

2015 Review of the Charter of Human Rights

SUBMISSION



Contact:

Laura Helm, Policy Lawyer
T 03 9607 9380 F 03 9602 5270
lhelm@liv.asn.au
www.liv.asn.au

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INTRODUCTION

The Law Institute of Victoria (LIV) welcomes the opportunity to make this submission to the Review of the *Charter of Human Rights and Responsibilities 2006 (Vic)* (the Charter Review 2015).

The LIV has long been a supporter of the Charter, including having contributed to the Human Rights Consultation Committee process in 2005 that led to the enactment of the Charter and the 2011 inquiry and review of the Charter conducted by the Scrutiny of Acts and Regulations Committee (SARC).

The Charter has been an important first step towards better protection and promotion of human rights in Victoria. During its eight years of operation, the Charter has had a positive impact on human rights in Victoria. The Charter has:

- *Shaped the law and policy development process* – human rights are considered throughout the legislative drafting process via the mandatory Charter Impact Section on Cabinet documents for Approval in Principle to draft a Bill; the Human Rights Certificates that are prepared for new regulations and the Practice Note ‘*Changes to Drafting Practices for Statement of Compatibility*’ circulated by the Secretary of the Department of Justice in September 2013;¹
- *Ensured that Parliament takes human rights into account when passing laws* – through the requirement to table Statements of Compatibility and the assessment of legislation by the bipartisan Scrutiny of Acts and Regulations Committee for compatibility with human rights;²
- *Generated a greater awareness of human rights within public bodies* – the rights protected by the Charter (Charter Rights) are incorporated in key policies, through guidelines and initiatives, and in business plans for many public authorities;³
- *Improved decision-making in public authorities* – by ensuring that public decision-makers (including courts and tribunals when acting in an administrative capacity) must consider and act compatibly with human rights. For example, the Department of Human Services’ public housing policy and procedure manuals now include information relevant to Charter obligations and clarify when, and how, Charter Rights may arise in day-to-day decision-making and the delivery of housing services;⁴
- *Been an important advocacy tool for people whose rights are at risk of being violated* – for example, advocates for a woman with a disability were successful in persuading her local council to consider her Charter Rights and build a footpath ramp outside her house;⁵
- *Directed courts to interpret legislation compatibly with human rights (so far as possible consistent with its purpose)* – for example, in *Nigro v Secretary to the Department of Justice*⁶ the Victorian Court of Appeal considered how the Charter Rights to freedom of movement, privacy and liberty affect the interpretation of provisions in the *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* for supervision orders; and

¹ See Victorian Equal Opportunity and Human Rights Commission, *2013 Report on the operation of the Charter of Human Rights and Responsibilities*, 57 (VEOHRC report).

² See *Charter of Human Rights and Responsibilities 2006 (Vic)*, ss28 and 30.

³ Including Department of Premier and Cabinet, Department of Environment and Primary Industries, Department of Transport, Planning and Local Infrastructure including Public Transport Victoria, Department of Justice, Department of Health, Department of Education and Early Childhood Development; see VEOHRC report, above n 1, 33.

⁴ See VEOHRC report, above n 1, 37

⁵ See Case studies prepared by the Victorian Equal Opportunity and Human Rights Commission at <http://www.humanrights.vic.gov.au/>.

⁶ [2013] VSCA 213.

- *Provided remedies for individuals when their human rights have been breached, including:*
 - a public housing tenant who successfully challenged a warrant for possession, when faced with eviction;⁷
 - a prisoner who successfully gained access to IVF treatment;⁸
 - a person with a mental illness who successfully appealed a decision to appoint an administrator;⁹ and
 - a person who was charged with a criminal offence successfully had evidence excluded on the basis that it was collected in a way that breached his human rights.¹⁰

This submission highlights, however, that there are a number of gaps and issues in the current operation and application of the Charter. A common theme is uncertainty about the Charter's legal application, based on the complexity of Charter jurisprudence and a number of unresolved questions of law. This uncertainty undermines the Charter's ability to protect and promote human rights in Victoria.

This submission provides responses to the Charter Review 2015 terms of reference and identifies:

- Gaps and issues under the current system, based on an analysis of the LIV Charter Case Audit, prepared with assistance from Ashurst, and the experience of members of the Administrative Law and Human Rights Section who use the Charter in legal practice;
- Possible measures to address these issues; and
- Recommendations to improve the operation of the Charter and to strengthen its ability to protect and promote human rights in Victoria, within the confines of constitutionality.

The LIV's recommendations to ensure that the Charter is capable of effectively protecting and promoting human rights are made on the basis that an effective Charter should be a clear and accessible law that:

1. Supports development of a human rights culture within government and society;¹¹
2. Effects systemic change in our laws and legal system to protect and promote human rights;¹²
3. Provides a framework for human rights decision-making and balancing competing rights, consistent with international human rights standards;¹³ and
4. Provides accountability for breaches of human rights and access to meaningful remedies.

The submission focuses largely on new issues arising since the 2011 review, although we repeat some past recommendations where there have been no substantial developments.

⁷ Eg *Director of Housing v Sudi* (2011) 33 VR 559 (*Sudi*) and *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648 (*Burgess*).

⁸ Eg *Castles v Secretary to the Department of Justice* [2010] VSC 310 (*Castles*).

⁹ Eg *P J B v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327.

¹⁰ Eg *Director of Public Prosecutions v Kaba* [2014] VSC 52 (*Kaba*).

¹¹ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (November 2005): during their Consultation the Committee found that 'the idea of a community based upon a culture of values and rights is one that [they] heard again and again' (ii) (Human Rights Consultation Committee Report).

¹² Article 2 of the *International Covenant on Civil and Political Rights* (ICCPR) contains a positive obligation on states to take the necessary steps to 'implement laws that are necessary to implement the rights in the Covenant: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2) (ICCPR).

¹³ See Department of Justice, *Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria* (July 2008) 3-7.

RECOMMENDATIONS

Expanding avenues for investigation and resolution of human rights complaints

1. The Victorian Equal Opportunity and Human Rights Commission (the Commission) should be given jurisdiction to provide dispute resolution services for human rights disputes under the Charter, modelled on Part 8 of the *Equal Opportunity Act 2010* (Vic) (EOA).
2. Individuals should be able to bring legal proceedings under the Charter, irrespective of whether they have brought a dispute to the Commission (see further recommendations 19 and 20 below regarding legal proceedings).
3. The Ombudsman should retain her current jurisdiction to enquire into, or investigate, whether an administrative action is incompatible with a human right set out in the Charter. This should be stated expressly in the Charter.
4. Section 13(4) of the *Ombudsman Act 1977* (Vic) (Ombudsman Act) should be amended to include the administrative actions of all functional public authorities under the Charter.
5. The Commission should be given powers to investigate serious or systemic human rights breaches, based on Part 9 of the EOA prior to the 2011 amendments to that Act.
6. The Charter should clearly set out the respective functions of the Ombudsman and Commission to deal with human rights complaints and should provide for referral of matters to the most appropriate body.
7. The Charter should provide for information sharing between the Ombudsman and Commission to assist with the conduct of investigations.
8. Review the jurisdiction of the Independent Broad-based Anti-Corruption Commission to refer complaints to Victoria Police.

Strengthening the role of SARC

9. Section 30 of the Charter should be amended to enable SARC to request an adjournment of parliamentary debate for a specified period (e.g. four weeks) where it considers that a Bill raises a human rights matter of significant public importance.
10. The Charter should provide the public an opportunity to make submissions to SARC on the human rights compatibility of a Bill where it raises significant human rights issues.

Providing sufficient resources

11. Sufficient resources should be allocated to ensure effective implementation of the Charter across government, including for education and complaint mechanisms, to ensure the sustainable development of a human rights culture in Victoria.

Clarifying the application of the Charter to private entities

12. The Charter should be amended to include a provision on the effect of outsourcing, to clarify that a public authority contract may provide for the contracted service provider to be bound by the Charter, (similar to s17 of the *Privacy and Data Protection Act 2014* (Vic)).
13. The definition of public authority in s4 of the Charter should be extended to include:
 - a. Entities that agree to be bound by the Charter in a contract or funding agreement with a public authority; and
 - b. Entities that agree to be bound by the Charter by joining an online register of public authorities, to be managed by the Commission.
14. The Charter should include a non-exhaustive list of functions that are taken to be functions of a public nature (similar to s40A(c) of the *Human Rights Act 2004* (ACT)).

15. Guidance should be provided on the meaning of the function of 'public housing' to reflect the different ways social housing is managed in Victoria.
16. Public authorities should review contracts with service providers exercising functions of a public nature to require compliance with the Charter.
17. The Charter should require entities to bear the burden of resolving the question of whether they are a public authority, for example, by:
 - a. reversing the onus of proof for entities performing one or more of a list of functions of a public nature; and
 - b. legislating a presumption that legal costs associated with resolving a dispute about whether an entity is a public authority under s4 will be borne by the entity.

Creating a direct cause of action

18. Section 39 should be replaced with a clear and accessible provision establishing that breach of s38:
 - a. is a ground for judicial review in the Supreme Court;
 - b. is an unlawful act that can be raised either in a dispute lodged with the Commission, or directly with VCAT; and
 - c. can be raised in any other legal proceedings brought by or against the person.
19. The Charter should confer VCAT with:
 - a. original jurisdiction to consider breaches of s38 of the Charter; and
 - b. an express power to provide any appropriate relief or remedy for breach, including damages.

Clarifying the statutory interpretation obligation

20. Section 32 (1) should be amended to clarify that it creates:
 - a. a new rule of statutory interpretation that imposes a positive obligation to interpret statutory provisions in the most human rights compatible way, so far as it is possible to do so consistent with the purpose of the statutory provision.
21. Section 32(2) should be strengthened to provide that, in interpreting a statutory provision, courts must consider relevant international law.

Clarifying how the question of 'proportionality' relates to statutory interpretation and public authority obligations

22. The Charter should be amended to clarify that s7(2) applies to the application of Part 3 of the Charter (and specifically ss32(1) and 38(1)).
23. Section 7 should be amended to refer to the concept of 'incompatibility' to provide guidance on when a limitation will be incompatible with a human right.
24. Section 7(2)(a) should be amended to refer to the nature of the right 'including under international law'.
25. The Charter should be amended to expressly confirm that where a person demonstrates that an act of a public authority limits a human right, the public authority has the onus of proving that the limit is reasonable and justified under s7(2).

Clarifying when courts and tribunals are public authorities

26. Tribunals should be public authorities under the Charter for all purposes. They should be listed as public authorities in s4(1) with no restrictions.
27. Tribunals specifically excluded from the Charter's application, such as the Adult Parole Board, should be subject to the Charter.
28. Section 6(2)(b) of the Charter should be clarified to require courts to give effect to any rights under Part 2 of the Charter which relate to court or tribunal proceedings.
29. Courts and tribunals should develop a process to notify Charter cases to a central register so that, unless they are restricted, cases are reported or otherwise made available to the public.

Repealing the statutory override provision

30. The override provision in s31 should be repealed.

Ensuring consistent use of terminology across the Charter

31. Section 36 should be amended to replace the term inconsistent with 'incompatible' in accordance with other provisions elsewhere in the Charter.

Supporting parties to raise the Charter in legal proceedings

32. The requirement in s35 to give notice to the Attorney General and the Commission should be retained.
33. The Supreme Court should amend Practice Note No 3 of 2008 to clarify that there is no requirement to adjourn proceedings when a notice is given under s35 and the County Court should issue a similar Practice Note.
34. The Commission and Attorney-General should issue guidelines to inform legal practitioners about how and when they will respond to s35 notices.
35. The right of intervention of the Attorney-General and Commission should be retained. However, ss 34 and 40 should be amended to provide the Court with the power to place conditions on that intervention at any time after the intervention, including conditions as to:
 - a. the matters on which the interveners can submit;
 - b. costs; and
 - c. the timing of the taking any step in the proceeding, including the hearing.

Expanding the application of the Charter

36. Consider whether the Charter should be enhanced by:
 - including all human rights and responsibilities contained in international human rights instruments to which Australia is a party, and instruments Australia adopts in the future, including economic, social and cultural rights, rights of women and children and the right to self-determination;
 - requiring regular reporting by, and auditing of, public authorities for compliance with human rights; and
 - repealing s48 so that no laws are excluded from the Charter's application.

ENHANCING THE CHARTER

1 b. The functions of the Victorian Equal Opportunity and Human Rights Commission under the Charter and the Victorian Ombudsman under the Ombudsman Act 1973, especially with respect to human rights complaints

Recommendations

1. The Commission should be given jurisdiction to provide dispute resolution services for human rights disputes under the Charter, modelled on Part 8 of the EOA.
2. Individuals should be able to bring legal proceedings under the Charter, irrespective of whether they have brought a dispute to the Commission (see further recommendations 19 and 20 below regarding legal proceedings).
3. The Ombudsman should retain her current jurisdiction to enquire into or investigate whether an administrative action is incompatible with a human right set out in the Charter. This should be set out expressly in the Charter.
4. Section 13(4) of the *Ombudsman Act 1977* (Vic) (Ombudsman Act) should be amended to include the administrative actions of all functional public authorities under the Charter.
5. The Commission should be given powers to investigate serious or systemic human rights breaches, based on Part 9 of the EOA prior to the 2011 amendments to that Act.
6. The Charter should clearly set out the respective functions of the Ombudsman and Commission to deal with human rights complaints and should provide for referral of matters to the most appropriate body.
7. The Charter should provide for information sharing between the Ombudsman and Commission to assist with conduct of investigations.
8. Review the jurisdiction of the Independent Broad-based Anti-Corruption Commission to refer complaints to Victoria Police.

Summary

The Charter should be enhanced by:

- giving the Victorian Equal Opportunity and Human Rights Commission (the Commission) additional functions (beyond its current advisory and educative functions), to provide alternative dispute resolution services under the Charter, with a focus on resolving individual complaints about breach of s 38 of the Charter; and
- amendments to clarify the scope of the Ombudsman's complaint handling and investigation powers, and their interaction with the Commission's proposed new dispute resolution function, with a focus on achieving systemic changes in policies and procedures.¹⁴

What are the gaps and issues under the current system?

The ability to bring human rights complaints plays an important role in providing accountability for breaches of human rights, and can provide access to meaningful remedies for individuals without the need to litigate in

¹⁴ *Ombudsman Act 1979* (Vic), s14.

the courts. Investigation of complaints can also affect systemic change in policies and procedures to better protect human rights and contribute to the development of a human rights culture within government and society.

However, investigation of complaints and conciliation of disputes will only be effective in achieving these goals if complaint mechanisms are accessible and easy to navigate. They must be capable of leading to meaningful remedies and must be supported by sufficient investigative powers.

The current system has a number of gaps, which lessen the effectiveness of the Charter, including the following:

1. Limits to the Ombudsman's and Commission's jurisdictions to receive complaints

While the Ombudsman plays an important role in investigating human rights complaints under the Charter, there are significant gaps in her jurisdiction. These gaps include:

- no jurisdiction over police – while the Independent Broad-based Anti-Corruption Commission has jurisdiction over police conduct complaints¹⁵ and its functions include ensuring that police and protective services officers have regard to the human rights set out in the Charter,¹⁶ the vast majority of matters are referred back to Victoria Police for investigation. This raises concerns that need to be addressed through changes to the IBAC Act, including: the effectiveness of investigation of such complaints; the perception by complainants about the effectiveness of investigation of complaints about police by police; and the compatibility of investigation by a non-independent body of such complaints with human rights so that human rights complaints against police might not be investigated independently.¹⁷
- the requirement for an 'administrative action' to trigger a complaint (in s13(2)) – which might limit the Ombudsman's power to investigate complaints about, for example, taking a step under an outsourcing contract that is incompatible with human rights.
- private contractors and other functional public authorities under the Charter, where they fall outside the outside the definition of authority in ss2 and 13(4) of the Ombudsman Act – which limits accountability mechanisms for human rights breaches when government services are performed under contract by private providers.

These gaps mean that not all human rights related complaints can be investigated, either at all or by the Ombudsman, even though they raise valid issues under the Charter. Further, the Ombudsman cannot provide remedies for human rights breaches (although she can make recommendations). While an Ombudsman investigation will provide effective remedies for some people (sometimes through informal inquiries), others will be unable to obtain a remedy that is meaningful to their circumstances and proportionate to the human rights breach that has occurred.

The Commission currently has a limited role in human rights complaints, under the *Equal Opportunity Act 2010* (EOA) and the *Racial and Religious Tolerance Act 2001* (RRTA). Under these Acts the Commission has free and impartial dispute resolution services under which the Commission works with complainants and respondents in both the public and private sector to resolve complaints about unlawful discrimination, sexual harassment, racial and religious vilification and victimisation. Resolution can include remedies agreed by the parties, which can include compensation.

2. The Commission has no investigative powers

The Ombudsman has powers to require attendance and provision of information during an investigation into a human rights complaint or own motion investigation. The Commission has no equivalent powers, either

¹⁵ Sections 52, 5 *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) (IBAC Act).

¹⁶ Section 15(3)(b)(iii), IBAC Act.

¹⁷ Independent Broad-based Anti-corruption Commission Victoria, Annual Report 2013-14 (Complaints and notifications) < <http://www.ibac.vic.gov.au/publications-and-resources/annual-report-2013-14>>. The LIV has previously raised these issues in a submission on the Integrity Legislation Amendment Bill 2011: < <http://www.liv.asn.au/getattachment/dc17f547-9695-4cb2-a1fa-341d6d26d001/Integrity-Legislation-Amendment-Bill-2014.aspx>>.

under the EOA or the Charter.¹⁸ This significantly hampers the Commission's ability to investigate systemic discrimination.

3. Confidentiality provisions make it difficult to identify trends

The Background Brief on the Terms of Reference highlights secrecy and confidentiality provisions that limit the ability of the Commission and Ombudsman to share information about complaints. This has the effect that:

- efforts are duplicated where both the Commission and Ombudsman are dealing with complaints regarding the same factual situation; and
- there is less capacity to identify trends and potential systemic human rights breaches.

What measures would address these issues?

The Charter's ability to effect systemic change in our laws and legal system to protect rights, to provide accountability for breaches of human rights and to provide access to meaningful remedies could be significantly strengthened by amendments that:

- make it easier for individuals to bring human rights complaints, to facilitate the resolution of disputes between individuals and public authorities about possible human rights breaches, without the need to bring costly and time-consuming litigation;
- provide access to a range of meaningful remedies that will adequately address the needs of individuals and effectively remedy human rights breaches; and
- ensure that human rights complaint outcomes contribute to broader efforts to protect human rights and do not prevent investigation of systemic human rights issues.

These objectives could be achieved by broadening the Ombudsman's jurisdiction and/or the Commission's jurisdiction to receive, investigate and facilitate resolution of complaints about possible breaches of the Charter.

1. Clarifying the Ombudsman's jurisdiction

It would be problematic to expand the Ombudsman's jurisdiction to receive human rights complaints beyond administrative actions, because this would lead to an inconsistency between human rights based and non-human rights complaints and investigations. Most complaints to the Ombudsman, we understand, are made in general terms and do not require the complainant to articulate alleged human rights breaches. Investigations may include consideration of a mix of human rights and other concerns. It would therefore lead to unnecessary complexity to broaden the Ombudsman's jurisdiction for some complaints and not others.

Similar complexities would arise if the Ombudsman's jurisdiction were expanded to allow human right complaints against police, but not other complaints. This could lead to dual investigations, where the Ombudsman inquires into the human rights aspects of a complaint against police, while IBAC or Victoria Police investigate alleged misconduct arising on other grounds.

The Ombudsman's jurisdiction under s 13(4) of the Ombudsman Act (to investigate administrative actions of bodies that are not authorities, but have powers or functions conferred by an authority) could be extended to include the administrative actions of all functional public authorities under the Charter. This would bring contracted service providers and other functional authorities within the Ombudsman's jurisdiction only for the purpose of administrative decisions and would therefore be consistent with the Ombudsman's functions.

2. Expanding the Commission's functions

Expanding the Commission's functions to offer services designed to facilitate the resolution of disputes about alleged human rights breaches would provide an alternative avenue to bringing legal proceedings or making

¹⁸ The *Equal Opportunity Amendment Act 2011* (Vic) significantly reduced the capacity of the Commission to undertake investigations by repealing powers to compel production of documents and to compel attendance.

a complaint to the Ombudsman. Unlike complaint handling, which leads to a report and recommendations (for example, about whether an administrative action was taken contrary to law, or was unreasonable, unjust, oppressive or discriminatory), dispute resolution would be focused on facilitating an agreed outcome between an individual and a public authority.

An informal, low or no cost dispute resolution service could have a number of benefits in terms of encouraging and facilitating greater use by Victorians of the Charter. It could potentially lead to faster resolution of disputes and a broader range of potential outcomes for individuals. There are many potential barriers and disincentives to individuals seeking to resolve human rights complaints by way of legal proceedings, including their cost, complexity and delay, the potential adverse cost risk of bringing unsuccessful litigation and limitations in terms of available remedies.

The Commission already performs dispute resolution under Part 8 of the EOA and therefore has expertise in resolving disputes between individuals and government agencies. Through its advisory and education functions, the Commission already has significant expertise on the Charter, which could be transferred into its dispute resolution functions. The Commission already works with public authorities, including Victoria Police, and would not be fettered by jurisdictional limits relating to administrative actions.

Dispute resolution outcomes, however, should not prevent investigation of serious human rights breaches or systemic human rights violations. Public authorities should not be encouraged to settle disputes to avoid scrutiny of their practices. It is therefore important that any new human rights complaint dispute resolution functions contribute to the identification of trends to monitor for serious systemic issues.

3. *Strengthening the Commission's investigation powers*

The Commission has no investigation powers under the Charter. The Commission could be given an investigation power under the Charter, similar to s127 of the EOA. To be effective, however, this should be accompanied by appropriate powers to compel the production of documents and to require witnesses to appear.

Strong investigation powers would ensure that the Commission could investigate serious and systemic human rights breaches that are currently outside the jurisdiction of the Ombudsman (for example, functional public authorities not within the Ombudsman's jurisdiction and/or where there is no administrative action). Provisions could prevent dual investigations through referral powers between the Ombudsman and Commission and changes to secrecy and confidentiality provisions to allow more information sharing.

To ensure consistency between the Commission's human rights and anti-discrimination jurisdiction, we recommend that the introduction of investigation powers in the Charter be accompanied by the reintroduction of Part 9 of the original version of the EOA, prior to the 2011 amendments. This would mean that discrimination under the Charter would have the same meaning as under the EOA (s3 of the Charter).

1 c. The effectiveness of the scrutiny role of the Scrutiny of Acts and Regulations Committee

Recommendations

9. Section 30 of the Charter should be amended to enable SARC to request an adjournment of parliamentary debate for a specified period (e.g. four weeks) where it considers that a Bill raises a human rights matter of significant public importance.
10. The Charter should provide the public an opportunity to make submissions to SARC on the human rights compatibility of a Bill where it raises significant human rights issues.

Summary

The role of the Scrutiny of Acts and Regulations Committee (SARC) to consider human rights compatibility of Bills should be strengthened by enabling SARC to request an adjournment of parliamentary debate for a specified period (e.g. four weeks) where it considers that a Bill raises a significant human rights issue, in order to allow consideration of public submissions.

What gaps and issues under the current system should be addressed?

The LIV addressed the issue of the effectiveness of the scrutiny role of SARC in our previous 2011 submission and our position remains unchanged.

SARC's process of reviewing Bills before Parliament and reporting as to whether they are incompatible with human rights (s30 Charter) is often a very effective way of ensuring that human rights issues are appropriately raised and discussed.

However, this process could be improved by:

1. Ensuring that SARC has adequate time to consider and report on legislation before it is debated and passed by Parliament. We recommend that s30 of the Charter be amended to allow SARC to request adjournment of parliamentary debate for a specified period (for example, four weeks) where it considers that a Bill raises a human rights matter of significant public importance. Parliament would retain the discretion to reject this request.¹⁹
2. Encouraging the public to be involved in the process of Parliamentary consideration of potential human rights impacts of Bills. This could be achieved by providing the public with a formal opportunity under the Charter to make submissions to SARC on the human rights compatibility of a Bill where it raises a human rights matter of significant public importance. Public submissions should be documented in SARC's report to Parliament. Greater resourcing would need to be provided to SARC to enable it to receive and report on public submissions.

¹⁹ This would ensure that the amendment would not impose limitations on parliamentary processes and should address SARC's concerns about similar suggestions outlined in: SARC, *Review of Charter of Human Rights and Responsibilities Act 2006* (2011) 92 (SARC Report).

1 d. The development of a human rights culture in Victoria, particularly within the Victorian public sector

Recommendation

11. Sufficient resources should be allocated to ensure effective implementation of the Charter across government, including for education and complaint mechanisms, to ensure the sustainable development of a human rights culture in Victoria.

What is needed to develop a human rights culture in Victoria?

The Charter creates a common language and platform for shared understanding about human rights in Victoria – but for a human rights culture to permeate the Victorian public sector, a change in attitudes, values and behaviours about the importance of human rights and their role in public policy development, administrative decision-making and law making is required.

The LIV believes that amendments to enhance the Charter and to strengthen the operation of the Charter, as outlined in this submission, will contribute significantly to a human rights culture by making the Charter more accessible and easier to apply.

Based on research in the United Kingdom,²⁰ the LIV believes that other measures needed to develop a strong human rights culture are:

- **Leadership from government:** a consistent vision confirming the central importance of the Charter across all arms of government.
- **Education:** raising awareness and providing information to enable all types of government 'duty-holders' to engage with and apply the Charter in their work (duty holders being: elected representatives and unelected government officers and employees developing and making laws and policy; public authorities (across central government, statutory authorities and outsourced service providers) and courts (including judicial officers, prosecutors and lawyers)).
- **Accountability:** enforcement and scrutiny to create an incentive for cultural change, extending existing checks and balances on executive power and providing individuals with a clear avenue to seek meaningful remedies for breaches.

These measures will require both resources and commitment from government to ensure the cultural change is long term and sustainable.

²⁰ See Knott et al, 'Achieving Cultural Change: A Policy Framework' (January 2008), Cabinet Office (United Kingdom).

1 e. The application of the Charter to non-State entities when they provide State-funded services.

Recommendations

12. The Charter should be amended to include a provision on the effect of outsourcing, to clarify that a public authority contract may provide for the contracted service provider to be bound by the Charter, (similar to s17 of the *Privacy and Data Protection Act 2014* (Vic)).
13. The definition of public authority in s4 of the Charter should be extended to include:
 - a. Entities that agree to be bound by the Charter in a contract or funding agreement with government; and
 - b. Entities that agree to be bound by the Charter by joining an online register of public authorities, to be managed by the Commission.
14. The Charter should include a non-exhaustive list of functions that are taken to be functions of a public nature (similar to s40A(c) of the *Human Rights Act 2004* (ACT)).
15. Guidance should be provided on the meaning of the public function of 'public housing' to reflect the different ways social housing is managed in Victoria.
16. Public authorities should review contracts with service providers exercising functions of a public nature to require compliance with the Charter.

Summary

The Charter should be amended to clarify its application to non-State entities.

What are the gaps and issues under the current system?

When introduced, the Charter was clearly intended to apply broadly to non-state entities performing public functions, reflecting the reality of modern government that many essential government services (such as education, housing and health) are outsourced to the private sector.²¹

The application of the Charter to private state-funded entities and other non-government organisations performing public functions is hampered, however, by two main factors:

1. Uncertainty about the meaning of 'functions of a public nature' in s4

The 2011 SARC report suggested that there is some uncertainty about when service providers will be considered to be functional public authorities.²² Primarily, uncertainty has centred on whether functions are of a 'public nature' (as defined in s 4(2) – (3)) and, in particular, as a matter of statutory construction, what constitutes 'functions of a public nature'.

Outsourcing usually occurs under a contract between a statutory body or department and the private entity that provides the public service. In carrying out contractual duties to the State, a private entity will often have to make decisions or deliver services that impact individuals. If decisions made by a private entity are an

²¹ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (November 2005) 57-59; Second Reading Speech (Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls) (Second Reading speech) 1294.

²² SARC Report, above n 19, 106.

exercise of a delegated statutory power, judicial review remedies will be available.²³ Outside of a formal delegation, however, the law is currently unsettled in Australia about:

- whether and to what extent judicial review applies to the exercise of ‘governmental’ but non-statutory powers by private entities (the application question);²⁴ and
- the statutory construction of ‘functions of a public nature’.

Section 4 of the Charter avoids the application question by providing an expansive statutory definition of ‘public authority’ which includes both ‘core’ and ‘functional’ public authorities. In *Metro West v Sudi*,²⁵ Bell J held that the application of s4(1)(c) involves two questions:

- (a) whether the functions being exercised are of a public nature (which turns on the nature of the functions, and whether they are being exercised in the public interest, not on the nature of the entity); and
- (b) whether the functions are being exercised on behalf of the State or a public authority (which turns on the relationship between them and the entity, and whether there is some arrangement under which the entity, in exercising the functions, is acting as their representative or for their purposes in a practical sense).

In that case, both were fulfilled by Metro West.

The LIV considers that s4 is likely to capture most private organisations that are delivering services under contract with a ‘core’ public authority. However, we understand that continuing uncertainty about the meaning of ‘functions of a public nature’ has led, in practice, to some service providers (such as social housing providers) taking the position that they are not public authorities under the Charter.

The lack of clarity about who and what is a public authority:

- reduces the Charter’s ability to contribute to development of a human rights culture in the provision of public services; and
- makes it more difficult for individuals to raise potential breaches of their human rights, because they do not know if the entity is bound by the Charter.

2. Section 39 requires a piggy back cause of action to bring legal proceedings

The current uncertainty in administrative law about whether and to what extent the decision of private entities can be subject to judicial review²⁶ seriously impacts on an individual’s ability to challenge acts and decisions of functional public authorities under the Charter because of the requirement in s 39 for a ‘piggy back’ cause of action.

Under s 39, individuals seeking to challenge an act or decision of a public authority on Charter grounds must be able to identify a right to seek relief or a remedy in respect of the act or decision independently of the Charter. A plaintiff must therefore be able to identify another source of unlawfulness of the relevant act or decision of the entity, such as a breach of the EOA²⁷ or jurisdictional error or another ground of judicial review.²⁸ This limitation under the Charter is discussed in detail below.

The limitations caused by s39 raise particular problems where the act or decision under challenge has been made by a private entity. While the contractual arrangement between the relevant private entity and statutory body or Department may bring the entity within s4 (and therefore within the obligations under s38), it will only be possible to challenge a decision that has not given proper consideration to human rights or an act that is incompatible with human rights if there is another cause of action.

²³ *Griffith University v Tang* (2005) 221 CLR 89 (*Tang*).

²⁴ See eg *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 (*NEAT*); *Tang*; *Mickovski v Financial Ombudsman Service Limited* [2012] VSCA 185; E Kyrou “Judicial Review of Decisions of Non-Governmental Bodies exercising Governmental powers: is Datafin part of Australian law” (2012) 86 *ALJ* 20.

²⁵ [2009] VCAT 2025.

²⁶ See the cases at above n 24.

²⁷ See *Goode v Common Equity Housing* [2014] VSC 585 (*Goode*).

²⁸ *Director of Public Prosecutions v Debono* [2013] VSC 407 (*Debono*).

Whether judicial review proceedings can be commenced as the 'piggy back' cause of action will depend on whether the act or decision of the public authority is amenable to judicial review.

What measures would address these issues?

1. Clarify the effect of outsourcing

The LIV believes that the simplest way to clarify that the Charter applies to entities that provide state-funded services is for the Charter to state the effect of outsourcing and funding agreements on an entity's status under the Charter.

A provision could be modelled on s17 of the *Privacy and Data Protection Act 2014* (Vic), which:

- ensures that private organisations implementing government policies and delivering government funded services to the community:
 - collect and handle personal information in accordance with the Privacy and Data Protection Act; and
 - are liable to the same extent as the public sector organisation would have been, if they had not outsourced the service.
- provides a strong incentive for public sector organisations to include a provision requiring compliance with the Act in contracts, because if they fail to do so, they could be directly liable for any breaches by the contracted service provider.

A new provision in the Charter, modelled on s 17, could provide that:

- Public authorities may include a provision in a contract or funding agreement that a service provider is to be bound by the Charter;
- If such a provision is in force, that the Charter applies to the service provider; and
- If a contract contains no provision regarding the Charter, the public authority will be directly responsible for a breach of s 38 of the Charter by the service provider (unless the public authority can show that the service provider is in fact a public authority within s 4(1)(c)).

If a new provision were to be applied to existing contracts, public authorities would have a strong incentive to review contracts with service providers exercising functions of a public nature to require service providers to be bound by the Charter. Encouraging public authorities to review contracts with service providers to require compliance with the Charter would foster a rights-compliant environment.

2. Giving private entities the option of assuming the obligations of public authorities under the Charter

Private entities should have the option of assuming the obligations of public authorities under the Charter. An 'opt-in' provision equivalent to s40D of the ACT *Human Rights Act* could be included in the Charter. An opt-in provision might be used by private organisations seeking to integrate human rights compliance into their operations. Businesses might see competitive benefits to assuming human rights obligations in a formal manner, including during government tender processes.²⁹ The voluntary nature of an 'opt in' provision would be consistent with the government's desire to promote a human rights culture.

A register of organisations that 'opt in' should be published online and managed by the Commission, to promote transparency and to ensure that individuals know when organisations have assumed obligations under the Charter.

3. Clarifying functions that are taken to be 'functions of a public nature'

The Charter should include a non-exhaustive list of functions that are taken to be functions of a public nature (similar to s40A(c) of the *Human Rights Act 2004* (ACT)). This would significantly reduce uncertainty in determining who is a public authority for the purposes of the Charter and when a public authority is

²⁹ Note Telstra's submission to the National Human Rights Consultation in support of a national human rights charter [http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)-Telstra_AG_WW-7N42E2.pdf/\\$file/Telstra_AGWW-7N42E2.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)-Telstra_AG_WW-7N42E2.pdf/$file/Telstra_AGWW-7N42E2.pdf) (accessed at 29 June 2011).

exercising a public function. Further guidance should be provided on the meaning of the public function of 'public housing' to reflect the different ways social housing is managed in Victoria.³⁰ These new functions should be clearly defined to avoid litigation on their meaning.

It is important to provide guidance on 'functions of a public nature' even if a new provision is included in the Charter on the effect of outsourcing (as recommended above), because a private entity might perform a public function under a contractual arrangement with the state, but may carry out activities and make decisions that are determined to be of a private nature. For example, in *Griffith University v Tang*³¹ the High Court found that while the university was established under statute, because there were no provisions dealing with academic misconduct or expulsion, the decision was not made under an enactment that could confer, alter or affect the legal rights and obligations of Mr. Tang for the purposes of attracting judicial review of the decision.

4. Replacing s39 with a direct cause of action

A direct cause of action for breach of s38 would eliminate the need to consider the availability of judicial review against a particular entity carrying out public functions on behalf of the state. This would simplify enforcement of Charter rights by individuals against private contractors. The benefits of a direct cause of action are discussed further below (under the discussion relating to Term of Reference 2 b).

5. Prescribing entities as public authorities would be unworkable

Section 4(h) of the Charter permits entities to be declared by the regulations to be a public authority for the purposes of the Charter. As far as we are aware, no entities have been prescribed to date under this section. Under s 4(h), non-government entities providing services such as utilities, emergency services, public health services, public education, public transport and public and social housing could be prescribed.

This approach would help bring significant clarity to the question of which entities are bound by the Charter when exercising functions of a public nature. However, the LIV believes that this approach may be unworkable due to the volume and constantly changing nature of government outsourcing and the complexity of funding arrangements, which in practice mean that it would be too difficult to keep regulations up to date.

³⁰ We understand that the complex arrangements for provision of public housing, where there will not always be a contract or funding in place with a social housing provider, is a particular difficulty faced by tenants seeking to enforce their Charter rights.

³¹ *Tang* (2005) 221 CLR 89.

DESIRABLE AMENDMENTS TO IMPROVE THE OPERATION OF THE CHARTER

2 a. Clarifying the provisions regarding public authorities, including the identification of public authorities and the content of their human rights obligations

Recommendation

17. The Charter should require entities to bear the burden of resolving the question of whether they are a public authority, for example, by:
- a. reversing the onus of proof for entities performing one or more of a list of functions of a public nature; and
 - b. legislating a presumption that legal costs associated with resolving a dispute about whether an entity is a public authority under s4 will be borne by the entity.

Summary

Because of the broad definition of public authority under s4 of the Charter, fairness and access to justice requires that entities that dispute their status as a public authority should bear the legal and financial burden of proving they are not bound by the Charter.

What are the gaps and issues in the current system?³²

Who should bear the responsibility of identifying public authorities?

Currently, if an entity contends that it is not a public authority under the Charter, an individual seeking to assert a breach of their human rights in a legal proceeding must argue the preliminary question of whether the entity is a public authority.³³ Determination of this question can take considerable resources and presents a significant barrier to access to justice, prior to determination of the real issues in dispute.

What measures would address this issue?

Reverse onus of proof and/or presumption of costs where entity disputes status as a public authority

Individuals seeking to assert that their human rights have been breached by a public authority should not have to spend time and money to determine whether or not the entity is bound by the Charter.

The potential costs of identifying public authorities would be reduced significantly if LIV's recommendations regarding State-funded entities are implemented. If government contracts routinely provide that entities are to be bound by the Charter, entities will effectively agree to be public authorities under the Charter.

³² Issues relating to identifying public authorities and the content of their human rights obligations are largely dealt with in this submission under TOR 1(d) (in relation to non-state entities performing public functions) and TOR 2(d) (in relation to the role of the proportionality test in determining the content of human rights obligations).

³³ See eg *Metro West v Sudi* [2009] VCAT 2025.

However, because these amendments will not capture all functional public authorities, there are likely to continue to be some entities that dispute they are performing functions of a public nature on behalf of government.

It would be more efficient to require entities to bear the burden of resolving the question of whether they are a public authority. This could be done by:

- reversing the onus of proof for entities performing one or more of the proposed non-exhaustive list of functions of a public nature (such as such as utilities, emergency services, public health services, public education, public transport and public and social housing);³⁴ and/or
- legislating a presumption that legal costs associated with resolving a dispute about whether an entity is a public authority under s4 will be borne by the entity.

A reverse onus would be appropriate because evidence about the activities and functions of the entity will be in the possession of the entity, not the individual seeking to assert their rights.

Fairness to entities would be maintained because a presumption of legal costs could be overturned, for example, if it is later established that the claim was frivolous, vexatious or otherwise an abuse of process.

³⁴ See eg *Human Rights Act 2004* (ACT), s40A.

2 b. Clarifying the provision(s) regarding legal proceedings and remedies against public authorities

Recommendations

18. Section 39 should be replaced with a clear and accessible provision establishing that breach of s38:
- a. is a ground for judicial review in the Supreme Court;
 - b. is an unlawful act that can be raised either in a dispute lodged with the Commission, or directly with VCAT; and
 - c. can be raised in any other legal proceedings brought by or against the person.
19. The Charter should confer VCAT with:
- a. original jurisdiction to consider breaches of s38 of the Charter; and
 - b. an express power to provide any appropriate relief or remedy for breach, including damages.

Summary

The ability of the Charter to provide accountability for breaches of human rights and access to meaningful remedies would be significantly improved by replacing s39 with a clear and accessible provision that:

- States the potential consequences of breaching the obligations in s38;
- Explains how and where alleged breaches of s38 can be raised;
- Enables claims to be brought directly in VCAT as an accessible and low cost forum; and
- Provides a broad discretion to provide any appropriate relief or remedy for breach (including damages).

What are the gaps and issues under the current system?

1. No direct cause of action for breach of s 38

Under s39, alleged breach of Charter obligations can be raised only when a person has a right to bring legal proceedings under another law (for example, where there are allegations of discrimination giving rise to a claim under the EOA³⁵ or where there are other grounds for judicial review of a decision³⁶) – that is, where there is another cause of action to ‘piggy-back’ the Charter claim.

The requirement for a piggy-back cause of action can mean that significant resources (including legal costs, court time and scarce pro bono resources) are spent on:

- resolving preliminary jurisdictional questions, rather than focusing on the real issue in dispute (that is, whether a public authority has breached a person’s human rights),³⁷
- bringing judicial review proceedings in the Supreme Court, rather than in a more accessible forum such as VCAT;³⁸
- arguing potentially ‘weaker’ claims, when the ‘stronger’ claim arises from a breach of the Charter.

³⁵ See eg *Goode* [2014] VSC 585.

³⁶ See eg *Debono* [2013] VSC 407.

³⁷ See eg *Sudi* (2011) 33 VR 559; *Slattery v Manningham CC* [2013] VCAT 1869, [149]-[160] *RW v State of Victoria* [2015] VCAT 266 see [181]-[208]; *Goode v Common Equity Housing* [2013] VCAT 2188 and *Goode* [2014] VSC 585.

³⁸ Eg *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648 (*Burgess*.)

The absence of a direct cause of action for a breach of human rights under the Charter is a barrier to accessible, just and timely remedies for infringements of people's basic human rights. The following case examples show how difficult it has been for individuals to get effective remedies for a breach of their human rights under the Charter:

- *RW v State of Victoria (Human Rights)*:³⁹ VCAT held it was unable to consider the matters relating to alleged breaches of the Charter that were not the subject matter of the alleged discrimination claim in the proceeding.
- *Director of Housing v Sudi*:⁴⁰ Court of Appeal found that VCAT did not have jurisdiction to consider whether the Director of Housing had breached s38 of the Charter in seeking an order for possession under the *Residential Tenancies Act 1997*, requiring tenants to bring judicial review proceedings in the Supreme Court.
- *Burgess v Director of Housing*:⁴¹ Supreme Court held that the Director of Housing had breached the Charter in purchasing a warrant of possession but declined to quash the notice to vacate, severely limiting the timeframe in which tenants must commence judicial review proceedings if they want to challenge an eviction.

2. Consequences of breaching the Charter are unclear

Section 39 provides no guidance about the consequences of breaching the Charter. Weinberg JA commented in *Sudi* that:

Section 38(1) of the Charter...imposes an obligation upon public authorities to comply with human rights. Regrettably, [s 38(1)] does not specify what consequences, if any, are to flow from a breach of that obligation. The Charter does not create a cause of action for breach. Section 39, loosely described as the 'remedies provision', is drafted in terms that are convoluted and extraordinarily difficult to follow.⁴²

In *Bare v Small*,⁴³ Justice Williams held that an 'unlawful' act under s38(1) or a breach of the s38(1) 'procedural limb' does not amount to a jurisdictional error on the basis that s38 was intended to have a 'normative effect' on decision-making, rather than create a discrete cause of action. Under this approach, because of the operation of a privative clause, no legal consequence flowed from a finding that an act or decision of a public authority breached s38. The Court of Appeal has reserved judgment on the appeal in *Bare*, which, when the decision is handed down may assist litigants in understanding the scope of relief or remedies available in judicial review proceedings for breach of the Charter under current provisions.

In other decisions, the Court has granted limited relief. For example, in *Burgess v Director of Housing*,⁴⁴ Macaulay J held that the Department of Health was obliged by law to consider the human rights of Ms Burgess and her son identified in s17 of the Charter. Failure to take these rights into account made the Director of Housing's decision unlawful under s38. His Honour made a declaration that the decision to apply for the warrant was and is of no legal force or effect. However, the Court was unable to grant relief in the nature of certiorari to quash the decision as the decision to issue the notices to vacate ceased to have ongoing legal effect once VCAT made its possession order. This decision further narrows the time period for tenants to enforce their human rights when facing eviction and limits the possibility for meaningful consequences from a finding that the Charter has been breached.

Normative obligations are ordinarily imposed on persons who are subject to democratic oversight; that is, Ministers who are required to face the electorate every four years. The consequences of breaches of such normative obligations are therefore political, rather than legal. Given that the obligations under the Charter

³⁹ [2015] VCAT 266 (*RW*).

⁴⁰ (2011) 33 VR 559 (*Sudi*).

⁴¹ *Burgess* [2014] VSC 648.

⁴² *Sudi* (2011) 33 VR 559 [214].

⁴³ [2013] VSC 129.

⁴⁴ *Burgess* [2014] VSC 648 and *Burgess & Anor v Director of Housing & The Victorian Civil and Administrative Tribunal* (No 2) [2015] VSC 70.

apply to public servants, who are not subject to democratic oversight or consequences, it is appropriate that something more than these consequences apply to breaches of the Charter.

Where the consequences of breaching s 38 are unclear:

- there is less incentive for public authorities to comply with the obligation; and
- lawyers are unlikely to raise Charter arguments in cases even where a breach might be serious, because they will not materially advance a client's case; will involve additional work; and may involve intervention by the Commission or Attorney-General, which in turn may delay the hearing of the matter and attract additional costs.

3. Damages are specifically excluded

Section 39(3) specifically excludes the remedy of damages for a breach of the Charter. The decision to exclude damages was a policy decision when the Charter was enacted, 'reflecting the government's intention that any available remedies should focus on practical outcomes rather than monetary compensation'.⁴⁵

The LIV agrees that practical outcomes are important. In our members' experience, individuals generally want a remedy that will change the outcome of an act or decision of a public authority. For example:

- a public housing tenant facing eviction, who wants to stay in their home;⁴⁶
- a prisoner who is seeking access to IVF treatment, but is being denied access;⁴⁷
- a person with a mental illness who wants to appeal a decision to appoint an administrator to keep control of their financial affairs;⁴⁸ and
- a person who is charged with a criminal offence and is seeking to have evidence excluded on the basis that it was collected in a way that breached their human rights.⁴⁹

There are cases, however, where it is not possible to provide a practical outcome. For example, in *Kracke v Mental Health Review Board*,⁵⁰ Mr. Kracke sought to challenge the validity of his Community Treatment Order (CTO) under the *Mental Health Act 1986* (Vic) on the basis that the (then) Mental Health Review Board had failed to conduct mandatory reviews of the order. Bell J held that the Board had breached Mr. Kracke's right to a fair hearing (s24 of the Charter) by failing to conduct the reviews in time, but held that the CTO was not invalidated by this breach. The only remedy available was a declaration that the Mental Health Review Board breached Mr. Kracke's right to a fair hearing under s24(1) of the Charter by failing to conduct the reviews of his involuntary and community treatment orders within a reasonable time.

While a declaration can provide important acknowledgement that a person's rights have been breached, it provides no compensation to the individual for the breach. In some cases, where very serious breaches have occurred (such as assault by police officers), damages may be the only way to fairly compensate a person for a breach of their human rights.⁵¹

⁴⁵ Second reading speech, above n 21 at 1294.

⁴⁶ Eg *Sudi* (2011) 33 VR 559 and *Burgess* [2014] VSC 648.

⁴⁷ Eg *Castles* [2010] VSC 310.

⁴⁸ Eg *Patrick's case* [2011] VSC 327.

⁴⁹ Eg *Kaba* [2014] VSC 52.

⁵⁰ [2009] VCAT 646 (*Kracke*).

⁵¹ See eg United Nations Human Rights Committee Communication No 1885/2009 (*Horvath v Australia*); In *Henry v. British Columbia (Attorney General)* 2015 SCC 24 (Canada) the Supreme Court ruled that the Canadian Charter of Rights and Freedoms permits courts to award damages against the Crown for wrongful non-disclosure absent proof of malice.

What measures would address these issues?

1. Replacing s 39 with a clear direct cause of action for breach of s 38

A direct cause of action would be consistent with:

- the Charter's purpose to protect and promote human rights in Victoria,
- the right to an effective remedy under international law; and
- the longstanding common law principle that every right protected by law must have a remedy.

The Charter should be amended to introduce a direct cause of action. A new provision should make it clear that a person can challenge a public authority on the sole basis of an alleged breach of s 38 in the following ways:

- a. judicial review proceedings in the Supreme Court;
- b. directly with VCAT; and
- c. in any other legal proceedings brought by or against the person.

a. Express ground for judicial review

Judicial review is a standard part of Victorian law and is an important check on the exercise of government power. Judicial review considers the lawfulness of government decisions and not the merits of the decision. The Human Rights Consultation Committee recommended that judicial review grounds should be expressly expanded to include where a public authority has acted unlawfully by acting in a way that is incompatible with the Charter.⁵²

Currently, breach of s38 is a ground for judicial review that can only be argued where another ground is arguable.⁵³ A new s39 should provide that breach of s38 is a standalone ground for judicial review. A standalone provision will avoid the problems discussed above by a piggy back requirement and will provide clarity and access to justice for individuals.

Individuals should be able to seek any relief or remedy normally available in judicial review proceedings.

We note that some remedies are only available where there is jurisdictional error and whether they are available or not will depend on whether breach of s38 is considered to be a jurisdictional error. This question may be determined by the Court of Appeal when it hands down its decision in *Bare* (discussed above on page 20).

b. New jurisdiction for VCAT to consider breaches of s38 of the Charter

Judicial review cannot provide access to justice for all breaches of the Charter, because it is expensive and focused only on certain errors of law in decision-making. Many breaches of the Charter may be "unlawful" but not constitute jurisdictional error warranting a judicial review remedy (noting that this position may change depending on the Court of Appeal's decision in *Bare*). Furthermore, accountability for breaches of human rights will be achieved only if individuals are able to make human rights complaints in an accessible low cost forum. The LIV believes that VCAT would provide an accessible and low cost forum for people to seek a remedy for a breach of s38.

To allow individuals to raise human rights breaches at VCAT, the Charter should:

- confer VCAT with original jurisdiction to consider breaches of s38 of the Charter;⁵⁴ and
- provide VCAT with express power to provide any appropriate relief or remedy for a breach of s38 , including damages.

⁵² Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (November 2005), Recommendation 30.

⁵³ *Debono*, above n 29.

⁵⁴ Under s 43 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act).

A person should also have the option of resolving human rights complaints through dispute resolution services at the Commission, prior to going to VCAT (see above recommendation 1).

An express remedies provision would complement VCAT's general powers to grant injunctions and make declarations.⁵⁵ A provision equivalent to s 8(3) of the *Human Rights Act 1998* (United Kingdom) could be included to ensure that relief in the form of damages is not a remedy of first resort.⁵⁶

Like the ACT and UK Acts and similar in effect to s39(4) of the Charter, the Charter should also ensure that any right to damages for a breach of the Charter does not affect any right a person may have to damages apart from the operation of Charter.

⁵⁵ Sections 123 and 124, VCAT Act.

⁵⁶ Subsection (3) states, "[n]o award of damages is to be made unless, taking account of all the circumstances of the case, including— (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made".

2 c. Clarifying the role of human rights in statutory construction

Recommendations

20. Section 32 (1) should be amended to clarify that it creates:
 - a. a new rule of statutory interpretation that imposes a positive obligation to interpret statutory provisions in the most human rights compatible way, so far as it is possible to do so consistent with the purpose of the statutory provision.
21. Section 32(2) should be strengthened to provide that, in interpreting a statutory provision, courts must consider relevant international law.

Summary

The Charter's ability to affect systemic change in our laws and legal system is currently limited by the conservative approach taken by courts in applying s32(1) to the interpretation of Victorian laws, and the limited recourse to international law under s32(2). The Charter should be amended to provide clear guidance about the scope of s32(1) to address the significant uncertainty on its correct application following the High Court decision in *Momcilovic v The Queen*.⁵⁷

What are the gaps and issues in the current system?

1. Uncertainty about the application of s32 (1)

Despite two early cases where Victorian courts have used s32(1) to interpret statutory provisions so that they were compatible with human rights,⁵⁸ there has been significant judicial controversy about the nature and extent of the interpretive obligation in s32(1) of the Charter following the High Court's decision in *Momcilovic*.

Case law on the application of s32(1) has raised a number of issues, including whether s32(1):

- is a constitutionally valid rule of statutory interpretation that can be conferred on the courts in Australia;
- permits a 'remedial approach' to interpretation or re-interpretation of statutory provisions; and
- requires courts to go beyond the common law principle of legality.

In *Momcilovic* the High Court upheld the constitutional validity of s32(1), but held that it does not permit the remedial approach adopted by the courts in the United Kingdom. It would therefore appear to be settled that Victorian courts are not authorised by the Charter to depart from the clear, unambiguous legislative intention of a provision in order to bring about compatibility of that provision with human rights. This has reduced the potential for s32(1) to have significant systemic impact on the development of laws in Victoria.

Momcilovic did not resolve the question of whether and to what extent s32(1) requires courts to go beyond the common law principle of legality when interpreting statutory provisions. Uncertainty about the correct approach to statutory construction following the conflicting judgements in *Momcilovic*, in addition to the High Court's rejection of the 'remedial approach', have led to a significant chilling effect on parties raising arguments under s 32(1).

⁵⁷ (2011) 245 CLR 1 (*Momcilovic*).

⁵⁸ *Re an application under the Major Crimes (Investigation Powers) Act 2004* (2009) 24 VR 415 and *RJE v The Secretary for the Department of Justice* (2008) 21 VR 526.

The LIV is aware of only one case since *Momcilovic* in which a tribunal has relied predominantly on s32(1) in interpreting a provision.⁵⁹ The LIV Charter Case Audit identifies that a number of judgments have referenced s32(1) as a relevant consideration in coming to an interpretation that was influenced by a range of factors.⁶⁰ For example, in *Victorian Police Toll Enforcement v Taha*⁶¹ Justice Tate said s32 is more than a codification of the principle of legality. It might "more stringently require" that words be read in a manner that does not correspond with the literal or grammatical meaning than would be demanded by the common law principle of legality. However, in *Taha*, it was sufficient to treat s32 as at least reflecting the principle of legality.⁶² In many cases, s32(1) can be seen as buttressing the Court's conclusion in relation to interpretation reached pursuant to common law principles of statutory interpretation.

The LIV Charter Case Audit has identified that arguments under s32(1) have been raised unsuccessfully in a number of cases since *Momcilovic*, on the basis that s32 does not authorise a court to read beyond a statute's ordinary meaning.⁶³ Further, there are some cases in which the Charter has been held not to apply and therefore an ordinary reading of the provision creates no inconsistency between the provision and Charter Rights.⁶⁴ Finally, a number of s32(1) arguments have been unsuccessful on the basis that, although a prima facie infringement of a Charter Right is made out, the infringement is permitted under s7(2) as being demonstrably justified in a free and democratic society based on human dignity, equality and freedom.⁶⁵

Uncertainty about how to apply s32(1) is closely connected with the role of s7(2) in the interpretive exercise, which is discussed below under heading 2 d.

2. Section 32(2) and the role of international law

Section 32(2) provides that international law and judgements of domestic, foreign and international courts and tribunals relevant to a human right *may* be considered in interpreting a statutory provision.

The LIV considers that relevant international law is central to understanding the content of particular human rights, because the Charter Rights originate from international law (in particular, the *International Covenant on Civil and Political Rights*). International law and decisions of foreign and international courts and tribunals, provide significant guidance about the nature of rights, when they can be limited and how to balance competing rights. In the LIV's view, the application of Charter Rights should develop consistently with international law as far as possible.

The role of international law under s 7(2) of the Charter is discussed further below.

⁵⁹ VCAT applied s32(1) in *Director of Housing v Cochrane* [2014] VCAT 1180 to reach a human rights compatible interpretation of s 243 of the *Residential Tenancies Act 1997* (Vic). The Member considered the tenant's rights to privacy, family and home under s13 of the Charter and found that a strict and narrow interpretation of the provisions of s 243 would potentially expose the tenant to homelessness (following a residence of approximately 11 years in the property), and an inability to continue down the path of reunification with her family'. The Member found that a narrow interpretation would be inconsistent with the Charter, when there is an alternative, less harsh and unjust interpretation possible on the face of the Act.

⁶⁰ *Obudho v Patty Malones Bar Pty Ltd t/as Inflation Nightclub* [2014] VCAT 1390; *Re Beth* [2013] VSC 189; *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (*Taha*); *Aitken & Ors v The State of Victoria – Department of Education and Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547.

⁶¹ [2013] VSCA 37.

⁶² *Taha* [2013] VSCA 37) at [189]-[191].

⁶³ *XX v WW and Middle South Area Mental Health Service* [2014] VSC 564; *DPP v Bryar* [2014] VSC 224; *Waddington v Magistrates' Court of Victoria and Kha* [2013] VSC 340; *Aitken v State of Victoria*; *Carpis v Victoria Police* [2012] VCAT 1472.

⁶⁴ See eg *DPP v JPH* [2014] VSC 177; *Georgina Martina Inc* [2012] VCAT 1384.

⁶⁵ See eg *Thales Australia Limited and ADI Munitions Pty Ltd exemption (Human Rights)* [2014] VCAT 1441; *Whitehorse Community Health Centre Exemption* [2014] VCAT 1040; *Pham & Anor v Clark v Anor* [2012] VCAT 801; *Nigro v Secretary to the Department of Justice* [2013] VSCA 213; *Muldoon v Melbourne City Council* (2013) FCA 994.

What measures would address these issues?

1. Amend s32(1) to clarify that it creates a new rule of statutory interpretation

It could be left to the courts to determine the nature and scope of the interpretive exercise required under s32(1). However, the LIV recommends that s32(1) state that it creates a new rule of statutory interpretation. This approach would be consistent with s35 of the *Interpretation of Legislation Act 1984* (Vic), which states that the courts should prefer a construction of a provision that would promote the purpose or object underlying an Act or subordinate instrument, over a construction that would not promote that purpose or object.

With a clear positive obligation, an amended s32(1) would encourage courts to consider the application of the Charter in any case where human rights are affected by a statutory provision, and not merely as an interpretive exercise of last resort. Rather than using human rights arguments under the Charter to buttress conclusions, the LIV considers that the courts should strive to interpret statutory provisions in a way that is compatible with human rights (as far as possible within the confines of the purpose of the statutory provision and without straining the ordinary meaning of words). In this sense, the Charter should be ‘front of mind’ when interpreting statutory provisions.

When a statutory provision does not affect any human rights, the positive obligation under s32(1) would not be engaged. Where a statutory provision does affect human rights, it will be relevant whether the provision limits those rights and if so, whether the limit is reasonable. The relationship of s32(2) with s7(2) of the Charter, regarding when human rights may be limited, is discussed below.

2. Amend s 32(2) to require consideration of relevant international law

The LIV believes that, as far as possible (within the confines of the Australian Constitution), it is desirable for Charter jurisprudence to develop consistently with international human rights law. This is because the Charter is based on human rights under international law, in particular the ICCPR. By enacting a Charter, Victoria itself is a contributor to the development of international human rights law jurisprudence, which develops through international treaty bodies (such as the United Nations Human Rights Committee) and decisions of domestic and transnational courts and tribunals applying human rights principles.⁶⁶

The LIV recommends that s32(2) be amended to provide that courts must consider relevant international law when determining what might be the most human rights compatible interpretation of a statutory provision. Such a requirement would reflect that Charter Rights cannot be considered in isolation from the international law from which they are derived.

An amended s32(2) should not require consideration of every relevant judgement of foreign and international courts and tribunals, as this would be impracticable. Further, when interpreting a statutory provision, relevant international law that has not been incorporated into Victorian law would have less weight than international law that has been expressly incorporated.

⁶⁶ See eg *Castles* [2010] VSC 310, [70].

2 d. Clarifying the role of the proportionality test in section 7(2), in particular as it relates to statutory construction and the obligations of public authorities

Recommendations

22. The Charter should be amended to clarify that s7(2) applies to the application of Part 3 of the Charter (and specifically ss32(1) and 38(1)).
23. Section 7 should be amended to refer to the concept of 'incompatibility' to provide guidance on when a limitation will be incompatible with a human right.
24. Section 7(2)(a) should be amended to refer to the nature of the right 'including under international law'.
25. The Charter should be amended to expressly confirm that where a person demonstrates that an act of a public authority limits a human right, the public authority has the onus of proving that the limit is reasonable and justified under s7(2).

Summary

The Charter should be amended to clarify how the s7(2) proportionality test should be applied to statutory construction and the obligations of public authorities, to ensure that the Charter provides a framework for human rights decision-making and synthesising competing rights, consistent with international human rights standards.

What are the gaps and issues under the current system?

1. Uncertainty about whether s7(2) applies to ss32 and 38

Case law demonstrates that there is considerable uncertainty about whether s7(2) has a role to play when assessing the human rights compatibility of a statutory provision (under s32) or the act of a public authority (under s38). While a number of single judges in the Supreme Court have ruled in favour of s7(2) 'conditioning' public authority obligations under s38,⁶⁷ appellate decisions concerning the role of s7(2) in the interpretative obligation under s32(1) such as *Momcilovic* and concerning the role of s7(2) in the application of s38 of the Charter such as *Kerrison v Melbourne City Council*⁶⁸ have been divided and provide no clear authority.

This uncertainty significantly impairs the Charter's ability to provide a useful framework for human rights decision-making and synthesising competing rights, consistent with international human rights standards. Decision-makers under the Charter, including public authorities and judges, need clear guidance about how to implement their obligations in a practical way.

2. Different approaches on how to apply s7(2)

The LIV acknowledges that there are different views about how to apply s7(2). In *Momcilovic*, the Commission (as intervener) and Human Rights Law Centre (as amicus) agreed that s7(2) had a role to play under s32(1). They disagreed, however, on the proper approach to applying s7(2).

⁶⁷ See eg *XX v WW* [2014] VSC 564; *Director of Public Prosecutions v Kaba* [2014] VSC 52 at [468]; *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414; [2008] VSC 346 and *Patrick's case* [2011] VSC 327.

⁶⁸ [2014] FCAFC 130.

The LIV understands that there is controversy about which approach will lead to the most rights protective outcome. LIV members acknowledge that both approaches have potential advantages and disadvantages and have not reached a view about the best approach. Ideally, the Charter should expressly state how s7(2) should be applied, to ensure that the Charter is clear and accessible.

What measures would address these issues?

1. State that s7(2) applies to the application of Part 3 of the Charter (and specifically ss32(1) and 38(1)).

Judicial uncertainty about the application s7(2) to ss38 and 32 should be resolved through specific amendments.

The LIV believes that it is important to provide that s7(2) applies to ss38 and 32, because the Charter Rights in ss8 – 27 generally do not have built-in limitations.⁶⁹ The Charter Rights are based on human rights in the ICCPR, which, with the exception of those rights which are absolute and cannot be limited, have specific express built-in limitations within each article. As a 'general limitations clause', it is important that s7(2) is used to synthesise human rights with other rights and interests, to ensure that Victorian law develops consistently with international law.

If s7(2) applies to s38, public authorities would be permitted to act and make decisions that limit human rights (as long as those limits are reasonable and can be justified). If s7(2) does not apply to s38, public authorities would only be permitted to limit human rights where they are specifically authorised by law to do so (under s38(2)). This would arguably impose a much higher standard on decision-makers, especially where they are exercising a discretionary power. This approach also raises the question of how a decision-maker should determine the scope of a relevant human right. To understand the scope of a human right, it is necessary to look beyond the Charter to international human rights jurisprudence. It is unclear how public authorities would apply this without considering limitations, because under the ICCPR (on which the Charter Rights are based), most human rights have built-in limitations.

The role of s7(2) in balancing competing rights and interests was discussed by (then) Attorney General Rob Hulls in the Charter Second Reading Speech, where he said:

- Part 2 [of the Charter] reflects that rights should not generally be seen as absolute but must be balanced against each other and against other competing public interests.
- Action taken in accordance with a reasonable and demonstrably justified limitation 'arising under the law' will not be prohibited under the Charter, and is not incompatible with the right.
- It is intended that 'the law' in this context includes limitations specified by the common law as well as by statutory provisions.
- The general limitations clause embodies what is known as the 'proportionality test', referencing comparable human rights instruments in the ACT, New Zealand, Canada and South Africa.⁷⁰

In our submission to the 2011 SARC inquiry, the LIV recommended that s7(2) of the Charter should be amended to reflect the fact that some rights cannot be limited under international law. In addition, we recommended that 'built-in' limitations should be reinstated for all human rights that contain built-in limitations under international law.⁷¹ We recognise, however, that the Review is focusing on the 'procedural' provisions in the Charter and that it is unlikely that the rights included in ss 8 – 27 will be amended.

The LIV therefore recommends that the Charter should state that s7(2) applies to the application of Part 3 of the Charter (and specifically ss32(1) and 38(1)).

⁶⁹ Except for the right to freedom of expression in the Charter, which has built-in limitations in s15(3).

⁷⁰ Second Reading speech (above n21) at 1291.

⁷¹ See also Julie Debeljak, 'Balancing rights in a democracy: The problems with limitations and overrides of rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32 *Melbourne University Law Review* 422.

2. Amend s7 to refer to the concept of 'incompatibility' to provide guidance on when a limitation will be incompatible with a human right

Currently, s7(2) refers to 'limitations' on human rights. It does not refer to the concept of 'compatibility' with human rights, which is used in ss32 and 38. The LIV considers that the role of s7(2) in ss32 and 38 in assessing human rights compatibility could be clarified if s7 is amended to expressly refer to the concept of incompatibility, to link the test in s7(2) with the requirements in ss32 and 38. Section 7 should provide guidance on when a limitation on a human right will be incompatible with the human right.

3. Include an express reference to international law in s7(2)

Currently, the Charter refers to international law in s32(2). This sub-section permits reference to international law and decisions of courts and tribunals when interpreting a statutory provision. This includes provisions within the Charter, including s7(2).

The LIV believes there is merit in amending s7(2)(a) to expressly refer to the nature of the right 'including under international law', despite sub-s 32(2). This amendment would make it clear that Parliament and courts are required to consider international jurisprudence on the nature of a human right, for example, whether it is an absolute right that cannot be limited.

4. Expressly providing that public authorities bear the onus of proving that a limitation is reasonable and justified

It has not yet been determined by the Court of Appeal whether the onus of establishing whether any limitations on human rights are reasonable rests on the party making that assertion.⁷² It would be useful if the Charter expressly confirmed that public authorities bear the onus of proving that a limitation on a human right is reasonable and justified.

⁷² See the Trial Division judgments in *Re an application under the Major Crimes (Investigation Powers) Act 2004* (2009) 24 VR 415 at 147; *Patrick's case* [2011] VSC 327 at 310. Cf *Bare* [2013] VSC 129– the question of onus is one of the questions that the Court of Appeal may determine in its decision.

2 e. Clarifying the obligations of courts including under sections 4(1)(j) and 6(2)(b)

Recommendations

26. Tribunals should be public authorities under the Charter for all purposes. They should be listed as public authorities in s4(1) with no restrictions.
27. Tribunals specifically excluded from the Charter's application, such as the Adult Parole Board, should be subject to the Charter.
28. Section 6(2)(b) of the Charter should be clarified to require courts to give effect to any rights under Part 2 of the Charter which relate to court or tribunal proceedings.
29. Courts and tribunals should develop a process to notify Charter cases to a central register and, unless restricted, are reported or otherwise made available to the public.

What gaps and issue in the current system should be addressed?

1. Providing that tribunals are public authorities

The LIV acknowledges that courts are excluded from the definition of 'public authority' (except when they are acting in an administrative capacity) because of constitutional concerns about challenges to the unified common law of Australia.⁷³

As a minimum, the Charter should be applied more clearly and comprehensively to tribunals. It is important for VCAT to be a public authority under the Charter, in particular when exercising the proposed new original jurisdiction to hear and determine human rights complaints. Section 38 would then apply to VCAT itself when making a decision under the Charter.

We also submit that tribunals currently excluded from the application of the Charter, such as the Adult Parole Board, should be subject to the Charter, in order to ensure that Charter Rights are applied consistently across all tribunals exercising executive power. These tribunals are often the bodies that deal with the most sensitive rights-based issues. The Adult Parole Board, for example, makes important decisions in managing the appropriate release of offenders on parole orders, decisions which can affect their right to liberty under the Charter.

2. Clarifying the effect of s 6(2)(b)

The legal effect of s6(2)(b) is unclear, including whether it requires the Court to give effect to any rights under Part 2 of the Charter in so far as those rights arise in a proceeding before the Court.

Evans and Evans note in *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (2008), 'if courts do not have direct obligations with respect to rights such as the right to a fair trial or the presumption of innocence, there could be serious gaps in the protection of those rights'.⁷⁴

Section 6(2)(b) should be clarified to require courts and tribunals to give effect to any rights under Part 2 of the Charter in so far as those rights relate to court or tribunal proceedings.

3. Create a public register of Charter decisions

To support the growing Charter jurisprudence, there should be a requirement for court and tribunals to publicly report on cases raising Charter issues. The Supreme Court of Victoria recently began this process by publishing its Human Rights Charter Case Collection, which includes summaries of over 70 decisions on

⁷³ See Human Rights Consultation Committee report, (above n11) at 59.

⁷⁴ Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 14. See also *R v Williams* [2007] VSC 2, [51]-[57]).

Charter issues from 2007 to 2014. The Law Institute of Victoria has also developed an online Charter Case Audit of cases raising Charter Rights that is searchable, contains summaries of the decisions, and links to cases. It is important to have a formal method of tracking and recording Charter cases in all courts and tribunals so that the effects of the Charter can be publicly known and analysed.

2 f. The need for the provision for an override declaration by Parliament under section 31

Recommendation

30. The override provision in s31 should be repealed.

Summary

Section 31 of the Charter is inconsistent with Australia's international law obligations and should be repealed. If it is not repealed, s 31 should be amended so that it does not apply to absolute rights.

What issues in the current system need to be addressed?

The limitation of rights in the Charter should be consistent with international law. Under international law, human rights cannot be abrogated except in limited circumstances, such as in times of public emergency.⁷⁵

As noted in the Background brief, override declarations have been made twice since the 2011 review: the *Legal Profession Uniform Law Application Act 2014* and the *Corrections Amendment (Parole) Act 2014*.⁷⁶ Neither of these Bills meet the requirement in sub-s 31(4) that an override declaration only be made in 'exceptional circumstances'. As the Background brief notes, 'exceptional circumstances' was intended to include threats to national security or a state of emergency.⁷⁷

The *Legal Profession Uniform Act Application Act 2014* included an override declaration simply to ensure 'uniformity of interpretation and application of the scheme across the participating jurisdictions'.⁷⁸ These are not 'exceptional circumstances' and SARC noted that the override provision prevented SARC from reporting to Parliament about whether the Legal Profession Uniform Regulations were incompatible with human rights. The decision to use the override provision therefore prevented review and dialogue on the human rights implications of this law. It is anticipated that uniform or cooperative statutory schemes will increase in future, given the increasing need for uniform regulation across state borders. This welcome development in Australia's federal system should not undermine the human rights system in Victoria.

The *Corrections Amendment (Parole) Act 2014* included an override declaration to 'protect the community from the ongoing risk of serious harm presented by Julian Knight' (the individual targeted by the Bill). Again this is not exceptional circumstances and, as SARC pointed out, there was a less rights-restrictive way for Parliament to achieve the same aim.⁷⁹ The Second Reading Speech for this Bill noted that the override provision was included to prevent the court from giving the Bill an 'interpretation based on Charter rights which do not achieve the government's intention'.⁸⁰

The LIV considers that the override provision is unnecessary in Victoria. Because the Charter is not constitutionally entrenched, Parliament has the ability to pass any legislation regardless of whether it is incompatible with Charter Rights. As noted by the Background brief, Parliament has passed laws that it has noted are 'incompatible' with the Charter without using the override provision.⁸¹

We acknowledge that one of the benefits of using the override provision is that it makes Parliament's intention clear that it views the laws being passed as incompatible, or potentially incompatible, under the Charter. However, this advantage is outweighed by the potential disadvantage of the override being used in cases which do not meet the requirement in s31(4), thereby avoiding review and dialogue on the rights implications of proposed legislation.

⁷⁵ See LIV 2011 Submission, fns 35-37.

⁷⁶ Background Brief, pp 24-25.

⁷⁷ Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill, clauses 31, p 22.

⁷⁸ Victoria, *Parliamentary Debates*, Assembly, 12 December 2013, 4661 (Robert Clark) quoted in the SARC Report (above n19) at p 24.

⁷⁹ SARC Report, above n 19, 26.

⁸⁰ Ibid.

⁸¹ Eg *Summary Offences and Control of Weapons Amendment Act 2009*(Vic) and *Control of Weapons Amendment Act 2010* (Vic).

2 g. The effectiveness of the declaration of inconsistent interpretation provision under section 36

Recommendation

31. Section 36 should be amended to replace the term inconsistent with 'incompatible' in accordance with other provisions elsewhere in the Charter.

Summary

The Supreme Court's power to issue a declaration under s36 of the Charter should refer to compatibility with a human right, because the concept of incompatibility is used elsewhere in the Charter.

What issues in the current system need to be addressed?

A declaration of inconsistent interpretation under s36 currently has no real consequences, except for a requirement that a copy of the declaration be given to the relevant Minister. Its purpose is part of the 'dialogue model' of the Charter, so that Parliament can be alerted where a statutory provision is incompatible with a human right, and allow Parliament to consider whether to amend the provision.⁸²

Only one declaration has been made by the Court of Appeal under s36, and this was overturned by the High Court in *Momcilovic*. The High Court's conservative approach to s32 and the lack of certainty about how to apply this provision has meant that there has been very limited judicial consideration of s36.

The LIV would like to see s36 amended so that real consequences flow from a declaration, within the confines of what is possible under the Constitution. We have not been able to prepare a detailed recommendation in the time available and may provide a further supplementary submission on this point.

As a minimum, it would be useful to amend s36 to replace the term inconsistent with 'incompatible' in accordance with other provisions elsewhere the Charter.

⁸² Second Reading speech (above n 21), at 1293.

2 h. The usefulness of the notification provision(s) including under section 35

Recommendations

32. The requirement in s35 to give notice to the Attorney General and the Commission should be retained.
33. The Supreme Court should amend Practice Note No 3 of 2008 to clarify that there is no requirement to adjourn proceedings when a notice is given under s35 and the County Court should issue a similar Practice Note.
34. The Commission and Attorney-General should issue guidelines to inform legal practitioners about how and when they will respond to s35 notices.
35. The right of intervention of the Attorney-General and Commission should be retained. However, ss34 and 40 should be amended to provide the Court with the power to place conditions on that intervention at any time after the intervention, including conditions as to:
 - a. the matters on which the interveners can submit;
 - b. costs; and
 - c. the timing of the taking any step in the proceeding, including the hearing.

Summary

Perceptions about potential delay to proceedings arising from the notification requirement should be addressed by providing information to legal practitioners about the effect of s 35, including through:

- Changes to the Supreme Court Practice Note No 3 of 2008; and
- Guidelines prepared by the Commission and the Attorney-General.

While the Attorney-General and Commission should retain their right to intervene, ss34 and 40 should be amended to provide the Court with the power to place conditions on that intervention at any time after the intervention, including as to:

- matters on which the interveners can submit;
- costs; and
- the timing of taking any step in the proceeding, including the hearing.

What are the gaps and issues under the current system?

1. *Potential delay in proceedings*

a. *Notification requirement*

In our 2011 submission, LIV recommended that s35 be amended to give the courts discretion to dispense with mandatory notification depending on the circumstances of a particular case. Our members reported that s35 creates a disincentive to raise Charter arguments because of the risk it could delay proceedings.

Following consultation with the Commission, the LIV has changed its position on s35 because we understand that removing the requirement to notify would make it difficult for the Commission or Attorney-General to identify important cases and to assess when to intervene where appropriate. The Commission, in

its *Report to Stakeholders* on its intervention functions under the Charter, noted that it would be difficult to monitor proceedings without notifications under s35.⁸³

The main concern raised by our members about s35 is the potential delay to proceedings caused by notification.⁸⁴ However, we understand that both the Attorney-General and the Commission are able to receive and respond to urgent notices within a very short period of time. It may be that s 35 leads to perceived, rather than actual delay.

We understand that the main source of delay in proceedings arises not from the notification itself, but where the Attorney General and/or the Commission exercise their right to intervene (under ss34 and 40) (particularly if the notice has been sent late in proceedings). The issue of delay would therefore be better addressed through changes to the intervention provisions, rather than the notice provision.

The notice requirement should not be extended to VCAT, including if VCAT is given original jurisdiction to consider breaches of the Charter as recommended in this submission, because the notice requirement applies only to questions of law. Where a question of law arises in VCAT, this can be referred to the Supreme Court under s33 of the Charter (and the notice requirement under s35 will apply).

b. Delay caused by interventions

The LIV recognises that interventions by the Commission and Attorney General can greatly assist the running of a Charter case. They do this by clarifying the human rights issues in dispute and identifying important legal principles and material to assist the court in its decision. As a result, interventions often assist courts in deciding complex questions under the Charter.

Some LIV members report, however, that they are hesitant to raise issues under the Charter because of potential delay that this may cause in proceedings if the Commission and/or the Attorney General might intervene. This is particularly an issue in urgent cases, where a delay in proceedings may be detrimental to parties to the dispute. In criminal law matters, for example, many practitioners believe that any benefit that could be obtained by raising Charter arguments is outweighed by the likely delay in proceedings (especially in the context of legal uncertainties about the operation and application of the Charter, as identified in this submission, and clients who may be on remand).

The Commission, in its recent *Report to Stakeholders*, noted that the possibility of a detrimental delay in proceedings would be an important consideration as to whether it considers an intervention to be appropriate. During consultations, the LIV provided feedback that the Commission's intervention guidelines are right to include as a consideration the impact of its interventions on the parties to a proceeding, for example considering whether the intervention will add time, complexity and/or cost to a matter.

What measures would address these issues?

1. Providing education and information to legal practitioners about the notice requirement

The LIV believes that perceptions about delay arising from the notice requirement should be addressed through information and education to legal practitioners. Measures could include:

- Revising the Supreme Court Practice Note No 3 of 2008;
- Recommending that the County Court issue a Practice Note; and
- Publication of guidelines by the Commission and the Attorney General about the notification process and how they will respond.⁸⁵

Practitioners should also be aware that there is not requirement to give notice about Charter arguments in VCAT or the Magistrates' Court of Victoria.

⁸³ Victorian Equal Opportunity and Human Rights Commission, *Report to Stakeholders*, p 32.

⁸⁴ Eg Supreme Court of Victoria, Practice Note No 3 of 2008 suggests that 14 days is the expected response time.

⁸⁵ Guidelines could be similar to the Commission's publication 'When will the Commission intervene?'.

2. Provide the Court with the ability to place conditions on the intervention of the Attorney-General and Commission

The Attorney General and the Commission should retain the right to intervene under ss34 and 40. However, in order to address the concerns raised by practitioners regarding delay and possible costs orders (perceived or actual), the Court should be expressly conferred with the ability to place conditions on interveners throughout the proceedings. These conditions could cover issues such as:

- matters on which the interveners can submit;
- costs; and
- the timing of taking any step in the proceeding, including the hearing.

Parties could raise concerns about delay or costs which can be addressed by the Court through these conditions.

With respect to the costs risk to litigants in the event that the Attorney-General or Commission intervene, the LIV notes that it may be a significant barrier to access to justice that potential litigants wishing to rely on the Charter may be liable to pay the costs of the Attorney-General or Commission intervening in their case. The LIV understands that the Commission's policy is not to seek costs and it expects in turn that costs will not be sought against it where it has conducted its role as an intervener reasonably.⁸⁶ However, the LIV is not aware that the Attorney-General has an equivalent policy. The Attorney-General has successfully sought costs against an individual litigant in a Charter case.⁸⁷ In *Bare v Small*, the Attorney-General refused to agree not to seek costs against Mr Bare in the event that his appeal was dismissed⁸⁸ which was a reason leading to Mr Bare needing to apply for a protective costs order in order to bring his appeal.

The LIV believes that by providing the Court with the ability to apply conditions on interventions, parties will be more likely to raise Charter arguments in urgent cases or where there may be cost implications.

⁸⁶ Victorian Equal Opportunity and Human Rights Commission, *Report to Stakeholders*, 7.

⁸⁷ *Magee v Delaney* [2012] VSC 419.

⁸⁸ [2013] VSCA 204 [39].

2 i. Any other desirable amendments

Recommendation

36. Consider whether the Charter should be enhanced by:

- including all human rights and responsibilities contained in international human rights instruments to which Australia is a party, and instruments Australia adopts in the future, including economic, social and cultural rights, rights of women and children and the right to self-determination;
- requiring regular reporting by and auditing of public authorities for compliance with human rights; and
- repealing s48 so that no laws are excluded from the Charter's application.

Summary

The LIV made a submission to the 2011 Scrutiny of Acts and Regulations Committee review and appeared before a public hearing of the Committee to provide evidence.

Our 2011 submission made a number of additional recommendations not discussed above that are not specifically addressed by the Eight Year Review terms of reference, including that the Charter should be amended to:

- include all human rights and responsibilities contained in international human rights instruments to which Australia is a party now and in the future, including economic, social and cultural rights, rights of women and children and the right to self-determination;
- require regular reporting by and auditing of public authorities for compliance with human rights; and
- repeal s48 so that no laws are excluded from the Charter's application.

The LIV reiterates its support for these recommendations and we refer you to our 2011 submission for further details.