Native Title Services Victoria

Submission to the Scrutiny of Acts and Regulations Committee

Review of the Victorian Charter of Human Rights and Responsibilities

1 July 2011
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A. Summary and Recommendations

1. Native Title Services Victoria (NTSV) welcomes the Victorian Government review of the Victorian Charter of Rights and Responsibilities Act 2006 (Charter) being undertaken by the Scrutiny of Acts and Regulations Committee (Committee).

2. NTSV is funded to provide the services of a Native Title Representative Body under the Native Title Act 1993. NTSV exists to deliver sustainable Native Title outcomes to Aboriginal people in Victoria that will respect, protect and transmit Aboriginal culture and identity for present and future generations.

3. NTSV believes that the rights of Victorian Aboriginal Traditional Owners to access their traditional lands and waters, participate in decision making over their traditional lands and waters, develop and participate in cultural practices and have access to economic opportunities deriving from their traditional lands and waters are fundamental human rights that should be protected and promoted.

4. NTSV believes that the Charter has been an invaluable addition to the Victorian legislation, and has contributed to a Victorian environment where people feel that their rights are protected and promoted.

5. NTSV’s submission addresses those terms of reference that are relevant to land justice for Victorian traditional owners. Specifically, this submission addresses Term of Reference (1), being the matters referred to in section 44(2) of the Charter Act, including:

   a) Whether additional human rights should be included as human rights under this Charter?
   b) Whether the right to self-determination should be included in this Charter?
   d) Whether further provision should be made in the Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of the Charter

6. This submission begins by considering whether the right to self-determination should be included in the Charter as NTSV believes the exercise of this right is fundamental to the realisation of the aspirations of Traditional Owners in Victoria. The submission then considers whether other human rights should be included in the Charter before considering whether provision for remedies should be included.

7. NTSV submits that the following recommendations be adopted by the Committee:

   i. That the Charter be amended to include the fundamental right to self determination, the terms of which should be determined and agreed upon after collaboration with, and the participation of the Victorian Traditional Owner Land Justice Group and the Victorian Indigenous community more broadly;
   ii. That the Charter be amended to include rights of indigenous peoples, which also help give expression to the right of self-determination, as contained in the United Nations Declaration on the Rights of Indigenous Peoples:
iii. That the Charter is amended to allow for a clear, simple and effective right to a legal remedy in relation to decisions of public authorities made unlawful by the Charter.

B. Inclusion of the right to self-determination

The right to self-determination

8. The right to self-determination is recognised as a fundamental right in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR). It is the only Article common to both International Covenants, and is the first Article in both Covenants. Its inclusion in both covenants, and primacy, emphasizes the fundamental importance of this right in underpinning all other rights. The United Nations High Commission for Human Rights Human Rights Committee (UN Human Rights Committee) has stressed this point, stating that the right to self-determination is an “essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights”. Both Covenants have been signed and ratified by Australia.

9. The right to self-determination in reference to Indigenous Peoples has been further detailed in the United Nations Declaration of the Rights of Indigenous Peoples (DRIP):

Indigenous peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (Article 3)

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. (Article 4)

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State. (Article 5)

10. Inclusion of the right to self-determination for indigenous peoples does not imply any concession of sovereignty. Both the ICCPR and the ICESCR state that the right to self-determination should be promoted “in conformity with the provisions of the Charter of the United Nations” (Article 1(3)). In the context of nations such as Australia, it has been recognised that the right to self-determination relates not to secession of states, but to autonomy over culture, which “requires a considerable degree of self-management and control over land and other natural resources.”

11. The UN Special Rapporteur on the Rights of Indigenous Peoples, S. James Anaya, has written that self-determination is a “foundational principle” in international law, with five core elements:

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- non-discrimination and equality.
- cultural integrity - the right of Indigenous groups “to maintain and freely develop their cultural identities.” This encompasses the maintenance and protection of language, heritage, culture, religion.
- upholding and protecting the rights of Indigenous peoples to access and use land and natural resources, as this is fundamental to their economic and cultural development.
- an obligation on States to promote Indigenous social welfare and development.
- self-government - upholding the right of Indigenous groups to maintain and develop autonomous governance institutions applicable within the group on matters relating to their internal affairs.

12. In reference to the application of the right to self-determination in Australia, the UN Human Rights Committee has said that “the State party should take the necessary steps in order to secure for the Indigenous inhabitants a stronger role in decision making over their traditional lands and natural resources.”

13. Furthermore the Australian Aboriginal and Torres Strait Islander Social Justice Commissioner has stated that the inclusion of the right to self-determination will enable the strengthening of Indigenous cultural identity and full and effective participation of Indigenous peoples in Australian society.

14. Numerous studies have indicated that self-determination is profoundly important to the economic, cultural and social development of Indigenous groups. A 2007 study, “Sustainable Northern Landscapes and the Nexus with Indigenous Health: Healthy Country, Healthy People” (Professor Stephen Garnett and Dr Bev Sithole, Land and Water Australia, Australian Government, 2007) undertaken in Northern Australia found that Aboriginal people taking part in customary and contemporary land and sea management practices, particularly those living on traditional homelands, were much healthier, and had lower rates of diabetes and lower risks of cardiovascular disease. In addition, where Aboriginal people are gainfully employed in Indigenous cultural resource management, they have greater self-esteem and better mental health. The authors of the four year study, which was funded by the Commonwealth Department Land and Water Australia, concluded that investing in projects enabling Indigenous cultural resource management is justified as good policy, not just for improving physical health and conservation outcomes, but for potential economic, educational, employment, judicial and governance benefits.

15. The consultation undertaken with the Victorian Aboriginal community detailed in the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) Talking Rights: Consulting with Victoria’s Indigenous Community about the Right to Self-Determination (2011) Report, found that the right to self-determination is important to Indigenous people in Victoria and the consultation generally supported the inclusion of the right to self-determination in the Charter. It also found that that the needs, goals and aspirations of Victoria’s Indigenous people are diverse and that a definition of self-determination must allow for individual perspectives in its application. The Report states that further engagement with the Indigenous

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1 Human Rights Committee, Concluding Observations: Australia, UN Doc CCPR/CO/69/AUS.
community to prepare the detail and the mechanisms for the inclusion of the right to self-determination should be considered a mandatory part of the process.  

16. In another VEOHRC paper, *Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion*, authors Behrendt and Vivian suggest that the actual content of the right to self-determination is not easy to define. It includes “control over one’s future destiny... [and] depends on the aspirations of the individual or group involved.” The Report identifies key themes inherent in the concept of self-determination as identified through discussion with Aboriginal Victorians. These include equality and non-discrimination, protection of cultural identity, land and resources, economic development and meaningful consultation and participation in decision making.  

17. Behrendt and Vivian outline key principles developed by treaty-monitoring bodies to help define what self determination means in practice. Based on these principles, a right to self-determination in the Charter could encompass:  
   - An emphasised and stronger role of Indigenous peoples in decision making on issues affecting their traditional lands and resources, and economic activities;  
   - Indigenous participation in decisions that affect them;  
   - Right to develop language and culture;  
   - Increased participation in State institutions; and  
   - Strengthening of self-governing programs.  

**Options for Protecting the right to self-determination**  

18. The VEOHRC has identified four options for protecting self-determination under the Charter. These include:  
   a. entrenching the right in the list of rights protected,  
   b. protecting a ‘cluster of rights’ that would assist the right to self-determination  
   c. including the principle of self-determination in the Preamble to the Charter; and  
   d. introducing a mechanism , such as a Social Justice Commissioner, to support the enforcement of Charter rights.  

19. To some extent, the core elements of self-determination are already expressed in the Charter, or in other statutes, notably:  
   - The right to equality before the law is recognised in s 8 of the Charter, and non-discrimination legislation both federally and in Victoria;  
   - Aboriginal cultural rights are recognised in s 19(2) of the Charter.  

The effectiveness of this recognition, particularly regarding aboriginal cultural rights, is considered further below.  

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7 Ibid.
20. NTSV submits that, notwithstanding the separate recognition of component rights, the right to self-determination of Victorian Aboriginal traditional owners should be expressly included in the Charter. Aboriginal traditional owners in Victoria have not had the right to self-determination in the past, and in fact have been uniquely vulnerable to dispossession and discrimination. While more recently positive steps have been made to remedy past dispossession, Victorian Aboriginal traditional owners still have inadequate access and ownership of land and natural resources, too few opportunities to enjoy the economic component of their rights, and too little say in decisions that affect their traditional lands.

21. As such, NTSV submits that the best option is entrenchment of the right in the list of rights protected by the Charter. To this end, VEOHRC suggests that the Charter might use the language of the ICCPR and ICESCR common Article 1. Alternatively, the right could be expressed in a manner that emphasises its special significance to Aboriginal Victorians by “recognis[ing]” and “affirm[ing]” the “right to self-determination held by the Aboriginal peoples of Victoria.”

22. Ultimately, the definition/substance of the right to self-determination must be developed in partnership with Indigenous Victorians. Given the importance of ensuring that Indigenous self-determination is not denied through the imposition of a definition of self-determination that Indigenous Victorians do not agree with, NTSV submits that the definition/substance of the right should be determined and agreed upon in collaboration with the Victorian Traditional Owner Land Justice Group and with the Victorian Indigenous community more broadly.

23. NTSV also generally adopts the VEOHRC suggestion of adopting the language of the ICCPR and ICESCR, and the reasons for that, including:
   - this would allow the Charter to operate as a living document, enabling ‘self-determination’ to be interpreted according to contemporary and evolving international human rights standards.
   - it would see self-determination being expressed as a general right and avoid potential (but baseless) criticism in relation to perceived ‘benefits’ being conferred on Indigenous Victorians which are not enjoyed by ‘ordinary’ Victorians.
   - it would mean that the right is phrased in very broad terms. Therefore, self-determination would not be denied by imposing on Indigenous Victorians a very specific articulation of the right which does not reflect their understandings of its content.

The right in the Victorian context – negotiations for land justice

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8 ibid.
9 ibid.
10 ibid 2.
11 Jackie Hartley, ‘Indigenous Rights under the Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic)’ (2007) 11 Australian Indigenous Law Reporter 6, 18-19. Note that this approach was recommended by the Australian Capital Territory (‘ACT’) Consultative Committee in relation to the Human Rights Act 2004 (ACT): Australian Capital Territory Bill of Rights Consultative Committee, Australian Capital Territory Government, Towards an ACT Bill of Rights Act (2003) 100-104. If this approach were adopted, the special significance of human rights to Indigenous Victorians would still be recognised in the Charter’s Preamble. It seems that this criticism was anticipated by the Human Rights Consultation Committee in 2006, as it noted that the right ‘must be general in its terms and operate across all of the varied communities in Victoria’ and it accepted the principle that ‘the rights of Indigenous peoples are generally best advanced through laws that are applicable to everyone in the community’: Human Rights Consultation Committee, Victorian Government Department of Justice, Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee (2005) 39.
24. NTSV represents Victorian Indigenous Traditional Owner groups that are asserting rights, involved in negotiations to gain greater access and ownership of their traditional lands and waters, make decisions over their traditional lands, and who are seeking recognition and protection of their traditional rights, culture and customs.

25. Negotiations under the Native Title Act in Victoria have increasingly addressed a larger range of traditional owner aspirations, and have been vehicles for gaining native title, other access and ownership of land, recognition, and some limited capacity for self-governance through the establishment of traditional owner corporations.

26. More recently, the Traditional Owner Settlement Act 2010 (Vic) allows Victorian Traditional Owner groups to settle native title claims directly with the Victorian Government. Potential negotiated benefits which address the access to land and natural resources principle of self-determination are: hand-back and joint management of national parks and state forests; the grant of land for economic development or cultural purposes; and the increased participation of Traditional Owner groups in natural resource management (including participation on advisory bodies). Cultural integrity can be secured through negotiation of measures for recognition and strengthening of culture (for instance, cultural centres to assist in the transmission of cultural knowledge). Within the context of negotiations under the NTA or TOSA, there is also the intention and capacity to consider and include potential economic benefits, as well as sustainable, perpetual funding for corporations to help manage and protect the benefits to traditional owners.

27. Protection of the right to self-determination in the Charter could inform public authorities in negotiations, and the negotiations towards land justice could be a means by which the Victorian Government gives practical effect to the protection of the right in the Charter.

The right in an international context – a Canadian example

28. The potential for formal protection in Victoria can be illustrated by the strong measures of self-determination exercised in contemporary Canada, where entrenched legal mechanisms support the exercise of the right to self-determination. The Canadian example demonstrates that self-determination is not divisive, is highly beneficial to Indigenous peoples, and is most strongly exercised when underpinned by entrenched legal mechanisms.

29. Significant land claim agreements have been negotiated in contemporary Canada. This has allowed some Indigenous Nations to exercise self-determination by negotiating with Government to secure rights which reflect the core elements of self-determination. For example, the Nisga’a secured full ownership of certain land within the agreement area, reflecting the access to land and natural resources principle of self-determination. It also involved a self-government agreement, recognising Nisga’a legislative authority over internal matters such as Nisga’a government and constitution, Nisga’a property, use of Nisga’a lands, education, child and family services. This reflects the autonomous self-governance principle, allowing the Nisga’a to determine the allocation of rights and entitlements within the group and to

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12 Ibid 11.
13 Ibid.
make and enforce decisions that affect them as a group.\textsuperscript{15} Such self-governance also upholds the \textit{cultural integrity} principle because the Nisga’a are given authority over Nisga’a citizenship, culture, language, and cultural property.\textsuperscript{16}

30. The strong culture of agreement-making in contemporary Canada\textsuperscript{17} is made possible by government policy directed at recognising self-determination.\textsuperscript{18} It is supported by a range of entrenched legal and constitutional mechanisms. The \textit{Canadian Charter of Rights and Freedoms} protects ‘Aboriginal, treaty or other rights or freedoms’ of Indigenous peoples from being abrogated or derogated from.\textsuperscript{19} The \textit{Constitution Act 1982} recognises and affirms the ‘existing Aboriginal and treaty rights’ so that they form part of the Supreme Law of Canada.\textsuperscript{20} Other legal mechanisms also protect self-determination and treaty rights.\textsuperscript{21} As a totality, these mechanisms are significant because they will typically see the right to self-determination being accorded ‘the highest level of respect within the domestic realm of both public and private decision making.’\textsuperscript{22}

\section{C. Inclusion of additional human rights}

31. NTSV recognises that a fundamental aim of human rights law and policy is to ensure the respect and protection of each person’s basic human dignity. Respecting the dignity of the person requires ensuring equal access to social, economic and cultural rights. NTSV supports the position of the Human Rights Law Resource Centre that the inclusion of all fundamental rights, including the right to self-determination, contained in the ICCPR and the ICESCR “would contribute to the conditions necessary for all people to live with dignity and participate fully and equally in our community.”\textsuperscript{23} NTSV recognises that genuine self determination may be difficult to practice without the protection of further social, economic and cultural rights.

32. As NTSV is focussed on issues of traditional owner rights in land, natural resources and waters, NTSV submission addresses matters that are fundamental to traditional owner rights. However, even in the context of that more limited framework, it is important to understand that the socio-economic position of Indigenous Victorians indicates that of all Victorians, they are likely to be the most adversely affected by a lack of recognition of basic economic and social rights.

\begin{itemize}
\item \textsuperscript{15} Castan and Yarrow, above n 22, 11-12.
\item \textsuperscript{16} Imai, above n 41, 15. Whilst in some areas the provincial or federal government laws will either be paramount (such as in health services and intoxicants) or exclusive (for example, criminal law), autonomous self-governance is particularly strong in relation to Nisga’a cultural integrity, because Nisga’a laws will prevail over conflicting federal or provincial laws ‘in matters essential to their collective life as a people or nation’ (areas such as management of Nisga’a land, Nisga’a constitution, membership, the maintenance and fostering of Nisga’a language and culture): Peter Russell, ‘Indigenous Self-Determination: is Canada as Good as it Gets?’ in Barbara Ann Hocking (ed), \textit{Unfinished Constitutional Business? Rethinking Indigenous Self-Determination} 170, 182; Imai, above n 41, 15. The agreement also provides scope for the creation of a Nisga’a court: see Imai, above n 41, 15.
\item \textsuperscript{17} See Bradford W Morse, ‘Indigenous-Settler Treaty Making in Canada’ in Langton et al. (eds), \textit{ Honour Among Nations? Treaties and Agreements with Indigenous Peoples} (Melbourne University Press, 2004), 50.
\item \textsuperscript{18} Victorian Equal Opportunity and Human Rights Commission, above n 12, 10.
\item \textsuperscript{19} \textit{Canada Act 1982} (UK) c 11, sch B (‘\textit{Constitution Act 1982}’), s 25.
\item \textsuperscript{20} \textit{Canada Act 1982} (UK) c 11, sch B pt I, s 35. The Nisga’a agreement is protected by this provision, such that the rights are not subject to derogation by unilateral Federal government legislation: Imai, above n 41, 15.
\item \textsuperscript{21} See: \textit{Constitution Act 1982} s 35(4) (prior and future land claims settlements afforded same constitutional status as historic treaties); s 35(1) (imposes restrictions on altering constitutional provisions that explicitly apply to Aboriginal peoples). Another legal protection of self-determination is the notion of ‘Honour of the Crown’ and its fiduciary obligations owed to Indigenous peoples: Morse, above n 44, 67. See also \textit{Haida Nation v British Columbia (Minister of Forests)[2004]} 3 SCR 511 (legally enforceable duty to consult with Aboriginal peoples where potential infringement upon Aboriginal or treaty rights).
\item \textsuperscript{22} S James Anaya, \textit{Indigenous Peoples in International Law} (Oxford University Press, 2\textsuperscript{nd} ed, 2000), 136
\item \textsuperscript{23} Human Rights Law Resource Centre, ‘Review of the Victorian Charter: HRLRC Position Paper’
\end{itemize}
33. Indigenous Victorians experience substantial inequalities in health, education and social outcomes. Contemporary disadvantage suffered by Indigenous Victorians is directly attributable to the processes of colonisation and ongoing discrimination. The Victorian Government has succinctly outlined the inequities endured by Indigenous Victorians:

‘The ongoing effect of dispossession on Indigenous families and communities continues today and is reflected in the gap between Indigenous and non Indigenous Victorians across all social and economic indicators. Indigenous Victorians are more likely to be involved in the justice system, be admitted to hospital, suffer chronic illness and health problems. They are less likely to finish school, attend university and have a sustainable job. Ultimately, Indigenous Victorians are more likely to die younger than non Indigenous Victorians.’

International Covenant on Economic Social and Cultural Rights

34. NTSV submits that the following ICESCR rights should in particular be included in the Charter:

- Article 11: Right to an Adequate Standard of Living and the continuous improvement of living conditions.
- Article 15: Right to Cultural Life

35. NTSV limits its submission to these rights because of the role of NTSV, and the submission does not address other rights of importance to indigenous people generally.

36. It must be noted that whilst the ICESCR rights may be (indirectly) relevant to the Charter though the court’s interpretive role, international experience suggests that direct incorporation of these rights may be necessary.

Declaration of the Rights of Indigenous Peoples

37. The United Nations Declaration on the Rights of Indigenous Peoples (DRIP) sets out a range of rights that relate specifically to the aspirations of Aboriginal peoples in Victoria. The DRIP was adopted by the United Nations General Assembly on 14 September 2007 and was formally supported by the Australian Government in 2009.

38. The underlying principles of the DRIP are about participation, engagement and consultation. As discussed previously [8], the right to self-determination is a fundamental right in the DRIP. The implementation of all the other rights contained in the DRIP would support Victorian Aboriginal people to achieve self-determination.

39. NTSV supports the protection and promotion of rights contained in the DRIP that support Victorian Traditional Owners to regain access to their traditional lands and waters, participate in decision making over their traditional lands and waters, develop and participate in cultural practices and have access to economic opportunities deriving from their traditional lands and waters. The DRIP rights also help give full expression to the right of self-determination, whether or not that right is separately and expressly protected.

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40. NTSV also strongly supports the protection and promotion of rights that assist Victorian Aboriginal peoples to ‘obtain compensation in relation to their dispossession from their traditional lands and/or waters; and in relation to the future use and exploitation of such traditional lands and/or waters’.\(^{26}\)

41. The report of the consultation undertaken by VEOHRC *Talking Rights*, identified rights considered by the Victorian Aboriginal community to be of fundamental importance. These include “the right to live life as an Indigenous person who is free to practise their culture”, which encompasses:

- “having access to land to gain economic benefit and provide for their family”; and
- “participating in the decision making that impacts their life choices and life paths.”\(^{27}\)

42. NTSV therefore submits that the following rights outlined in the DRIP should be considered for inclusion in the Charter in some form:

- Cultural rights: Articles 11-13
- Rights to country, resources and knowledge: Articles 25 and 26
- Rights to participation and decision making: Articles 18 and 19
- Rights to development, economic and social rights: Articles 20, 21, 23, 29
- Rights to compensation and redress: Article 28

43. The protection of cultural rights is of fundamental importance to Aboriginal peoples in Victoria.\(^{28}\) Whilst cultural rights are currently included in section 19(2) of the Charter, Articles 11-13 of the DRIP contain a more comprehensive articulation of cultural rights including rights to practice and revitalize culture and the transmission of histories, and languages, and the protection of traditions, sites, ceremonial objects and repatriation of remains. NTSV submits that section 19(2) of the current Charter be strengthened to encompass articles 11-13 of the DRIP.

**D. Access to effective remedies**

*The importance of the Charter*

44. The Charter plays an important role in protecting human rights before they are breached.\(^{29}\) The Charter can play a significant role in ensuring that regard is had to rights protected by the Charter in the development of policy and legislation, and in administrative decision making by public authorities. The Charter can have, and most likely has had, a role in creating a culture whereby human rights are routinely considered, and are generally protected, in public policy decisions.

45. Despite its strengths, a number of reforms may be made to the Charter to strengthen the protection it affords to the rights of Victorians.

**Strengthening the Charter**

\(^{26}\) Native Title Services Victoria Constitution Clause 3.1(b)(iv).


\(^{28}\) Victorian Equal Opportunity and Human Rights Commission, above n 10, 19.

46. The Charter does not give individuals a freestanding right to bring a legal complaint for a breach of a human right.\(^{30}\) Courts cannot invalidate or alter the operation of legislative provisions that are inconsistent with human rights,\(^{31}\) and a court declaration of inconsistency will not create legal rights or obligations or give rise to any civil cause of action.\(^{32}\)

47. NTSV believes that Charter must be amended to allow for a clear, simple and effective right to a legal remedy for breach of the Charter.\(^{33}\) For example, while the Charter makes it unlawful for a public authority to breach the cultural rights of Aboriginal people under s 19(2), because of the nature of that right, there is at the moment no effective tool for ensuring that right is not breached. Such amendments can also contribute to the creation of a culture of compliance with human rights that extends beyond the litigation context (for instance, it can function to deter public officials from acting in a manner that is inconsistent with the Charter).\(^{34}\)

48. NTSV supports the position taken by the Human Rights Law Resource Centre that the Charter must provide accessible, affordable and effective remedies for breaches of human rights.\(^{35}\)

49. NTSV supports recommendations 13 – 17 of the VEOHRC submission to the Charter review\(^{36}\) that address the need for remedies when the government acts unlawfully; that is, when a public authority breaches rights contained in the Charter.

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\(^{30}\)Charter of Human Rights and Responsibilities Act 2006 (Vic) s 33.


\(^{32}\) Charter of Human Rights and Responsibilities Act 2006 (Vic) s 36(5)(b).


\(^{34}\) Ibid.

\(^{35}\) HRLRC above n 53, 2

\(^{36}\) VEOHRC Putting People into Practice 1 July 2011 recommendations 13-17, 24.