (using policies, guidelines or regulations made for the purpose) to determine whether the complaint raises any issues which, in the Commission’s opinion, should be addressed by the relevant public authority.

205. All complaints would be required to be referred, within a specified period, to the public authority (or public authorities) which the Commissioner considers the most appropriate in the circumstances. The Commissioner must include with the referred complaint his or her conclusions as to the action that should be taken by the public authority. The HRLC envisages that the Commissioner would have available three alternative recommendations (but this does not preclude the possibility that more options may become apparent with further consideration):

(a) the complaint does not disclose a shortcoming in the conduct, policies or procedures of the public authority or an officer thereof, and no remedial action by the public authority is recommended;

(b) the complaint does disclose a failure of conduct, policy or procedure by a public authority or officer thereof, and the Commissioner recommends that action be taken to remedy the shortcoming(s), in which case the public authority must either:

   (i) take action to remedy the shortcoming; or

   (ii) if, after giving the complaint and recommendation due consideration, it decides not to take action, publish its reasons for making that decision; or
the complaint does not give rise to a need for corrective actions by the public authority, but the Commissioner is of the opinion that the person's complaint may be resolved by arbitration or conciliation (leading to potential results such as an apology).

(iii) Supplementary Measures to Protect Social and Economic Rights

206. Judicial enforcement is not the only important aspect of human rights protection, particularly with respect to economic and social rights. As identified above, ensuring that law makers and policy makers integrate a human rights-based approach at the front end that takes into account economic and social rights in their work should be a very high priority.

207. Further, in the event that powers are extended to the VEOHRC, public authorities should be required to publish the details of all complaints received, the Commissioner's recommendations, and any actions taken in response or the reasons for not taking remedial action in their annual audit reports. The Commission, in its annual report, should also publish details of all complaints received, including referral and recommendation details, actions taken by the public authorities and any reasons given by the public authorities for actions not being taken. The information gained by this process would be extremely useful in allowing public authorities and the Victorian Government to target policy areas that are in need of urgent attention and will provide a basis for future reviews of the Victorian Charter to determine how and when to bolster the protection of economic and social rights.

**Recommendation:**

The Victorian Charter should protect the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community. The protected rights contained in the Victorian Charter should therefore be expanded to protect other fundamental rights enshrined in the International Covenant on Economic, Social and Cultural Rights, as well as the right of self-determination.
8.2 Auditing of Public Authorities (Term of Reference 3)

208. The HRLC considers that a number of different mechanisms are necessary in order to ensure the effective operation of the Victorian Charter. In addition to the availability of a range of legal and non-legal remedies, regular reporting and auditing frameworks play an important role in identifying any systemic and structural issues and to monitor and evaluate the effectiveness of actions that are taken to address such issues.

209. In the HRLC’s view, accountability of policy-makers and public service delivery could be enhanced through regular audits and reports, as well as a requirement for the development of action plans on Charter implementation. It is critical to the effective implementation of the Victorian Charter that any shortcomings in public authorities’ understanding of their human rights obligations are quickly identified. The Victorian Charter should mandate regular reporting by public authorities on steps they have taken to monitor and evaluate their processes for ensuring that their decisions and actions are compatible with human rights.

Recommendation:

All civil, political, economic, social and cultural rights in the Victorian Charter should be legally enforceable and justiciable. In respect of economic and social rights, the state should be obliged to take reasonable steps to ensure the progressive realisation of the right within the maximum of available resources, with the reasonableness of administrative action being subject to judicial review in the ordinary way.

As an alternative to providing judicial remedies for breaches of economic and social rights, the Victorian Charter could provide for the VEOHRC to receive complaints from individuals who allege a breach of their economic or social rights.
Recommendation:

Reporting and auditing frameworks are important to identify systemic and structural issues and to monitor and evaluate the effectiveness of actions taken to address such issues. The Victorian Charter should:

(a) require all public authorities to develop an action plan for the protection and promotion of human rights and compliance with the Victorian Charter;

(b) require that all public authorities undertake an annual audit of their human rights compliance, which should also include details of all complaints received, as well as any actions taken or, alternatively, the reasons for not taking remedial action; and

(c) vest the VEOHRC with an own motion power to inquire into and audit the compliance of a public authority’s policies, programs and practices with human rights.

The HRLC considers that such requirements would ensure that appropriate consideration of human rights is institutionalised into the policies and practices of public authorities. If public authorities do not have adequate auditing and reporting procedures, the implementation and incorporation of human rights requirements into day to day activities stalls, which risks compromising the effectiveness of the Victorian Charter to ensure that human rights are appropriately considered across all areas of government. The HRLC observes that an annual audit of human rights compliance could easily be incorporated into existing reporting processes and requirements that are already undertaken by public authorities.

8.3 Operation of the Limitations Clause

Section 7(2) of the Victorian Charter provides that it is permissible for the human rights protected in the Act to be limited in certain circumstances. The HRLC considers that section 7 should be amended to provide that the limitations clause is relevant only to the task of legislators under section 28 and the Supreme Court and Court of Appeal under section 36. Section 7(2) should have no role to play in relation to either interpreting the Charter consistently with human rights (by operation of section 32) or in the actions of public authorities under the Charter (by operation of section 38). That is because a limitations clause such as section 7(2) should only be relevant in the preparation and drafting of legislation. It does not purport to permit interpretations of legislation pursuant to section 32 that would be compatible with rights as limited. Nor does it purport to authorise executive action pursuant to section 38 that is compatible with rights as limited.
The operation of section 7(2) has been the subject of litigation, some ongoing.\footnote{See \textit{R v Momcilovic} [2010] VSCA 50 (17 March 2010), currently on appeal to the High Court; and \textit{Director of Housing v Sudi} [2010] VCAT 328 (31 March 2010), currently on appeal to the Court of Appeal of the Supreme Court of Victoria.} In the HRLC’s view, and as largely adopted by the Court of Appeal in \textit{Momcilovic}, where a statutory provision is said to limit a human right, whether such limits can be justified under section 7(2) should not be considered first before then considering whether it is possible to reinterpret the provision compatibly with human rights under section 32.

Rather, where it is alleged that a statutory provision limits human rights, it should be considered whether it is possible to interpret the provision in a way that is compatible with human rights in accordance with section 32 of the Charter. Consideration of section 7 should only arise in the event that it is not possible to interpret the provision compatibly with human rights under section 32.

This position is supported by the fact that most human rights are subject to their own “internal” limitations, whether:

(a) provided for in the articulation of the rights itself (such as the right to privacy, which is expressly qualified by reference to “unlawful or arbitrary” interference); or

(b) by consequence of their scope and the threshold at which they are considered to be breached (such as the right to freedom of movement may be subject to acceptable restrictions in certain circumstances).

The current drafting of the Victorian Charter is therefore open to the interpretation that human rights should be subjected to a “double limitation” by:

(a) first, considering whether a limitation on a right can be justified under section 7; and

(b) then applying the “internal limitation” in interpreting the provision in a way that is compatible with human rights in accordance with section 32.\footnote{Bell J discussed the relationship between section 7 and internal limitations of rights in \textit{Kracke v Mental Health Review Board & Ors} [2009] VCAT 646.}

Accordingly, the HRLC considers that amendment to the Victorian Charter to provide that the limitations clause is relevant only to the task of legislators would both clarify and strengthen the operation of the Victorian Charter.

\begin{quote}
\textbf{Recommendation:} \\
Section 7 should be amended to provide that the limitations clause is relevant only to the task of legislators under section 28 and the Supreme Court and Court of Appeal under section 36.
\end{quote}
8.4 Operation of the Interpretative Provision

217. In order to ensure an appropriate balance between Parliament and courts, section 32 of the Victorian Charter, which requires courts to interpret legislation compatibly with human rights, and section 36, which empowers the Supreme Court and Court of Appeal to make a declaration when a law cannot be interpreted compatibly with rights, should be repealed and replaced with a provision which states that:

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

218. This approach would be faithful to the “constitutional” balance and roles of parliament and courts and would both strengthen the “remedial” capacity of the interpretative provision and the requirement that courts give fidelity and primacy to Parliament’s purpose.159 The requirement of an express provision that legislation is to operate notwithstanding any incompatibility with human rights in order for it to so operate would also enhance transparency and accountability in the legislative process.160

8.5 Rights Protected Should be Consistent with International Law

219. One of the criticisms of the Victorian Charter to date is that some of the rights as expressed in Part 2 of the Act are inconsistent with the expression of those rights in international instruments such as the ICCPR.161 The HRLC has compared the text of the rights as expressed in Part 2 of the Act against equivalent ICCPR provisions (see Appendix 2). This comparison illustrates that, contrary to the criticism of inconsistency, the rights protected in the Victorian Charter are broadly consistent with the rights set out in the ICCPR.

159 Such a model, similar to the 1960 Canadian Bill of Rights, was endorsed by The Hon Michael McHugh, ‘A Human Rights Act, the Courts and the Constitution’, Speech, Sydney, 5 March 2009, 35. Section 2 of the Canadian Bill of Rights provides that: “Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared”.

160 By way of contrast, the Summary Offences and Control of Weapons Acts Amendment Act 2009 (Vic), which was passed notwithstanding that it is incompatible with the Charter, does not contain any provisions which recognise such incompatibility. This may give rise to real operational issues as, for example, Victoria Police are still required by section 38 of the Charter to act compatibly with human rights even when giving effect to potentially incompatible laws.

220. There are a limited number of instances of ICCPR rights not being included in the Victorian Charter on policy grounds. For example, the right in article 26 of the ICCPR not to be discriminated against on the basis of “birth or other status” is not included in the Victorian Charter, though presumably this is to ensure consistency with Victoria’s already existing equal opportunity protections.

221. In all other cases, however, differences between the text of the ICCPR and the Victorian Charter are not for the purposes of weakening the protection of these rights but rather to:

(a) modernise the language of the ICCPR consistent with provisions of the ACT Human Rights Act 2004;

(b) remove ICCPR obligations that fall within the jurisdiction of the Federal Government;

(c) ensure consistency with existing Victorian laws;

(d) remove specific limitations on rights due to the operation of the general limitations provision contained in section 7 of the Victorian Charter; or

(e) strengthen the obligation expressed in the corresponding Charter right.

222. The table contained in Appendix 2 provides further explanation of each of these differences.

223. The HRLC further notes that it is common practice for some human rights to be modified when they are included in a domestic human rights instrument so that they match contemporary aspirations of the domestic community and only contain those rights that have broad community acceptance.

224. Nevertheless, to the extent possible, the HRLC notes that it is beneficial for the articulation of human rights in the Victorian Charter to be consistent with the rights as articulated in international law, as well as other similar domestic legislation such as the ACT Human Rights Act. This will allow for the development of human rights jurisprudence in Victorian to continue to be informed and guided by the experience of other jurisdictions to the extent necessary, and in turn for Victorian jurisprudence to be influential and meaningful in jurisdictions outside of Victoria.

8.6 Recognition of Absolute Rights

225. Currently, the Victorian Charter does not provide a distinct scheme for the treatment of absolute rights. In conformity with the ICCPR, section 7 of the Victorian Charter should be amended to recognise that certain human rights are absolute by expressly stating which rights are absolute and that no limitation of absolute rights is permissible in any circumstances.

226. The absolute rights contained in the ICCPR are:

(a) the right to be free from torture and other cruel, inhuman or degrading treatment or punishment (article 7);

(b) the right to be free from slavery and servitude (articles 8(1) and (2));
(c) the prohibition on genocide (article 6(3));
(d) the prohibition on prolonged arbitrary detention (elements of article 9(1));
(e) the prohibition on imprisonment for failure to fulfil a contractual obligation (article 11);
(f) the prohibition on the retrospective operation of criminal laws (article 15);
(g) the right of everyone to recognition everywhere as a person before the law (article 16); and
(h) the right to freedom from systematic racial discrimination (elements of articles 2(1) and 26).

227. Although it may be argued that courts take into account the status of rights at international law when interpreting Charter rights, a number of problems have been identified with not acknowledging the absolute nature of certain rights and applying the general limitations provision to absolute rights:162

First, this argument incorrectly suggests that absolute rights are negotiable – that there will be instances, albeit rare, in which an absolute right can be limited. Secondly it introduces the relatively subjective assessment of proportionality into an area where proportionality assessments are usually excluded. Thirdly, it means that the representative arms will be encouraged to enact laws that violate absolute rights and ‘argue the toss’ if they are challenged, rather than recognise that certain rights are non-negotiable. Fourthly, this is relatively unchartered territory. There is no international or regional guidance, and little domestic guidance, on how to assess the reasonableness and demonstrable justifiability of a limitation placed on an absolute right. Finally, assessing whether a limitation should be placed on an absolute right via the general limitations power in s 7(2) is therefore unsatisfactory and will amount to a violation of international human rights law.163

Recommendation:
Section 7 of the Victorian Charter should be amended to recognise that certain human rights are absolute by expressly stating which rights are absolute and that no limitation of absolute rights is permissible in any circumstances.

8.7 Notification and Intervention Provisions

228. The HRLC considers that section 35 of the Victorian Charter, which requires that the Attorney-General and VEOHRC be notified of proceedings brought under the Victorian Charter, should be repealed. While the notification provision may have assisted the Attorney-General and VEOHRC in the early days of the Charter’s operation, there has been concern raised that section 35 is a major impediment to the “smooth operation of the Charter

162 Debeljak, above n 12, 435.
163 Ibid.
which need[s] the urgent attention of the Legislature”. As an alternative to repealing section 35, the provision could be amended to provide courts and tribunals with a discretion to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason.

Both the Attorney-General and VEOHRC have a right under the Victorian Charter to intervene, or be joined as a party to, any proceedings in which Charter issues are raised. This right operates irrespective of whether the state is already a party to the proceeding. The HRLC considers that these provisions should be amended and replaced with the right to apply to the court or tribunal for leave to intervene as amicus curiae.

**Recommendation:**
Section 35 of the Victorian Charter requiring notices to the Attorney General and the VEOHRC should be repealed.

**Recommendation:**
Sections 34 and 40 of the Victorian Charter should be amended and replaced with the right of the Attorney-General and VEOHRC respectively to apply to the court or tribunal for leave to intervene as amicus curiae.

### 8.8 Ensuring Access to Justice

Effective protection of human rights requires that people know their rights and have the capacity to enforce those rights. This requires:

(a) community awareness, education and engagement about the Victorian Charter;
(b) targeted training to advocates and support workers;
(c) primary and secondary school education; and
(d) access to appropriate and affordable legal advice, representation and advocacy services.

Access to justice is a human right in itself and a critical element of the promotion, protection and fulfilment of other human rights. Accordingly, various practical resources are required to give individuals knowledge of, and the ability to enforce, their legal rights.

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164 See comments made by Bongiorno J in *R v Benbrika & Ors (Ruling No 20)* [2008] VSC 80 (20 March 2008), [18].

165 Ibid.

166 Victorian Charter, sections 34 and 40.
232. The HRLC considers that, in addition to the Victorian Charter’s operation as a legislative instrument, a range of further measures and initiatives remain necessary in order to strengthen the protection and promotion of human rights through engaging, educating and empowering the community.

**Recommendation:**

Better education and training is required to educate public authorities and the community about their rights and responsibilities. Particular attention should be paid to groups, including Aboriginal peoples, who could benefit from greater awareness of and engagement with the Charter.

**Recommendation:**

The Victorian Government should continue with appropriate resourcing measures to engage, educate and empower the Victorian community about human rights and the operation of the Victorian Charter.

8.9 Should the Victorian Charter Bind the Private Sector?

233. The HRLC recognises that business and private entities acting in a private capacity can (and already do) make important contributions to the enjoyment of human rights and, conversely, can have a significant detrimental impact on the enjoyment of human rights.

234. The ACT Human Rights Act has been amended to include a provision allowing entities that are not public authorities under that Act to opt-in to the obligations on public authorities.167 The opt-in procedure came into force on 1 January 2009 and is intended to promote a meaningful dialogue within the community about human rights, engender cultural change by developing a rights-consciousness in the ACT and recognise the contribution of the private sector to the well-being of society.168

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167 See s 40D of the ACT Human Rights Act.
Recommendation:

Consideration should be given to whether the Victorian Charter should be amended to include an “opt-in” provision for the private sector.
Appendix 1: HRLC’s Charter Experience

1. Since January 2006, the HRLC has undertaken a diverse range of activities in relation to the Victorian Charter, including case work and legal advice, legal education, training, research, publications and capacity building.

2. Examples of these activities include:

(a) providing education and training regarding the Victorian Charter to a range of entities and organisations, including the Department of Justice of the State of Victoria, judicial officers of the Magistrates’ Court of Victoria, members of the Victorian Civil and Administrative Tribunal (VCAT), the Victorian Electoral Commission, local councils, Victoria Legal Aid, TAFEs, community legal centres and non-profit organisations, commercial law firms and the Victorian Bar;

(b) publishing the first comprehensive Guide to the Charter;

(c) publishing a monthly Human Rights Bulletin which includes articles, case notes and analyses and commentary on the Charter;

(d) developing an on-line database of domestic and comparative jurisprudence relevant to the Charter;

(e) regularly speaking at conferences on the Charter and convening a Human Rights Seminar series which regularly considers the Charter; and

(f) providing legal advice to a range of bodies regarding the relevance and potential implications of the Charter for areas such as mental health, women in prison, access to education for children with disabilities, and conditions of detention.

3. The HRLC’s expertise in relation to the Charter has been recognised by the provision of funding to the HRLC, through the Department of Justice, to assist with the effective implementation of the Charter by providing human rights-focused legal assistance to disadvantaged and marginalised individuals and groups. In 2008, the HRLC entered into a five year funding agreement with the Victorian Government, through the Department of Justice, “to promote human rights through legal services, education, training, research, policy analysis and advocacy”. The grant amounts were:

(a) Year 1 - $50,000;
(b) Year 2 - $100,000;
(c) Year 3 - $150,000;
(d) Year 4 - $130,000; and
(e) Year 5 - $130,000.
4. Under the funding agreement, the HRLC is prohibited from using the funds to conduct litigation against government. The agreement does not, however, preclude the HRLC from using other funds to conduct such litigation.

5. The HRLC has been granted leave to appear as amicus curiae in the following proceedings involving the Charter:

   (a) *R v Momcilovic* [2010] VSCA 50 before the Court of Appeal and also in *Momcilovic v The Queen & Ors*, Proceeding No M134 of 2010 currently before the High Court;

   (b) *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025, which was heard by the Honourable Justice Bell, President of VCAT;

   (c) *Inquest into the Death of Tyler Cassidy* (as an ‘interested party’ under the *Coroners Act 2008* (Vic));

   (d) *Kracke v Mental Health Review Board* [2009] VCAT 646, which was heard by the Honourable Justice Bell, President of VCAT; and

   (e) *Inquest into the Death of Veronica Campbell* (as an ‘interested party’ under the *Coroners Act 2008* (Vic)).

## Appendix 2: Comparison between the Victorian Charter and the ICCPR

<table>
<thead>
<tr>
<th>Charter provision</th>
<th>Text of Charter provision</th>
<th>ICCPR provision</th>
<th>Text of ICCPR provision</th>
<th>Difference between the Charter and ICCPR provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>s 8</td>
<td>(1) Every person has the right to recognition as a person before the law. (2) Every person has the right to enjoy his or her human rights without discrimination. (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.</td>
<td>Art 16</td>
<td>Everyone shall have the right to recognition everywhere as a person before the law.</td>
<td>The ICCPR sets out attributes in respect of which discrimination must not occur. The Charter defines discrimination as discrimination on the basis of an attribute set out in section of the Equal Opportunity Act. These attributes include age; impairment; political belief or activity; physical features; race; religious belief or activity; sex; and sexual orientation. Some attributes referred to in the ICCPR are not attributes for the purpose of the Equal Opportunity Act (eg ‘birth or other status’). Section 8(4) has no equivalent in the ICCPR.</td>
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<tr>
<td></td>
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<td>Art 2(1)</td>
<td>Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</td>
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<td>Art 26</td>
<td>All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</td>
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<tr>
<td>s 9</td>
<td>Every person has the right to life and has the right not to be arbitrarily deprived of life.</td>
<td>Art 6(1)</td>
<td>Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.</td>
<td>Section 9 reflects art 6(1) only. The Human Rights Consultation Committee explained that articles 6(2), (4), (5) and (6) concern countries that have not abolished the death penalty and are not relevant in Australia. Article 6(3) speaks of obligations under the Convention on the</td>
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<td>s 10</td>
<td>A person must not be-</td>
<td>Art 7</td>
<td>No one shall be subjected to torture or to cruelty, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.</td>
<td>Section 10 reflects art 7 of the ICCPR but adds the additional requirement that consent to medical or scientific experimentation must be ‘full and informed’ as well as free.</td>
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<td>(a) subjected to torture; or</td>
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<td>(b) treated or punished in a cruel, inhuman or degrading way; or</td>
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<td>(c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.</td>
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<td>s 11</td>
<td>(1) A person must not be held in slavery or servitude.</td>
<td>Art 8</td>
<td>1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3. (a) No one shall be required to perform forced or compulsory labour; (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; (c) For the purpose of this paragraph the term “forced or compulsory labour” shall not</td>
<td>Section 11 does not incorporate art 8(3)(c)(ii). Military and national service are considered to be within the jurisdiction of the Federal Government.</td>
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<td>(2) A person must not be made to perform forced or compulsory labour.</td>
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<td>(3) For the purposes of subsection (2) forced or compulsory labour does not include-</td>
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<td>(a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, been conditionally released from detention or ordered to perform work in the community; or</td>
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<td>(b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or</td>
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<td>(c) work or service that forms part of normal civil obligations. (4) In this section court order includes an order made by a court of another jurisdiction.</td>
<td>include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations.</td>
<td>s 12 Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.</td>
<td>Art 12 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent</td>
<td>Section 12 does not include the limitations permitted under art 12(3). Instead the Charter relies on the general limitations clause in s 7. Arts 12(2) and (4) concern movement in and out of countries and are therefore within the jurisdiction of the Federal Government.</td>
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| s 13              | A person has the right-  
|                   | (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and  
|                   | (b) not to have his or her reputation unlawfully attacked. | Art 17 | 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.  
|                   |                          |                 | 2. Everyone has the right to the protection of the law against such interference or attacks. | Drafting changes only. |
| s 14              | (1) Every person has the right to freedom of thought, conscience, religion and belief, including-  
|                   | (a) the freedom to have or to adopt a religion or belief of his or her choice; and  
|                   | (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.  
|                   | (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching. | Art 18 | 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.  
|                   |                          |                 | 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.  
|                   |                          |                 | 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.  
|                   |                          |                 | 4. The States Parties to the present | Section 14 does not include the limitations permitted under art 18(3). Instead the Charter relies on the general limitations clause in s 7.  
|                   |                          |                 |                          | Section 14 does not include art 18(4). The Human Rights Consultation Committee’s explained that including art 18(4) ‘may have the unintended consequence of leading to an enforceable right to education when the Committee has decided that economic, social and cultural rights should not be included in the Charter at this first stage.’ 171 |

171 Ibid 44.
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| s 15              | (1) Every person has the right to hold an opinion without interference.  
|                   | (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether-  
|                   | (a) orally; or  
|                   | (b) in writing; or  
|                   | (c) in print; or  
|                   | (d) by way of art; or  
|                   | (e) in another medium chosen by him or her.  
|                   | (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary-  
|                   | (a) to respect the rights and reputation of other persons; or  
|                   | (b) for the protection of national security, public order, public health or public morality. | Art 19 | 1. Everyone shall have the right to hold opinions without interference.  
|                   | 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.  
|                   | 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:  
|                   | (a) For respect of the rights or reputations of others;  
|                   | (b) For the protection of national security or of public order (ordre public), or of public health or morals. | Drafting changes only. |
| s 16              | (1) Every person has the right of peaceful assembly.  
|                   | (2) Every person has the right to freedom of association with others, including the right to form and join trade unions. | Art 21 | The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety. | Section 16 does not include the limitations set out in art 21 and 22. Instead the Charter relies on the general limitations clause in s 7.  
<p>|                   | Section 16 does not include art 22(3). In proposing this the Human Rights Consultation Committee explained that it ‘prefers a Charter that is a stand- |</p>
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<td>s 17</td>
<td>(1) Families are the fundamental group unit of society and are entitled to be protected by society</td>
<td>Art 23</td>
<td>1. The family is the natural and fundamental group unit of society and is entitled to</td>
<td>Section 17 reflects arts 23(1) and 24(1). It omits other parts of arts 23 and 24.</td>
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<td>Art 22</td>
<td>public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.</td>
<td>1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.</td>
<td>No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.</td>
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<td>2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.</td>
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<td>3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.</td>
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172 Ibid 45.
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<td>and the State. (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.</td>
<td>protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.</td>
<td>Art 24</td>
<td>The Human Rights Consultation Committee explained its amendments to art 23 and 24 as follows: 'The Committee has modified the wording of article 23(1) to read ‘Families are the fundamental group unit of society’ rather than ‘The family is the natural and fundamental group unit of society’. The Committee considers that use of the term ‘Families’ is appropriate as it recognizes that families can take many and varied forms, all of which are worthy of protection. The Committee has not included the article 23 provisions concerning marriage, nor have we included the article 24 provision concerning children’s right to a nationality as these are essentially Commonwealth matters. In addition, the Committee has not included the article 24 provision concerning the right to birth registration and to a name. While these rights were more relevant in the post-World War II context in which the ICCPR was drafted, they are less relevant for inclusion in a modern Victorian Charter and are covered by other Victorian laws.'</td>
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<td>s 18 (1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to</td>
<td>Every citizen shall have the right and the opportunity, without any of the distinctions</td>
<td>Art 25</td>
<td>Section 18 does not include the art 25 requirement that the right be without unreasonable restriction</td>
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173 Ibid
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| participate in the conduct of public affairs, directly or through freely chosen representatives. (2) Every eligible person has the right, and is to have the opportunity, without discrimination-  
(a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and  
(b) to have access, on general terms of equality, to the Victorian public service and public office. | mentioned in article 2 and without unreasonable restrictions:  
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;  
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;  
(c) To have access, on general terms of equality, to public service in his country. | (instead the Charter relies on the general limitations clause in s 7). Section 18 restricts the right to vote and to occupy public office to eligible persons. |
| s 19 (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.  
(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community-  
(a) to enjoy their identity and culture; and  
(b) to maintain and use their language; and  
(c) to maintain their kinship ties; and  
(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs. | Art 27 In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. | The Victorian Government explains the basis on which section 19 was drafted as follows:  
‘Section 19(1) was modelled on article 27 of the ICCPR and incorporates ideas from section 4 of the Multicultural Victoria Act 2004.  
...  
The rights protected in section 19(2) are not expressly contained in the ICCPR. However, the UN Human Rights Committee has stated that article 27 of the ICCPR (which was the model for section 19(1)) extends to protecting the cultural rights of indigenous peoples. Paragraph (d) of s. 19(2) is modelled on article 25 of the United Nations Declaration on Indigenous Rights.” |
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<td><strong>s 20</strong></td>
<td>A person must not be deprived of his or her property other than in accordance with law.</td>
<td>The Victorian Government notes that although the ICCPR does not contain a provision that protects against arbitrary deprivation of property, articles 2(1), 24(1) and 24 of the ICCPR prohibit discrimination on various grounds, including property. Section 20 also reflects part of the content of article 17 of the Universal Declaration on Human Rights.</td>
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<td><strong>s 21</strong></td>
<td>(1) Everyone has the right to liberty and security. (2) No one shall be subjected to arbitrary arrest or detention. (3) No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. (4) Anyone who is arrested shall be informed at the time of arrest of the reasons for his arrest and shall be promptly informed of any charges against him.</td>
<td>No equivalent provision. The Victorian Government notes that although the ICCPR does not contain a provision that protects against arbitrary deprivation of property, ‘articles 2(1), 24(1) and 24(2) of the ICCPR prohibit discrimination on various grounds, including property. Section 20 also reflects part of the content of article 17 of the Universal Declaration on Human Rights.’</td>
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The Human Rights Consultation Committee explains that section 21 amends art 9 by providing that a person who is arrested or detained must be told of the reason for the arrest or detention, ICCPR article 9 also contains a right to compensation for unlawful detention. The Committee also notes that unlawful detention may give rise to a claim to damages under existing tort law.

175 Ibid 130.
176 Victorian Human Rights Consultation Committee, above n 86, 43.
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<td>s 22 (6)</td>
<td>A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to attend- (a) for trial; and (b) at any other stage of the judicial proceeding; and (c) if appropriate, for execution of judgment.</td>
<td>Art 11 (4)</td>
<td>4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.</td>
<td>Section 22 modifies art 10(2)(a) by requiring that accused persons be segregated from people who have been convicted ‘except where reasonably necessary’, instead of requiring segregation ‘save in exceptional circumstances’.</td>
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<td>s 22 (7)</td>
<td>Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must- (a) make a decision without delay; and (b) order the release of the person if it finds that the detention is unlawful.</td>
<td>Art 10 (5)</td>
<td>5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.</td>
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<td>s 22 (8)</td>
<td>A person must not be imprisoned only because of his or her inability to perform a contractual obligation.</td>
<td>Art 10 (8)</td>
<td>8. A person must not be imprisoned only because of his or her inability to perform a contractual obligation.</td>
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<td>s 22 (2)</td>
<td>All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.</td>
<td>Art 10 (1)</td>
<td>1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.</td>
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<td>s 22 (2)</td>
<td>An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.</td>
<td>Art 10 (2)</td>
<td>2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;</td>
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<td>s 23 (1)</td>
<td>An accused child who is detained or a child</td>
<td>Art 10 (1)</td>
<td>2. Section 23 does not include the sentence in art</td>
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<td>s 24</td>
<td>(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.</td>
<td>Art 14</td>
<td>1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings Section 24 provides that a court may exclude the media or public from a hearing if permitted by a law other than the Charter. This amends art 14(1) of the ICCPR, which provides a list of circumstances in which such exclusion can take place. Section 24 also modifies art 14(1) by allowing a court or tribunal to suppress a judgment where permitted by a law other than the Charter.</td>
<td>10(3) concerning the aim of the penitentiary system. The Human Rights Consultation Committee considered that the inclusion of this sentence would be inappropriate ‘as the prison system may have other aims apart from the reform and rehabilitation of offenders and this remains a matter for public debate’.</td>
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<td>(2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.</td>
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<td>(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter</td>
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177 Ibid.
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| s 25              | (1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees- (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and (c) to be tried without unreasonable delay; and (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the Legal Aid Act 1978; and (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the Legal Aid Act 1978; and (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the Legal Aid Act 1978; and (g) to examine, or have examined, witnesses | Art 14 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of the 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; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on | The Victorian Government explains that section 25 ‘modifies article 14(3) by ensuring, where necessary, that people will be entitled to specialised communication tools and technology in order to understand the nature and reason for the criminal charge and to participate in the judicial process. Article 14(3) is also modified as it relates to the provision of legal assistance by making reference to the Legal Aid Act to ensure consistency with Victorian law. Also, a qualification is made in relation to the examination of witnesses to accommodate Victorian laws regarding cross-examination of certain witnesses, such as children and victims of sexual assault.’

178 Charter Guidelines, above n 174 172.
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<td>against him or her, unless otherwise provided for by law; and (h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and (i) to have the free assistance of an interpreter if he or she understand or speak English; and (j) to have the free assistance of assistants and specialized communication tools and technology if he or she has communication or speech difficulties that require such assistance; and (k) not to be compelled to testify against himself or herself or to confess guilt. (3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child’s rehabilitation. (4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.</td>
<td>his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.</td>
<td>Drafting changes only.</td>
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<td>s 26</td>
<td>A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.</td>
<td>Art 14</td>
<td>7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.</td>
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<tr>
<td>Charter provision</td>
<td>Text of Charter provision</td>
<td>ICCPR provision</td>
<td>Text of ICCPR provision</td>
<td>Difference between the Charter and ICCPR provisions</td>
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<td>s 27</td>
<td>(1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in. (2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed. (3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty. (4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.</td>
<td>Art 15</td>
<td>1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.</td>
<td>Drafting changes only.</td>
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