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Parliament of Victoria
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By email: charter.review@parliament.vic.gov.au.

**Review of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*
Submissions of Australian Lawyers for Human Rights**

Dear Mr O'Donohue MLC

Introduction

1. Australian Lawyers for Human Rights (**ALHR**) welcomes the opportunity to make a submission in relation to the review of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the **Charter**).

About ALHR

2. ALHR was established in 1993 and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).
3. ALHR comprises a network of Australian lawyers active in the practice, promotion, and implementation of international human rights law standards in Australia. It raises awareness of international human rights laws and standards through training, information, submissions and networking.
4. ALHR has a national membership of over 2000 lawyers and engages its members through active National, State and Territory committees.
5. ALHR is a member of the Australian Forum of Human Rights Organisations. It is also a member of the Commonwealth Attorney General's NGO Forum on Human Rights and the Department of Foreign Affairs Human Rights NGO Consultations.

Endorsement of the Human Rights Law Resource Centre and Federation of Community Legal Centres' submissions

6. ALHR supports and endorses the comprehensive submissions made by the Human Rights Law Centre (**HRLC**) and the Federation of Community Legal Centres (**FCLC**), both of which organisations have considerable experience dealing with those who are most affected by the Charter, and whose rights have been affected by the Charter's operation.
7. ALHR considers the HRLC's and the FCLC's submissions to have addressed the key issues regarding the operation of the Charter and the necessary changes required to enhance the Charter's effectiveness.

Summary of ALHR's submissions and recommendations

- A. That additional rights be included as human rights under the Charter, including, but not limited to, rights under the International Covenant on Civil and Political Rights (the **ICCPR**), the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**), the Convention on the Rights of the Child (**CRoC**), the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**), and rights to self determination.
- B. That the Charter provide for the mandatory, regular auditing of public authorities by an independent body to assess compliance with human rights.
- C. That the Charter vest the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) with an own motion power to inquire into, audit and make recommendations relating to the compliance of government instrumentalities with human rights policies, programs and practices.
- D. That the Charter be amended to include further provisions regarding proceedings that may be brought or remedies that may be awarded relating to act or decisions of public authorities which are made unlawfully, in breach of human rights.
- E. That the Charter has had a positive effect on the development and drafting of statutory provisions, consideration of statutory provisions by parliament, provision of services, performance of functions by public authorities, and litigation and the roles and functioning of courts and tribunals.

Detailed submissions

ALHR's detailed submissions are as follows:

Inclusion of additional human rights, including (but not limited to), rights under the ICESCR, CRoC and CEDAW

8. The Charter in its present form only addresses a selection of rights codified by the ICCPR. To that end, ALHR recalls the State Government's position when first implementing the Charter that:

The *Charter* was implemented because some basic human rights - such as freedom of expression, freedom of religion and protection from cruel, inhuman or degrading treatment - previously had no clear legal protection.

The *Charter* complements other laws - such as equal opportunity legislation - by setting out a familiar list of 20 rights that assist people to live with freedom, respect, equality and dignity.¹

9. Whilst it agrees in whole with the State Government's position expressed above, ALHR considers it vital that the Charter be further expanded to recognise, respect and protect all human rights whether civil, political, economic, social or cultural. This, ALHR submits, should be done by expressly referencing the rights articulated in the ICESCR, CEDAW² and CRoC.
10. Further, as respectfully submitted and elaborated on below, the Charter should also include the right to self determination on the basis that including this right would substantially assist with attaining the autonomy and realisation of those rights recognised by international law to cultural, social and economic internal self-determination for Indigenous Victorians.³
11. ALHR submits that there should be no distinction between human rights in the sense of evaluating whether they are of sufficient importance for inclusion in the Charter. ALHR agrees with and adopts the UN's official position that civil and political rights, and economic, social and cultural rights, "are independent and indivisible", and that one set of rights "cannot be enjoyed in a meaningful way if the other set of rights is not" also enjoyed.⁴ Further, ALHR agrees with and endorses the provisions of the CEDAW which recognises that the civil and political rights of women are inherently linked with their economic and social development.⁵ By way of example, it is not difficult to see that a lack of access to adequate health care and housing will necessarily compromise one's right to be free from inhuman and degrading treatment.⁶ Further, denying one's ability to enjoy one's right to education, food and water will necessarily impact their ability to properly vote and participate in public life.⁷
12. Having ratified the ICCPR, ICESCR, CEDAW and CRoC, Australia, as a federation of united constituent States and Territories, has an obligation to protect all human rights codified by these instruments and recognised as inalienable under international law. This includes the right to self

¹ The Victorian Government, *Think Charter - The Victorian Charter of Human Rights and Responsibilities*, Authorised by Louise Martin, Director Strategic Communication Branch, Department of Justice.

² Having regard to the CEDAW, ALHR takes note of the VEOHRC's position that "consideration to adding rights derived from CEDAW cannot be meaningfully separated from the question of whether economic, social and cultural rights should also be enshrined in the Charter." See Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**), *Making Progress - The 2009 report on the operation of the Charter of Human Rights and Responsibilities* (2010) 116.

³ Indeed, there exists overwhelming authority which shows that the realisation of cultural, social and economic internal self-determination would be well received by many Indigenous groups. See, for example, Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 263.

⁴ VEOHRC, *Occasional Paper - Economic, Social and Cultural Rights and the Charter of Rights and Responsibilities - A Framework for Discussion* (2010) 4.

⁵ VEOHRC, *Occasional Paper - Advancing women's rights - exploring the relationship between the Charter of Human Rights and Responsibilities and the Convention on the Elimination of All Forms of Discrimination Against Women* (2010) 3.

⁶ See, for instance, VEOHRC, *Occasional Paper - Economic, Social and Cultural Rights and the Charter of Rights and Responsibilities - A Framework for Discussion* (2010) 4.

⁷ See, for instance, VEOHRC, *Occasional Paper - Economic, Social and Cultural Rights and the Charter of Rights and Responsibilities - A Framework for Discussion* (2010) 4.

determination which has been categorised as both a civil and political right, and an economic, social and cultural right as a result of its derivation from the recognition, respect and protection of human dignity at international law.⁸

13. Victoria should not endeavour to be nor be proud of the possibility of it becoming the first jurisdiction in the developed world to weaken or repeal a human rights Act.⁹ Victoria now has the opportunity to be a leader in the Australian and international landscapes by demonstrating its commitment towards acknowledging and protecting the rights of all individuals by including ICESCR, CEDAW, CRoC and self determination rights in the Charter.
14. ALHR submits that the following additional rights should be expressly included in the Charter to encourage the awareness, recognition and respect for, and the promotion and protection of all human rights recognised as essential and codified under international law:
 - (a) the right to education, including equal access to higher education based on ability and to human rights education¹⁰;
 - (b) the right to freedom to work and employment rights, including the rights to:
 - i. free choice of employment, just and favourable conditions of work and to protection against unemployment¹¹;
 - ii. equal pay for equal work¹²; and
 - iii. just and favourable remuneration ensuring for persons and their families an existence worthy of human dignity and supplemented, if necessary, by other means of social protection¹³.
 - (c) the right to equal access to services which assists persons to acquire adequate food and clothing and to housing and health services to assist persons to achieve a reasonable standard of physical and mental health;
 - (d) the right of persons living with disability to respect for their physical and mental integrity on an equal basis with others, to exercise the full extent of their legal capacity in all aspects of life, and to live independently and be involved in the community;
 - (e) the right for consultation of Indigenous persons on issues relating to land use and access and to free, prior and informed consent (which,

⁸ The right to self determination is considered a "foundational" human right under international law in accordance with Article 1 of the ICCPR and ICESCR.

⁹ Human Rights Law Centre (*HRLC*), Bulletin Volume 3, July (2011).

¹⁰ Article 26(2) of the Universal Declaration of Human Rights (*UDHR*) and Article 13(1) of the ICESCR.

¹¹ Articles 23 (1 - 3) UDHR. See also Articles 6 - 7 ICESCR; Articles 6 - 7 American Convention on Human Rights (*ACHR*); Article 15 African Charter on Human and People's Rights (*ACHPR*); Article 14 Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (*CIS*); Article 34 Arab Charter on Human Rights (*AL*); European Social Charter (*ESC*).

¹² Articles 23 (1 - 3) UDHR: see also Articles 6 - 7 ICESCR; Articles 6 - 7 ACHR; Article 15 ACHPR; Article 14 CIS; Article 34 AL; ESC.

¹³ Articles 23 (1 - 3) UDHR: see also Articles 6 - 7 ICESCR; Articles 6 - 7 ACHR; Article 15 ACHPR; Article 14 CIS; Article 34 AL; ESC.

ALHR notes, is codified at international law by the UNDRIP, to which Australia is a party)¹⁴;

- (f) the right to protection of the family, a family life, and to marry¹⁵;
- (g) the right of aliens to due process when facing expulsion¹⁶;
- (h) the right of asylum seekers to seek asylum from persecution;¹⁷
- (i) the right to live in an environment that is sustainably managed; and
- (j) minority rights, including the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits¹⁸, and of ethnic, religious or linguistic minorities to enjoy their own culture, profess and practice their own religion, and use their own language.¹⁹

15. Having regard to ALHR's submission at paragraph 14(b)(ii) above, ALHR acknowledges that the right to equal pay for equal work for women is addressed in broad terms by section 14(a) of the *Equal Opportunity Act 1995* (Vic) (**EOA**). Section 14(a) of the EOA states that an "employer should not discriminate against an employee - by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with employment". However, ALHR nevertheless submits that the right to equal pay for equal work should be expressly referenced or included in the Charter to:

- (a) address the concerns (including by the UN Committee on Economic, Social and Cultural Rights) that a wage gap still persists between men and women in Australian workplaces²⁰;
- (b) reinforce the UN Committee on Economic, Social and Cultural Rights' recommendations that Australia, as a whole, strengthen its efforts towards enhancing the equality between men and women in the workplace²¹;
- (c) give local effect to the requirement of the CEDAW that Australia (including its constituent States and Territories) take all appropriate measures to eliminate discrimination against women in areas including employment, sex role stereotyping, politics and public life, trafficking and exploitation, education, nationality, health, economic life, sport

¹⁴ *UN Declaration on the Rights of Indigenous Peoples; International Labour Organisation Convention Concerning Indigenous and Tribal Peoples (No. 169)*.

¹⁵ Article 23 ICCPR; Articles 16 and 22 UDHR; Article 10 ICESCR.

¹⁶ Article 13 ICCPR.

¹⁷ Article 14 UDHR.

¹⁸ Article 27(1) UDHR: see also Article 27 ICCPR; Article 14 ACHR ESCR Protocol; Article 17(2) ACHPR; Article 21 CIS; Article 41 AL.

¹⁹ Article 27 ICCPR.

²⁰ United Nations Economic and Social Council - Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant - Concluding Observations of the Committee on Economic, Social and Cultural Rights - Australia*, E/C.12/AUS/CO/4, 12 June 2009, at paragraph 17.

²¹ United Nations Economic and Social Council - Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant - Concluding Observations of the Committee on Economic, Social and Cultural Rights - Australia*, E/C.12/AUS/CO/4, 12 June 2009, at paragraph 17.

and culture, equality before the law, marriage and family relations, violence against women, and women living in remote areas²²; and

- (d) give legitimacy to the argument that access to women to equal pay for equal work is a legal requirement.
16. Having regard to ALHR's submission at paragraph 14(3) above, ALHR submits the Charter should be amended in order that the rights contained therein are interpreted and applied having regard to the UNDRIP.

Further suggested amendments

17. ALHR also submits that:
- (a) section 17 of the Charter which relates to the protection of families and children should be expanded to include a reference to the right to marry and found a family; and
 - (b) section 25 of the Charter which relates to rights in criminal proceedings should be amended to include compensation for wrongful conviction (which is included in the ACT human rights charter).

Self determination

18. The right to self determination has been described by the Human Rights Committee as an "essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."²³
19. In the context of Victoria's Indigenous population, the VEOHRC has been working with Indigenous Victorians to determine what self determination means to them and, as a result, has produced an occasional paper titled "Indigenous self-determination and the Charter of Rights and Responsibilities - A framework for discussion".
20. According to VEOHRC's paper, despite the difficulty of coming up with a "simple description of self determination because it covers a range of rights and aspirations"²⁴, a consistent theme which arose amongst the Victorian Indigenous people consulted was the "importance of respecting the unique status of Aboriginal and Torres Strait Islander people in Australia".²⁵ VEOHRC also noted in its paper the recognition by Indigenous Victorians of "the rights to equality, cultural integrity, economic independence and identity" as being synonymous with the meaning and concept of self determination²⁶, and the general view expressed by proponents of the right to self determination that:

²² VEOHRC, *Occasional Paper - Advancing women's rights - exploring the relationship between the Charter of Human Rights and Responsibilities and the Convention on the Elimination of All Forms of Discrimination Against Women* (2010) 3.

²³ General Comment No. 12: The right to self-determination of peoples (Art. 1) 03/13/1984. (Twenty-first session of the UN Office of the High Commission for Human Rights, 1984)

²⁴ VEOHRC, *Occasional Paper - Indigenous self-determination and the Charter of Human Rights and Responsibilities - A framework for discussion* (2010) 18.

²⁵ VEOHRC, *Occasional Paper - Indigenous self-determination and the Charter of Human Rights and Responsibilities - A framework for discussion* (2010) 21.

²⁶ VEOHRC, *Occasional Paper - Indigenous self-determination and the Charter of Human Rights and Responsibilities - A framework for discussion* (2010) 24.

"[i]nclusion [of the right to self determination] in the Charter would give [Victoria's Indigenous community] something to point to, and against which the actions of government and institutions can be benchmarked".²⁷

21. ALHR endorses and draws to the Committee's attention VEOHRC's concluding comments in its paper that "the inclusion of the right to self-determination in the Charter means that it becomes part of the dialogue of human rights", and that inclusion of the right in the Charter "will raise awareness about the right self-determination" and "provide an impetus for Aboriginal people to continue to discuss and define what the concept of self-determination would mean in practice".²⁸

ICESCR rights

22. ALHR considers it important that economic and social rights be included in the Charter (including the rights to the highest attainable standard of health and to adequate housing and education) on the basis that these rights, by their nature, have a significant impact on the protection and livelihoods of those who are the most vulnerable within the Victorian community.²⁹
23. ALHR submits that economic and social rights should be both legally enforceable and justiciable under the Charter. That is, in order to create a balance between the need to protect those who are most vulnerable within our community and the economic limitations of the State, the State should be required to take reasonable steps to ensure the progressive realisation of economic and social rights having regard to maximum available resources. Further, the reasonableness of any administrative action taken in relation to economic, social and cultural rights should be open to judicial review.
24. Should the Government not be minded to provide judicial remedies for breaches of economic and social rights from the time of their inclusion in the Charter, it is submitted that the Charter could, alternatively, provide for the Human Rights Commissioner to receive complaints from individuals who allege a breach of their economic and / or social rights.

Auditing of public authorities

25. It is submitted that there should be mandatory, regular and independent auditing of public authorities by an independent body (or bodies) which are adequately resourced and appropriately adapted to inquire into, audit, report on and make recommendations regarding the human rights compliance of government instrumentalities with laws, policies, programs and practices.
26. It is further submitted that such mandatory, regular and independent auditing of, and reporting on, public authorities for human rights compliance should be mandated by the Charter.
27. The Charter specifically defines public authorities to include most Victorian government employees, Victorian statutory agencies which perform public

²⁷ VEOHRC, *Occasional Paper - Indigenous self-determination and the Charter of Human Rights and Responsibilities - A framework for discussion* (2010) 24.

²⁸ "Occasional Paper": *Indigenous self-determination and the Charter of Human Rights and Responsibilities - A framework for discussion*, Victorian Equal Opportunity and Human Rights Commission (2010) at page 27.

²⁹ This includes the homeless, mentally ill, and those living in remote communities. See, for instance, National Human Rights Consultation Committee's "Report on the National Human Rights Consultation" (2009) 344 .

functions, and other entities which perform public functions on behalf of Victoria. The definition also includes government instrumentalities which arguably have the greatest impact on the recognition, respect and protection of human rights and justice in Victoria (namely, Victoria Police and local governments and ministers), but excludes Parliament and Victorian courts and tribunals acting in an administrative capacity.

28. Having regard to their positions (which can be described as ones entailing the entrustment of great trust and confidence by the public), powers and duties, and the need for transparency and accountability to the public, it is only fitting that state instrumentalities (including Victoria Police and local governments and ministers) be required to demonstrate the degree to which their powers and duties have been exercised and their responsibilities fulfilled having regard to applicable human rights key performance indicators (*KPIs*) and standards.³⁰ In addition, a mandatory, regular auditing and reporting framework would be useful for identifying certain systematic and structural issues which might go otherwise unidentified and for monitoring and evaluating the effectiveness of steps taken to address such issues.
29. In the event that compliance with the Charter is assessed and reported on by an independent body (which is ALHR's preference)³¹, it is submitted that such reports should be tabled in Parliament and that the relative compliance of government instrumentalities be evaluated for the purposes of identifying and addressing efficiencies (or inefficiencies, as the case may be) resulting from the requirement to comply with the Charter. In this way, the results from each report can be used constructively to identify those means and methods which are working or are not working, and to improve efficiencies associated with Charter compliance on the whole.
30. As to the role of the VEOHRC in protecting human rights and in monitoring, evaluating and reporting on human rights compliance in Victoria, it is submitted that the Charter should vest the VEOHRC with an own motion power to inquire into, audit and make recommendations regarding the compliance of government instrumentalities with applicable policies, programs and practices.

Bringing proceedings and remedies

31. The rights set out in Part 2 of the Charter are not given legal operation on their own accord. Rather, they are given effect by other parts of the Charter and by independent Victorian statutes where such statute permits.
32. Further, the Charter in its current form does not provide adequate access to remedies where the human rights to which the Charter speaks are violated. By way of example, the Charter does not currently:

³⁰ ALHR does of course recognise that a blanket approach towards developing applicable human rights KPIs and standards against which state instrumentalities can be measured would be inappropriate for addressing all government bodies having regard to their specific duties, roles, and level of interaction with the public. For instance, an assessment of Victoria Police's activities would necessarily require a more robust and detailed system of compliance measurement, performance assessment and reporting having regard to their extensive powers and high levels of community interaction and involvement whereas a government department whose day to day duties involve minimal public interaction may not require such a stringent evaluation.

³¹ Which should receive its mandate under the Charter.

- (a) enable persons to raise Charter arguments unless there is already a cause of action before a court or tribunal;
 - (b) empower the courts or tribunals to make orders which are appropriately adapted to respecting or protecting human rights where decisions have been made or actions have been taken by public authorities which adversely affect human rights;
 - (c) enable persons to challenge decisions made by public authorities which are found to have been made unlawfully by virtue of section 38 of the Charter;
 - (d) provide for a right to compensation where there has been wrongful conviction (contrary to the case under the ACT charter of rights and responsibilities); nor
 - (e) explicitly state what remedies are available where the human rights referred to in the Charter are violated.
29. Having regard to the way in which proceedings are presently brought and remedies are administered under the Charter, ALHR submits that the:
- (a) Charter should ensure that human rights are enforceable by providing for accessible, affordable and effective remedies for breaches of these rights, rather than being limited to administrative mechanisms;
 - (b) Charter should provide for effective legal remedies for acts or decisions of public authorities which are unlawful in accordance with section 38 of the Charter;
 - (c) Charter should articulate precisely what remedies and avenues of redress are available to ensure greater certainty to individuals and legal officers when handling matters which involve an alleged or apparent breach of Charter rights;
 - (d) VEOHRC should be provided with the power to receive and conciliate human rights complaints brought under and in accordance with the Charter.

Effects of the Charter

28. ALHR considers that the Charter has provided an important tool in protecting the human rights of Victorians by ensuring that new legislation is assessed against the human rights set out in the Charter.
29. The Charter has also resulted in an increase in parliamentary dialogue regarding human rights which, ALHR submits, is an important step towards creating an awareness about human rights, human rights breaches, and the steps necessary for ensuring human rights protection.
30. The responsibilities of public authorities to recognise, respect, uphold and work within the framework of human rights espoused by the Charter has undoubtedly led to an increased awareness of human rights by such authorities. The VEOHRC reports, for instance, that:

Victoria's community sector has demonstrated a sophisticated awareness of how the Charter and human rights principles can be used to better understand and respond to entrenched and complex issues.³²

31. Public authorities do appear, on balance, to be more vigilant in ensuring that they take the appropriate steps and measures to act in accordance with human rights. And the fact that all public authorities are required to take human rights considerations into account in their day-to-day activities has undoubtedly resulted in a (ALHR submits, positive) cultural change.
32. To illustrate the extent to which the Victorian public sector has experienced and engaged in a cultural shift since the Charter was introduced, a document titled "Think Charter - The Victorian charter of Human Rights and Responsibilities" prepared and disseminated by the Victorian Government to its officers and employees states as follows:

The *Victorian Charter of Human Rights and Responsibilities* is a law that protects the human rights of all people in Victoria. As an employee of the public sector, the *Charter* places legal responsibilities on your decision making and obligations on your professional behaviour. This is not just a matter of compliance, but a commitment to a human rights culture within government.

The *Charter* will ensure that when current and future Victorian Governments make law and deliver services, they do so with our civil and political rights in mind.

...

[The *Charter*] means that:

- you must *Think Charter* and take human rights into account when you make decisions, provide advice and deliver services;
- you must be **aware of any changes** made to your guidelines, policies or the legal framework for your job to take human rights into account ...³³

33. Accordingly, the Charter has provided a set of values by which public authorities are required to act when discharging their functions. Further, the Charter has, in effect, put the public sector "on notice" of some of the fundamental human rights which are required to be respected and protected for individuals to live with freedom, respect, equality and dignity.
34. As to the effect of the Charter on Victorian courts and tribunals, contrary to the myth espoused by some politicians and the media³⁴, the Charter has not resulted in excessive "judicial activism" nor resulted in a spectre of non-elected judges and members abrogating the powers or role of Victorian parliament.³⁵ Rather, there is still little jurisprudence from Victorian courts and tribunals in which rights under the Charter have been considered. This,

³² VEOHRC, *Making Progress - The 2009 report on the operation of the Charter of Human Rights and Responsibilities* (2010) 11.

³³ The Victorian Government, *Think Charter - The Victorian Charter of Human Rights and Responsibilities*, Authorised by Louise Martin, Director Strategic Communication Branch, Department of Justice.

³⁴ "An Australian Charter of Rights - Answering Some of the Critics", The Hon Michael Kirby AC CMG (Based on an address to the President's Luncheon at the Law Institute of Victoria, Melbourne 21 August 2008 and for the inaugural Michael D. Kirby Annual Human Rights Forum at Murdoch University on 21 October 2009).

³⁵ For instance, the VEOHRC reports that in 2008 only "a relatively small number of matters came before Victorian courts and tribunals involving consideration of and engagement with the Charter. This was partly explained by courts and tribunals not being presented with Charter submissions or arguments." VEOHRC, *Making Progress - The 2009 report on the operation of the Charter of Human Rights and Responsibilities* (2010) 101.

ALHR submits, is a testimony to the positive effect that the Charter has had on preventing human rights breaches which might otherwise be litigated. Importantly, the very few cases which have come before Victorian courts and tribunals and which have involved Charter rights or considerations have been important to the functioning of Victorian courts and tribunals generally by, amongst other things:

- (a) defining which rights courts and tribunals are bound to apply when acting judicially³⁶;
 - (b) clarifying the delineation between the judicial and administrative functions of courts and tribunals³⁷; and
 - (c) providing a consistent jurisprudence regarding the appropriate method for interpreting legislation having regard to the directive in section 32 of the Charter.³⁸
35. Further, in so far as law making, judicial interpretation and the provision of public services are concerned, the Charter has had the effect of requiring:
- (a) parliament to make laws which are compatible with human rights;
 - (b) courts and tribunals to interpret and apply legislation consistently with human rights; and
 - (c) public servants and government instrumentalities to make and administer decisions which affect people's rights having regard to human rights considerations.
34. This, it is submitted, has had a notable positive effect and resulted in positive outcomes in the context of housing and homelessness. The same obligations have also had a positive impact in areas relating to disability, mental health, consumer protection, and (to the extent possible having regard only to civil and political rights), education.³⁹

Overall benefits and costs of the Charter

Benefits

35. Having regard to the positive effects of the Charter described above, it is submitted that the Charter has played a pivotal role in protecting the rights of vulnerable groups within the Victorian community since its introduction.

³⁶ See *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646 (*Kracke*), where Justice Bell noted at paragraph 254 that "[t]he actual engagement and application of [Charter] rights for courts and tribunal depends upon the scope of the right concerned and the facts and circumstances of the individual proceeding.

³⁷ See *Sabet v Medical Practitioners' Board of Victoria* [2008] VSC 346, and further *Kracke* at paragraph 279 where Justice Bell noted that the application of general rules to particular cases is an administrative power, whereas power to give a binding and authoritative decision between definite parties as regards their legal rights and duties and according to legal principles, constitutes judicial power.

³⁸ For a useful overview, see VEOHRC, *Making Progress - The 2009 report on the operation of the Charter of Human Rights and Responsibilities* (2010) 101 - 112.

³⁹ For instance, the Public Interest Law Clearing House Homeless Persons' Legal Clinic (*HPLC*) reports that its Charter-related work prevented the eviction of 42 individuals (including 21 children) from social housing into homeless. The HPLC also reports that as a result of Charter considerations, the State has avoided adding 42 individuals into an already overcrowded emergency accommodation system. See HRLC Bulletin Vol 63, July (2011).

36. For instance, the Charter was raised in negotiations between a disability advocate and a rehabilitation centre operating as part of a public hospital which was seeking to discharge several young people with acquired brain injuries on the basis that their two year contractual periods had ended. It was proposed that the young people be moved into aged care facilities which would not have provided the social environment nor the support services required to continue their recovery. The rehabilitation centre agreed not to move the affected young people until it had considered its obligations under the Charter.
37. In another matter involving one of the authors of this paper, the Charter was used to re-open a matter outside its limitation period before the Victorian Civil and Administrative Tribunal. The ability to re-open the matter based on Charter arguments was significant as the affected subject was a homeless, mentally ill woman had been ordered to pay rent, cleaning and repairs to a property from which she had been forced to flee under witness protection as a result of domestic violence.
38. The Charter has also been used successfully by many advocates (including authors of this paper) to negotiate positive outcomes for homeless and mentally ill persons facing public transport infringements and summary offences.

Costs

39. ALHR submits that it is fundamentally untenable to evaluate the recognition, respect and protection human rights in an economic sense. This is because human rights are by their very nature inalienable and are necessary for individuals to live with freedom, dignity, respect and equality; qualities of life on which no-one should put a price.
40. However, if one insists on examining the "costs" of the Charter in a pure economic sense, one will immediately see that there is in fact a true practical economic value in having a Charter which widely recognises, respects and protects human rights. This is particularly so having regard to human rights in business practice developments (including corporate social responsibility developments) which have occurred in Australia and internationally. That is, according to the "UN Guiding Principles for Business and Human Rights" and 2008 UN "Protect Respect and Remedy" Framework on Business and Human Rights (which was recently unanimously endorsed⁴⁰ by the UN Human Rights Council)⁴¹, Australian corporations have a clear obligation to protect and respect human rights at each level of business operations both nationally and internationally. They also have an obligation to remedy breaches of human rights where such violations occur. Accordingly, the fact of the Victorian public sector being abreast of human rights responsibilities and obligations in

⁴⁰ ALHR notes the significance of this event as it appears to be the first time in the history of the UN human rights system that member states have unanimously endorsed a set of principles which they, themselves, had not negotiated. Scott Jerbi, *UN Adopts Guiding Principles on Business and Human Rights - What Comes Next?* 17 June 2011 (www.ihrb.org/commentary/staff/un_adopts_guiding_principles_on_business_and_human_rights.html).

⁴¹ See, for instance, Scott Jerbi, *UN Adopts Guiding Principles on Business and Human Rights - What Comes Next?* 17 June 2011 (www.ihrb.org/commentary/staff/un_adopts_guiding_principles_on_business_and_human_rights.html).

their own everyday practices will only assist with its ability to ensure the compliance of Victorian-based corporations and corporate officers who do business overseas with meeting their international human rights obligations (including by way of performing appropriate due diligence and having in place adequate policies and procedures), thereby avoiding potential human rights breaches and associated litigation.

41. As to the areas and industries in which a Victorian State-based human rights culture would assist Victorian companies, employees, officers and agents to understand and to comply with their international human rights obligations in a business context, this includes, but is not limited to, the areas of employment⁴², mining, manufacturing, investment (including on the stock exchange⁴³), banking and finance, financial services and renewable energy.⁴⁴

Reform options

42. ALHR submits that there are number of options for reform or improvement to the Charter to better recognise, respect and protect human rights. In particular, ALHR submits as follows:
- (a) Section 7 of the Charter should be amended to recognise and acknowledge that certain human rights (such as the rights to protection from torture and cruel, inhuman or degrading treatment) are absolute in accordance with the ICCPR and eliminate the ability for any limitations or derogations relating to these rights;
 - (b) Section 35 of the Charter (which obliges the notification of proceedings under the Charter to the Victorian Attorney-General and to the VEOHRC) should be repealed and amended so that courts and tribunals have a discretion to relieve parties from the requirement to give notice where to do so would unduly disrupt or delay a proceeding, or for such other reasons considered reasonable and appropriate having regard to the circumstances;
 - (c) Section 30 of the Charter should be amended to improve the consideration of statutory provisions by Parliament by:

⁴² Including in the context of employment agencies. See, for instance, David Arkless, *Clean up messy recruitment of migrant workers*, "The Daily Star", 29 June 2011 (see <http://www.thedailystar.net/newDesign/news-details.php?nid=192016>).

⁴³ For instance, people are now looking at how the US Securities and Exchange Commission will interpret the requirement of businesses under the *Dodd-Frank Financial Reform Act* (2010) with respect to the sourcing of "conflict minerals" in central Africa. In that regard, seven major companies (including Ford, Dell, Microsoft and Hewlett Packard) have supported the move towards "mandatory due diligence" to ensure their products neither directly or indirectly encroach on human rights. See, for instance, John Morrison, *Human Rights - The Case for Regulation*, 26 June 2011 ([http://www.i4bb.org.uk/Blog95A5M8/blog_topic.php?action=view_topic&list_num=1&people_id=Johnm&people_name=John%20Morrison&people_location=London&people_country=United%20Kingdom&formatted_people_registration_date=17%20February%202011&topic_id=1&category_id=%27%29](http://www.i4bb.org.uk/Blog95A5M8/blog_topic.php?action=view_topic&list_num=1&people_id=Johnm&people_name=John%20Morrison&people_location=London&people_country=United%20Kingdom&formatted_people_registration_date=17%20February%202011&topic_id=1&category_id=%27%29;)). The European Union is also developing a mandatory system of corporate social responsibility reporting which may apply to business done with Australian entities.

⁴⁴ For up to date and useful information visit www.ihrb.org/pdf/CSRJournalJanuary2010.

- (i) increasing the size (and hence capacities and capabilities) of the Human Rights Committee⁴⁵;
 - (ii) allowing for the establishment of a specialised Human Rights Sub-Committee which is adequately resourced and equipped to deal with imminent or unforeseen circumstances involving the investigation, application or consideration of human rights in Victorian law, policy or practice;
 - (iii) providing that, except in exceptional circumstances⁴⁶, legislation not be passed by parliament unless and until the Human Rights Committee has provided its report regarding the compatibility of that legislation with human rights; and
 - (iv) requiring the responsible Minister to respond substantially, with appropriate detail, to any concerns raised by the Committee prior to the passage of any Bill;
- (d) Section 31 of the Charter (which permits parliament to make overriding declarations) be repealed as this is unnecessary in a statutory model of human rights protection.

43. ALHR welcomes the opportunity to provide further evidence or elaborate on its submissions at the Committee's hearings later this year.



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⁴⁵ To that end, if the Committee has evidence or concerns about inefficiencies or delays resulting from the implementation of the Charter, ALHR notes that the question which properly needs to be asked is *why* the Victorian public sector has encountered such difficulties with respect to its ability to perform its functions compatibly with human rights. The likely response if this question is asked is that appropriate resources (including access to adequate training and appropriate numbers of employees to do the job properly) are not being provided. This is likely to be the case with or without the Charter.

⁴⁶ Which ALHR submits should be defined to include the immediate safety and wellbeing of others.