

Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VICTORIA) INC, IN CONSULTATION WITH MEMBER CENTRES

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**Federation of Community Legal Centres
submission to the**

2015 Review of the

***Charter of Human Rights
and Responsibilities Act***

2006

Inquiries to:

Liana Buchanan, Executive Officer and Katie Fraser, Sector Development Manager

Federation of Community Legal Centres (Victoria) Inc

03 9652 1501

executiveofficer@fclc.org.au and sectordevelopment@fclc.org.au

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1 Summary

1.1 The next steps towards realising human rights in Victoria

Like many agencies that work with people experiencing disadvantage and value a democracy in which fundamental human rights are respected, community legal centres (CLCs) welcomed the introduction of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).

From the outset, community lawyers and other CLC advocates have been eager to use the Charter to good effect, whether working with clients to secure fairer outcomes, educating community members about their rights and responsibilities before the law, or advocating for improvements to the law or government practice.

However, eight years after the Charter commenced operation, our consultations with CLCs heard mixed views about the Charter's impact.

There is no question that, over the past eight years, the Charter has resulted in a greater capacity to negotiate good outcomes for CLC clients when dealing with public authorities, some in particular. The Charter has also led to a number of improvements in government procedure, policy and practice and has seen the human rights impacts of new legislation more clearly articulated in the public domain.

However, community lawyers also report a number of factors limit the Charter's effectiveness or that stop them from using the Charter in their advocacy:

- Charter understanding and adherence is inconsistent across different public authorities, with some agencies appearing unaware of the Charter and others appearing to pay mere lip service to the legislation
- interest in and commitment to human rights subsides if there is no ongoing training and education and if relevant ministers and senior public sector leaders do not support the Charter, and
- the absence of a clear, accessible means by which individuals can seek redress if their Charter rights have been breached can make the Charter seem like "mere words".

We also heard that, among members of Victoria's most marginalised communities, there is a degree of cynicism about whether the Charter has delivered adequate, tangible changes in the way public authorities engage with Victoria's citizens.

In summary we believe that the Charter has led to significant improvements but that the Charter's potential is yet to be realised.

There is a need for proactive strategies that will improve engagement by public authorities, as well as amendments to ensure consequences can flow if public authorities breach the Charter or fail to take human rights into account. In particular we recommend measures that will:

- further embed the Charter in the operation and culture of public authorities and insulate it from fluctuations in political support for a human rights framework
- ensure the public sector continues to develop a strong, healthy human rights culture, including ongoing training and education and requirements for public authorities to develop and submit a plan for how they will improve Charter compliance, and
- provide the community with clear, accessible means of making a complaint and seeking redress where Charter obligations are not met.

In introducing the Charter, the then Government took an important step in entrenching regard for human rights in the workings of government and the values of the Victorian community. The then Government also took a measured approach, acting with caution to introduce a human rights instrument that preserved parliamentary sovereignty, mitigated concern that a Charter would lead to high levels of litigation, and focused on promoting rights dialogue between the three arms of government, the executive, Parliament and the judiciary. Eight years' experience of the Charter

has shown that concerns about creating a “lawyers’ picnic” or derogating parliamentary sovereignty were unfounded and, indeed, that some changes are needed to strengthen the Charter.

This eight year review affords the Victorian Government an ideal opportunity to make further, incremental amendment to strengthen the Charter, to take the next steps down the path towards full realisation of human rights in Victoria.

1.2 Recommendations

Recommendation 1: The Victorian Government should make an ongoing commitment to the provision of training, education and specialist advice on the application of the Charter for public sector staff.

Recommendation 2: The functions of the Victorian Equal Opportunity and Human Rights Commission should be expanded to enable the Commission to initiate and undertake reviews and audits of public authorities’ compliance with the Charter, irrespective of whether an authority has requested a review.

Recommendation 3: The Victorian Government should consider amending the Charter to require public authorities to take proactive steps to demonstrate how they propose to ensure compliance with the Charter, having regard to the scheme established by section 75 and Schedule 9 of the *Northern Ireland Act 1988* (NI).

Recommendation 4: Section 39 of the Charter should be replaced and a new provision inserted to create a direct cause of action against a public authority that has breached section 38 of the Charter.

Recommendation 5: Actions for breach of section 38 of the Charter should be able to be heard in the Victorian Civil and Administrative Tribunal, as this is intended as an accessible and low cost forum.

Recommendation 6: In hearing a Charter breach, the Victorian Civil and Administrative Tribunal should be able to make a finding on whether the public authority has breached section 38 and make such orders as it considers just and appropriate to prevent future contravention and redress any loss or injury the individual has suffered.

Recommendation 7: In addition to giving rise to a direct cause of action in the Victorian Civil and Administrative Tribunal, breach of the Charter should constitute stand alone grounds for judicial review, as recommended by the Human Rights Consultation Committee in 2005.

Recommendation 8: The Charter should be amended to provide the Victorian Civil and Administrative Tribunal with jurisdiction to hear Charter arguments in matters arising under the *Residential Tenancies Act 1997* (Vic).

Recommendation 9: An individual should be able to lodge a complaint with the Victorian Equal Opportunity and Human Rights Commission and access dispute resolution processes equivalent to those available in respect of complaints made under the *Equal Opportunity Act 2010* and the *Racial and Religious Tolerance Act 2001*.

Recommendation 10: In the event the Victorian Equal Opportunity and Human Rights Commission is given a complaint handling function under the Charter, the Commission should be required to report annually on trends and themes evident through complaints and, where possible, on the de-identified facts of significant conciliated cases.

Recommendation 11: The Victorian Ombudsman’s power under section 13(2) of the *Ombudsman Act 1972*, to enquire into or investigate whether an administrative action is incompatible with a Charter right, should be retained. For educative purposes this power should also be referred to in the Charter.

Recommendation 12: The Charter should provide for referral of matters between the Victorian Equal Opportunity and Human Rights Commission and the Victorian Ombudsman and should enable information sharing to assist with the conduct of investigations.

Recommendation 13: Education and training about the Charter and how it can be used to improve outcomes for disadvantaged and vulnerable clients should be made available for legal professionals, particularly those in the legal assistance sector, and for other community sector advocates.

Recommendation 14: The definition of “public authority” should be amended by specifying certain functions that are “taken to be of a public nature” similar to the *Human Rights Act 2004* (ACT).

Recommendation 15: Community housing providers registered under the *Housing Act 1983* (Vic) should be declared by regulation to be public authorities for the purposes of the Charter pursuant to section 4(1)(h) of the Charter.

Recommendation 16: Government contracts for the delivery of public services should include a requirement that the contractor agree to be bound by the Charter.

Recommendation 17: The Charter should be amended to include an “opt in” provision to enable private entities to voluntarily decide to be bound by the Charter.

Recommendation 18: The Victorian Government should reconsider the current exemption whereby the Adult Parole Board, Youth Parole Board and Youth Residential Boards are deemed not to be bound by section 38 of the Charter.

Recommendation 19: The Victorian Government should consider expanding the Charter to include additional rights, in particular economic, social and cultural rights, recognising that steps to this end have been taken in the Australian Capital Territory.

Recommendation 20: The Charter should be amended to empower the Scrutiny of Acts and Regulations Committee to recommend that the two week adjournment be extended for a further period of not less than two weeks where a Bill raises significant Charter issues.

Recommendation 21: The Charter should be the subject of further periodic legislative review to ensure that successive governments re-visit and review the Charter in consultation with the Victorian community.

2 Introduction

2.1 About the Federation of Community Legal Centres (Victoria) Inc

The Federation of Community Legal Centres (the Federation) is the peak body for 50 community legal centres (CLCs) across Victoria. The Federation leads and supports CLCs in providing access to justice and improving equity.

The Federation:

- works to build a strong and effective community legal sector
- provides services and support to CLCs
- provides information and referrals to people seeking legal assistance
- works for law reform to develop a fairer legal system that better responds to the needs of disadvantaged and vulnerable members of the community, and
- represents the priorities and interests of CLCs and their clients.

2.2 About community legal centres

Every year, community legal centres (CLCs) assist over 100,000 Victorians. Over 80% of CLC clients earn less than \$26,000 a year and around 60% receive assistance from Centrelink. CLC clients include people with mental illness, people with a disability, homeless people, young people, Aboriginal and Torres Strait Islander people and people from culturally diverse backgrounds.

Many CLC clients have a range of complex needs, commonly including special needs arising from mental illness, cognitive impairment, trauma, limited literacy or limited understanding of English. CLCs assist with a broad range of legal issues including family violence, family law, tenancy, infringements, and credit and debt.

CLCs have a longstanding commitment to providing legal and related assistance to address an individual client's inter-connected problems. They recognise that an individual's legal rights and wellbeing are usually affected by far more than the facts of their legal case. The CLC model of service is to provide, wherever possible, a holistic response, not only to a client's interconnected legal issues but also to non-legal problems through partnerships, coordination or integration with other services.

As well as providing a blend of direct services, including information, advice, casework, education and community development, CLCs also use their work with clients to identify areas of law, policy or practice that are negatively impacting vulnerable or disadvantaged groups. CLCs then work to address these issues through law reform or systemic advocacy.

2.3 Community legal centres and the Charter

Along with many individual member CLCs the Federation participated in consultation processes leading to the introduction of the Charter and welcomed the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the Charter). The Federation has played an active role in facilitating training for CLC and other community advocates since the Charter was introduced. We affirmed the value of the Charter in 2011, when the first legislative review was conducted. In submissions to that review the Federation pointed to:

- examples of the Charter resulting in concrete improvements in the lives of disadvantaged Victorians, especially in areas such as housing
- an increased capacity to negotiate good outcomes for clients because government agencies were required to consider human rights in their decisions

- improved consideration of human rights in policy development and greater transparency in Parliament, where government must account for its consideration and weighting of different, often conflicting human rights when developing new laws, and
- the benefit of having a single, clear statement of rights in facilitating community understanding of rights and empowering communities.

Given CLCs' focus on advancing the rights of people who experience disadvantage, the Charter has been seen as a valuable tool both in CLCs' individual client advocacy and in their work to improve the law and justice system more broadly.

2.4 Focus of this submission

The Federation of CLCs made a submission and a supplementary submission to the four year review of the Charter in 2011. Most of our recommendations, and the basis for them, remain relevant and we will not repeat them here. Rather we will make further submissions based mainly on the practical experience and perspectives of community lawyers whose day to day work involves advocating on behalf of Victorians experiencing disadvantage.

A number of CLCs that regularly use the Charter are making their own submissions to the Review. This submission therefore seeks to ensure the review has access to information and perspectives from CLCs whose staff are not using the Charter regularly, or who report use of the Charter is inconsistent across the service.

We have spoken to senior staff at a number of generalist CLCs including Eastern Community Legal Centre, Fitzroy Legal Service, Footscray Community Legal Centre, Wyndham Legal Service, Broadmeadows Community Legal Service, Loddon Campaspe Community Legal Centre, Inner Melbourne Community Legal and Brimbank Melton Community Legal Centre. We have also surveyed staff at specialist CLCs including Mental Health Legal Centre, Tenants Union Victoria, Consumer Action Law Centre and Youthlaw. In addition we organised two workshops for community legal centre advocates in conjunction with the Human Rights Law Centre and the Victorian Council of Social Services, where a number of CLC staff shared information about their experience of using the Charter and their views about how the Charter might be improved. This submission is based on these various consultations with CLC representatives.

3 CLCs' experience of using the Charter

CLCs should be well-placed to provide information to vulnerable clients about their human rights and to use the Charter to ensure their clients' rights are realised. In practice, however, use of the Charter is inconsistent across the community legal sector even after eight years of operation.

Some CLC advocates use the Charter on a daily basis; others do not use it at all. The ways in which community lawyers use the Charter, as well as some of the main barriers impeding use of the Charter, are outlined in more detail below.

3.1 Seeking improved decision making for CLC clients

Several CLCs use the Charter in negotiations with public authorities on behalf of clients, in order to bring human rights arguments to bear in the decision making process.

For example, a lawyer at Inner Melbourne Community Legal described a case in which she was acting on behalf of a tenant who was facing eviction by the Director of Housing on the basis of illegal use of the premises (under section 250 of the *Residential Tenancies Act 1997*). The client's son had allegedly been dealing drugs out of the premises. The then Office of Housing invited the tenant to a meeting before a notice to vacate was issued, as required under internal policies which had been created and implemented in order to ensure the department's compliance with the Charter. The lawyer was able to attend this meeting and make submissions, including both oral and written submissions relating to potential breach of the client's human rights, and was successful in preventing the eviction.

Several community lawyers reported using a similar process to engage in dialogue with the Office of Housing on behalf of clients, with some success. This work highlights the fact that some public authorities have made changes to their policies in ways that enable consideration of human rights arguments. Community lawyers say that, as a result, some clients are getting better, fairer outcomes than would be possible if the Charter did not exist.

Other community lawyers say that they use the Charter when communicating with public authorities but that these arguments appear to be given limited weight and that there is often a lack of transparency about why Charter arguments are not accepted. One community lawyer indicated they raise Charter arguments with the Office of Housing but that a common response from that agency is a one paragraph letter, the tenor of which is, "We have considered your human rights submissions and we disagree", without reasons being given for the rejection of the human rights arguments. In such cases, community lawyers say they feel there is no clear avenue of recourse or that the costs of seeking review outweigh any likely benefits.

The most common context in which community lawyers report using the Charter for individual client advocacy is for public housing clients at risk of eviction and homelessness. There are many other circumstances in which community lawyers and advocates report using the Charter, including:

- when negotiating with Victoria Police to secure a diversion outcome for a client
- in Victims of Crime Assistance Tribunal and family violence intervention order matters applications, and
- in advocacy with public schools or the Department of Education to negotiate satisfactory learning conditions for children with a disability.

3.2 Policy and law reform to advance a fairer system

Some CLCs, such as the Human Rights Law Centre, Youthlaw, Flemington Kensington Community Legal Centre and Homeless Law have used the Charter in high impact law reform and policy work. Some community lawyers and CEOs feel, however, that raising Charter arguments when advocating a particular reform on behalf of their clients is only advisable if the relevant decision-maker supports the Charter and sees value in a human rights framework. Otherwise, similar arguments are made but are usually couched in other terms that do not reference the Charter.

This reflects a view expressed during our consultations that the Charter is seen as “only as strong as the support it receives from the government of the day” and that Victoria would benefit from steps to more firmly entrench the Charter in the operations of government.

3.3 Influencing the legislative process - submissions to SARC

It is clearly good practice for government to consult with stakeholders on the likely impact of proposed legislation, including any impact on human rights, during the policy development process.

Government practice should prioritise good consultation as an important element of the “dialogue model” of rights protection. Unfortunately, CLCs’ experience in recent years is that this often does not occur. Rather, it is common for non-government stakeholders such as CLCs whose clients may be significantly affected by proposed legislation to learn of that legislation for the first time when a Bill is introduced into Parliament.

Where government has chosen not to consult on legislation that affects human rights, the first opportunity for CLCs to comment on a Bill is their opportunity to make submissions to the Scrutiny of Acts and Regulations Committee (SARC) while that body is reviewing the Bill pursuant to section 30 of the Charter. However, the capacity of CLCs to make submissions on proposed legislation is limited by the fact that submissions are generally required in a very short timeframe. In practice, this means that only CLCs with a dedicated policy role have capacity to make a submission to SARC, even though some laws are likely to affect large numbers of CLC clients.

Some CLCs that have made submissions to SARC questioned the efficacy of the process because:

- SARC is ultimately a product of the Parliament and decisions in SARC appear to be made along party political lines, undermining the extent of scrutiny applied
- There is a perception that SARC gives only scant consideration to submissions received and that submissions are unlikely to be taken up by SARC, and
- Even if SARC recommends changes to a Bill it is open to the Government to disregard the recommendation.

Community lawyers told of instances where they had worked to make a submission, no changes to the Bill had been made, and they felt that their submission had made no difference. As a result of this perception, one CLC said that in view of their limited resources, they no longer prioritised time to make submissions to SARC.

Despite these shortcomings, however, community lawyers consider it important to retain a process whereby a Bill can be the subject of further scrutiny, comment and dialogue after it has been introduced into Parliament and support any measures that might make that scrutiny more robust (see section 7).

3.4 Factors that prevent CLCs from using the Charter

A number of factors mean that use of the Charter is not consistent across or within CLCs.

A lack of understanding of how to use the Charter

At the time the Charter was introduced, there was a level of enthusiasm and excitement across the community legal sector about the Charter’s potential to effect positive outcomes for the clients and communities with whom CLCs work.

Early Charter training and education for community lawyers and other community advocates was funded by the Victorian Government. This training gave lawyers an understanding of how the Charter could be used. Some lawyers who still use the Charter in their work describe that training as invaluable. However, ongoing, in-depth training suitable for lawyers has not been resourced and this particularly impacts community lawyers in generalist CLCs who practice across many areas of civil, family and criminal law.

Lack of confidence in using the Charter is often connected with the indirect and complex means by which Charter breaches may be pursued and the absence of a separate, direct cause of action for breach of the Charter.

The lack of a direct cause of action

Some community lawyers note their use of the Charter is limited because their clients may not have any cause of action to bring a matter to court and the Charter does not allow for a separate cause of action. As a result, a client with a powerful human rights argument may not be able to seek redress because there is no other cause of action in which they can raise Charter issues.

The cost/benefit analysis suggests Charter arguments are not always worthwhile

Some community lawyers say that, in their own experience and that of colleagues, their use of Charter arguments when dealing with a public authority has not made a difference to the outcome for clients.

In the context of a high pressured CLC practice, where resources and capacity are always outstripped by legal need, some community lawyers do not feel it is worth the effort of making an argument using the Charter. Reasons for this varied – for some lawyers this is because there is no freestanding cause of action and a broad suite of remedies is not always available. For others, it is because public authorities' responsiveness to Charter arguments is inconsistent and has declined noticeably over the past four years.

Jurisdictional barriers make it difficult - and cost prohibitive - for lawyers to pursue Charter breaches

Given the most common circumstances in which community lawyers have used the Charter is in applications for possession on behalf of clients seeking to avoid eviction, the decision in *Director of Housing v Sudi* [2011] VSCA 266 (Sudi) has significantly reduced the positive effect of the Charter. Since the decision in Sudi, Charter compliance in eviction matters cannot be considered by the Victorian Civil and Administrative Tribunal (VCAT) and can only be raised in the Supreme Court.

Most community lawyers do not appear in the Supreme Court on a regular basis and are not familiar with the jurisdiction. In addition, the fact that costs orders can be made is a substantial disincentive to undertaking litigation in the Supreme Court.

The Charter does not apply to all service providers whose conduct impacts CLC clients

Some community lawyers indicate the Charter does not apply to the kind of legal matters with which their clients need help. For example, Footscray CLC runs a specialist refugee tenancy clinic to assist clients who are refugees with tenancy disputes. The clients of the clinic are recently arrived refugees who are highly vulnerable, do not speak English and have a low income. Almost all the clients are renting properties in private tenancy arrangements. Human rights protected by the Charter are often breached, for example in cases in which clients are evicted. However, because the Charter applies only to public authorities, it cannot be raised in respect of conduct by private landlords.

3.5 In support of a stronger, more accessible Charter

As a result of some of these barriers, community lawyers advise that clients and the community often perceive the Charter as “mere words”, a document which promises rights that cannot be enforced. Fitzroy Legal Service stated that it ran many events to promote the Charter with disenfranchised communities in the years after it was introduced, and it was devastating for communities when, for some, the Charter came to be viewed as a “false promise”.

In our opinion, the Charter's impact will always be limited if public authorities are not compelled to implement training, policies and procedures that will improve consideration of human rights and if the Charter is too difficult to understand and use from a community perspective. The Charter should be simplified and strengthened to ensure it delivers further benefits for the community.

4 A proactive approach to building a human rights culture

4.1 Time to embed a human rights culture in Victoria

One of the Charter's most important functions is to embed consideration of human rights in the working of the public sector - in development of policy and legislation, in program design and in service delivery.

Information from community lawyers is clear: while the Charter has had a positive impact on some public authorities there are many parts of the public sector that, at best, pay lip service to human rights. There are many agencies where frontline staff appear to have little or no awareness of the Charter and do not demonstrate any regard for the rights it purports to protect.

Even in agencies such as the Office of Housing, which is described as having changed processes significantly since the Charter was introduced, community lawyers report that staff often do not seem to understand the rationale for certain Charter-driven processes or policies. For example one community lawyer observed during consultations that although Office of Housing policies could be taken advantage of by her clients, who receive the benefit of a meeting before action was taken to evict them, Office of Housing staff seem to have limited understanding of why the policies exist or the human rights context in which they were created.

Community lawyers also report that public authorities' response to Charter issues seems to depend on the political environment. If a Government, individual minister and/or public sector leader is perceived as not supporting the Charter, the Charter is given little credence and public authorities do the bare minimum required to meet its requirements, if that.

We therefore believe two complementary approaches are needed to embed the Charter, to extend its practical and beneficial impact, and to insulate it from fluctuations in political will:

- proactive measures designed to build human rights culture and practice across the public sector and to entrench respect for the Charter, and
- changes to ensure that consequences flow if a public authority disregards the Charter, including amendments to improve the capacity of individuals to make a complaint and enforce their rights under the Charter (see section 5).

Building an environment in which human rights are taken into account and respected requires significant cultural change. Cultural change to tackle social harm requires time and a range of strategies. For example, it has taken over 25 years for it to become broadly accepted that women should not be subject to sexual harassment in the workplace and that employers have an obligation to prevent sexual harassment at work. Indeed, this shift is far from complete. A similar range of strategies is required to truly build a human rights culture in the Victorian public sector: ongoing education for rights bearers and those bound to recognise rights; development of preventative policies and procedures; and the creation of an enforceable right of action and an accessible complaints mechanism with corresponding dispute resolution processes.

4.2 Ongoing education and training throughout the public sector

Building an understanding of the Charter requires public sector and political leadership, as well as ongoing, regular education and training for staff. When the Charter was introduced it was accompanied by resources to train staff across and beyond the State Government, as well as the provision of specialist advice to the public sector on how to apply the Charter. Investment in this work has reduced considerably over time. Changing culture and increasing understanding of protected rights requires an ongoing commitment, including a commitment of training resources.

Cultural change is also most effective when those involved understand the benefits of the change. To this end, resources should be made available to collect and disseminate material showing that human rights-compliant policy and program delivery is often more effective and efficient and that working within the Charter ultimately improves public sector operations.

Recommendation 1

The Victorian Government should make an ongoing commitment to the provision of training, education and specialist advice on the application of the Charter for all public sector staff.

4.3 Testing Charter compliance through auditing and reporting

In addition to training for public authority staff, public authorities should be required to have policies and processes in place that ensure attention to human rights features in every aspect of their work. As is highlighted annually in the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) annual report on Charter operations, many public authorities have undertaken significant work to establish Charter-compliant practice. This work, however, is uneven.

At a minimum, public authorities should be subject to occasional audits to ensure they have basic human rights frameworks, policies and training in place. The Charter's current section 41(c) is inadequate, in that it empowers the VEOHRC to review an authority's programs and practices to determine their compatibility with human rights **only** when the authority so requests. The VEOHRC must be able to initiate such a review or audit irrespective of the authority's consent.

In addition, Victoria could apply an approach similar to that applied to equality provisions in Northern Ireland, where efforts have been made to "mainstream" the promotion of equality throughout the work of public authorities.

Public authorities are required by section 75 of the *Northern Ireland Act 1988* (NI) to have due regard to the need to promote equality of opportunity between nine named categories of people. Most public authorities are required to submit an "equality scheme" to the Equality Commission, a statutory body analogous to the VEOHRC. A public authority's equality scheme must set out: how the authority will assess its compliance with section 75; how it will consult on and assess the likely impact of proposed policies on equality of opportunity; how it will monitor any adverse impact of policies and make these assessments publicly available; and how it will train staff. The Equality Commission has a raft of powers under Schedule 9 of the *Northern Ireland Act*, including the power to require an authority to revise its equality scheme and to investigate an authority's failure to comply with its scheme.

While the scope of the Northern Ireland equality scheme does not address the full range of human rights protected under the Victorian Charter, the scheme offers some valuable ideas for embedding or "mainstreaming" rights principles in the workings of the public sector.

This approach encourages public authorities to invest in building rights-compliant practice rather than responding to complaints. It also means that the system for rights protection does not place the onus on affected individuals - often the most marginalised in society - to hold public authorities to account through complaints or litigation.

Recommendation 2

The functions of the Victorian Equal Opportunity and Human Rights Commission should be expanded to enable the Commission to initiate and undertake reviews and audits of public authorities' compliance with the Charter, irrespective of whether an authority has requested a review.

Recommendation 3

The Victorian Government should consider amending the Charter to require public authorities to take proactive steps to demonstrate how they propose to ensure compliance with the Charter, having regard to the scheme established by section 75 and Schedule 9 of the *Northern Ireland Act 1988* (NI).

5 Providing enforceable rights

5.1 The need for a clear and separate cause of action

As discussed in section 3, most community lawyers say they are unlikely to use the Charter in their work with clients because it is overly complex and, in particular, because it can be difficult to pursue a complaint or enforce Charter rights.

Although section 38 of the Charter establishes a clear statutory obligation on public authorities to operate in a manner compatible with Charter rights, the Charter provides a very limited, indirect avenue for seeking redress where a public authority fails to meet this duty.

An individual whose Charter rights have been breached by a public authority and who has not been able to resolve their complaint through an authority's own complaint handling processes, must navigate one of various options.

They may pursue a complaint to the Ombudsman if the matter relates to an administrative action and the Ombudsman may enquire into or investigate whether the action is incompatible with a right set out in the Charter (section 13 (2) *Ombudsman Act 1973*) or they may pursue a complaint to the Independent Broad-based Anti-corruption Commission (IBAC) if the matter relates to police conduct. An individual may seek relief through a court or tribunal only if they can attach a Charter argument to an existing cause of action against a public authority pursuant to section 39 of the Charter.

The impact of the Charter in advancing rights and incentivising public authorities to recognise rights will remain limited as long as the rights enshrined are too difficult, complex and costly to enforce. When the Charter was introduced, then Attorney-General, the Hon Rob Hulls, MP said:

It is intended that there should be no new causes of action in respect of breaches of human rights and that damages should not be awarded for breaches of human rights. This reflects the government's intention that any available remedies should focus on practical outcomes rather than monetary compensation. (Second Reading Speech, 4 May 2006)

We submit that the construction of section 39 has, in practice, failed to ensure practical outcomes are available for breach of Charter rights. We therefore recommend the creation of an independent cause of action for breach of section 38 of the Charter.

The cause of action should give rise to such remedies as are just and appropriate taking into account the circumstances and impact of any breach proven. We refer to section 40C of the *Human Rights Act 2004* (ACT) and, while this is not our recommended approach, we note it is possible to allow for a direct cause of action and a range of remedies without creating a right to damages.

Recommendation 4

Section 39 of the Charter should be replaced and a new provision inserted to create a direct cause of action against a public authority that has breached section 38 of the Charter.

Recommendation 5

Actions for breach of section 38 of the Charter should be able to be heard in the Victorian Civil and Administrative Tribunal, as this is intended as an accessible and low cost forum.

Recommendation 6

In hearing a Charter breach, the Victorian Civil and Administrative Tribunal should be able to make a finding on whether the public authority has breached section 38 and make such orders as it considers just and appropriate to prevent future contravention and redress any loss or injury the individual has suffered.

Recommendation 7

In addition to giving rise to a direct cause of action in the Victorian Civil and Administrative Tribunal, breach of the Charter should constitute stand alone grounds for judicial review, as recommended by the Human Rights Consultation Committee in 2005.

5.2 Restoring VCAT's jurisdiction to hear Charter argument in eviction proceedings

As discussed above, we consider that all Charter breaches should be able to be subject of action in VCAT as a low cost, more accessible jurisdiction.

However, we refer to the detailed submission of Homeless Law in respect of the implications of the decisions in Sudi and *Burgess v Director of Housing* [2014] VSC 648 (Burgess). Prior to these decisions, VCAT regularly heard argument regarding Charter rights in eviction proceedings, thereby giving the Charter arguably its greatest impact on the lives of marginalised Victorians.

Whether or not the Government chooses to strengthen the Charter by introducing a direct cause of action in VCAT and for the reasons elaborated in the Homeless Law submission, we consider the Government should make urgent amendments to the Charter to restore VCAT's capacity to hear Charter arguments in eviction proceedings.

Recommendation 8

The Charter should be amended to provide the Victorian Civil and Administrative Tribunal with jurisdiction to hear Charter arguments in matters arising under the *Residential Tenancies Act 1997* (Vic).

5.3 Effective dispute resolution for Charter complaints

Community lawyers advise that most people who are concerned their protected human rights have not been taken into consideration do not want to litigate as a first resort. Rather, they want a specific practical issue resolved and, sometimes, reassurance that the public authority they believe has disregarded their rights will make changes to ensure they will not treat others the same way in future.

This advice is consistent with the experience of comparable jurisdictions whose human rights legislation includes a direct cause of action, such as the ACT and the United Kingdom, and where experience shows that allowing an independent cause of action does not necessarily "open the floodgates" to litigation.

Victoria has a well established mechanism for enabling alternative dispute resolution in respect of certain complaints, particularly complaints of unlawful discrimination or sexual harassment under the *Equal Opportunity Act 2010* (Vic) or complaints of racial or religious vilification under the *Racial and Religious Tolerance Act 2001* (Vic).

Making this complaints resolution mechanism available for complaints of Charter breaches would provide many people with a clear, accessible and non-litigious path to raise and resolve their issues. It would also serve to remind public authorities of their obligations under the Charter and provide a further incentive to authorities to have good Charter training and Charter-compliant procedures and policies in place.

Recommendation 9

An individual should be able to lodge a complaint with the Victorian Equal Opportunity and Human Rights Commission and access dispute resolution processes equivalent to those available in respect of complaints made under the *Equal Opportunity Act 2010* and the *Racial and Religious Tolerance Act 2001*.

Recommendation 10

In the event the Victorian Equal Opportunity and Human Rights Commission is given a complaint handling function under the Charter, the Commission should be required to report annually on trends and themes evident through complaints and, where possible, on the de-identified facts of significant conciliated cases.

5.4 Retaining the Ombudsman’s functions to investigate certain breaches

The Victorian Ombudsman has an express function to enquire into or investigate whether an administrative action is incompatible with a Charter right, although this power is not contained in the Charter itself. It is our view that this function is not well understood by community advocates or the community more broadly and it has not appeared as a core feature of the Ombudsman’s work in the years since the Charter was introduced.

We note, however, that the current Ombudsman has indicated an intention to incorporate a human rights perspective in the work of her office. This is positive. Certain complaints of systemic disregard for human rights will be appropriate for the kind of investigation and public reporting that the Ombudsman is empowered to conduct. We therefore suggest that the Ombudsman’s powers under section 13(2) of the *Ombudsman Act 1972* be retained and that this power to enquire into or investigate whether an administrative action is incompatible also be referred to in the Charter.

Recommendation 11

The Victorian Ombudsman’s power under section 13(2) of the *Ombudsman Act 1972*, to enquire into or investigate whether an administrative action is incompatible with a Charter right, be retained. For educative purposes this power should also be referred to in the Charter.

Recommendation 12

The Charter should provide for referral of matters between the Victorian Equal Opportunity and Human Rights Commission and the Victorian Ombudsman and should enable information sharing to assist with the conduct of investigations.

5.5 Equipping the community and community advocates to raise Charter issues

Given many community lawyers consulted for this submission expressed concern that the Charter was too complex or their knowledge inadequate to enable them to use the Charter confidently on behalf of their clients, training and education for community advocates is vital.

Immediately after the Charter was introduced, the Victorian Government funded community advocate training and education. If the Victorian Government is committed to building a strong rights culture in this state, providing periodic support for training and education of community and legal advocates will be an important strategy to ensure the Charter is used sensibly, appropriately and consistently.

Recommendation 13

Education and training about the Charter and how it can be used to improve outcomes for disadvantaged and vulnerable clients should be made available for legal professionals, particularly those in the legal assistance sector, and for community sector advocates.

6 Scope of the Charter

6.1 The scope of ‘public authority’

Much confusion remains as to the boundaries of the term “public authority”. One example cited by many community lawyers who seek to use the Charter in advocating for clients is the lack of clarity as to whether community housing providers are bound by the Charter. Several community lawyers observe that while the Charter is useful in dealing with tenancy matters where the landlord is the Office of Housing, it is not currently helpful for clients residing in community housing.

Community lawyers note that on some occasions they have sought to raise Charter arguments with a community housing provider and the agency has rejected the proposition that it is a public authority. The lack of clarity about whether these service providers are bound by the Charter is not beneficial for the providers or users of community housing.

Indeed, beyond community housing providers, it is clearly in everyone’s interests for the scope of the Charter’s obligations to be clear. Having said this, the definition must be suitable to capture the diverse arrangements by which government uses the private and community sectors to deliver public services and we do not support an exhaustive list of public authorities, as recommended by the SARC 2011 review.

The ACT’s *Human Rights Act 2004* seeks to provide greater clarity about the scope of the obligations it contains, and provides a non-exhaustive list of functions that should be taken to be of a public nature (at section 40A(c)). These include:

- (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.

Recommendation 14

The definition of “public authority” should be amended by specifying certain functions that are “taken to be of a public nature” similar to the *Human Rights Act 2004* (ACT).

Recommendation 15

Community housing providers registered under the *Housing Act 1983* (Vic) should be declared by regulation to be public authorities for the purposes of the Charter pursuant to section 4(1)(h) of the Charter.

Recommendation 16

Government contracts for the delivery of public services should include a requirement that the contractor agree to be bound by the Charter.

6.2 Allowing private organisations to opt in

The Charter has an appropriate focus on binding the state and requiring the state - and agencies that perform public functions on behalf of the state - to recognise and respect the human rights of individuals. Respect for individual human rights, however, should not be the sole prerogative of government, and there may be some private entities, including charitable organisations and for profit corporations that want to operate in a way consistent with human rights and to be bound by the Charter.

Recommendation 17

The Charter should be amended to include an “opt in” provision to enable private entities to voluntarily decide to be bound by the Charter.

6.3 Removal of certain exemptions under section 4(1)(k)

Prisoners are uniquely impacted by decisions of public authorities by virtue of their status, and any further derogation of their rights or recognition under the Charter should only be taken with great precaution.

The Adult Parole Board, the Youth Residential Board and the Youth Parole Board have been exempted from the Charter until 2023, and it is our submission that this exemption should be revoked. These Boards, particularly the Adult Parole Board, exercise a broad and essentially non-reviewable power to grant parole to prisoners after their non-parole period of their sentence is served. Although the Parole Board publishes the factors taken into consideration, reasons for refusal of parole or not usually provided to a prisoner. There is no positive obligation on the Parole Board to provide reasons for their decisions, except where parole is revoked. There is no formal avenue for appeal of a decision of the Parole Board, and the case law indicates that the courts are reluctant to impinge on the Board’s broad discretion under the powers of judicial review (See for example *Kotzmann v Adult Parole Board Victoria & Anor* [2008] VSC 356 and *Chimirri v Adult Parole Board* [2008] VSC 187).

Allowing a prisoner to serve some of their sentence in the community, under the supervision of the Parole Board, provides a supported avenue for their re-integration into the community, where the prisoner can subject to supervision, monitoring and a requirement to participate in rehabilitative programs. We consider the removal of this exemption would strengthen the role of the Parole Board and, ultimately, the safety of our community.

Recommendation 18

The Victorian Government should reconsider and revoke the current exemption whereby the Adult Parole Board, Youth Parole Board and Youth Residential Boards are deemed not to be bound by section 38 of the Charter.

6.4 Inclusion of additional rights

Economic, social and cultural rights and civil and political rights have long been accepted as interdependent and indivisible. Australia has ratified the International Covenants for both sets of rights. Whether, or when, a domestic human rights act such as the Charter should include economic, social and cultural rights as well as civil and political rights has therefore been a key question since the Victorian Government began formal consultation on a human rights instrument in 2005.

The community consultation conducted by the Human Rights Consultation Committee prior to the introduction of the Charter found a strong level of community support for addressing economic, social and cultural rights. When introducing the Charter into Parliament, then Attorney-General, the Hon Rob Hulls, MP said:

Victoria's experience of a formal human rights instrument is only just beginning. It will be a matter for us as a community to determine, in light of Victoria's experience with this charter, whether further rights should be protected by the charter in the future. (Second Reading Speech, 4 May 2006)

Nine years on and eight years after the Charter took effect, we consider it is time to begin expanding the range of rights protected by the Charter.

For people facing social and financial disadvantage, economic, social and cultural rights are particularly important. Indeed, while income, housing and health needs are not met it is difficult to exercise one's other rights including one's civil and political rights.

For this reason, economic, social and cultural rights already strongly feature in the kinds of concerns that legal and non-legal advocates take up with public authorities or through their work before tribunals and courts. Issues around housing and homelessness are prominent as are issues that relate, directly or indirectly, to health and education rights.

Without economic, social and cultural rights in the Charter and given that issues relating to possible breaches of such rights feature prominently in the casework before advocates, these advocates are required to find ways to try and bring economic, cultural and social into consideration through the 'backdoor' by linking the breach of an economic, social or cultural right with a breach of a civil and political right. This results in advocates having to engage in clumsy, unnecessary and time-consuming legal manoeuvring.

The reality is that certain economic, social and cultural rights are already recognised and protected in Victorian law, such as in education and residential tenancy laws. This fact should reassure government that enshrining economic, cultural and social rights will neither open a new path by which the courts can comment on government resource allocation nor result in excessive litigation.

We note that the ACT has adopted a staged and gradual approach to rights recognition. Initially the *Human Rights Act* of that territory focused on civil and political rights. The *Human Rights Act* has since been amended to include the right to education as a first step in the direction of including economic, cultural and social rights. This approach should be emulated in Victoria.

The introduction of certain economic, cultural and social rights into the Charter would increase its positive impact on disadvantaged and marginalised Victorians, expand the "dialogue model" to promote dialogue on a broader range of important rights and would place these rights on an equal footing with civil and political rights.

Recommendation 19

The Victorian Government should consider expanding the Charter to include additional rights, in particular economic, social and cultural rights, recognising that steps to this end have been taken in the ACT.

7 Strengthening the human rights dialogue on new legislation

As indicated in section 3 above, many community lawyers feel that the SARC process does not allow adequate time for full community consultation and engagement, and that this reduces the effectiveness of the SARC process in scrutinising new legislation.

It is important to retain the additional process of consultation and scrutiny provided by SARC, even if advocates do not always consider the process to be as rigorous as would be ideal. To strengthen the SARC process, we recommend a longer opportunity for SARC to receive and consider submissions on Bills that raise significant human rights issues.

Recommendation 20

The Charter should be amended to empower the Scrutiny of Acts and Regulations Committee to recommend that the two week adjournment be extended for a further period of not less than two weeks where a Bill raises significant Charter issues.

8 Further legislative review

The terms of reference for this review seek submissions as to whether any further legislative review of the Charter is necessary.

While any government may review a statute or scheme at any time, we believe providing for regular legislative review is appropriate. Legislative review will ensure the Charter is re-visited periodically, awarding it status as a living, developing instrument that should be regularly updated to strengthen protection of human rights, reflect changes in community values and further embed a rights dialogue between the executive, Parliament and the judiciary.

Recommendation 21

The Charter should be the subject of further periodic legislative review to ensure that successive governments re-visit and review the Charter in consultation with the Victorian community.