

Charter of Human Rights and Responsibilities Act 2006

Eight-year review

June 2015

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Contents

Foreword	1
Executive Summary.....	2
Summary of recommendations.....	3
The Charter remains an effective tool to protect the rights of disadvantaged Victorians.....	4
Changes can be made to enhance the effectiveness of the Charter	6
Improving the operation of the Charter in the Victorian Civil and Administrative Tribunal	6
Clarifying the operation of section 39 of the Charter	9
Improving the accountability of existing public authorities.....	10
Use of the Charter in the Magistrates' and Children's Courts	12
Clarifying and simplifying the Charter's application to courts and tribunals	13
Clarifying how section 32 and section 7 of the Charter are to be interpreted	14
Education and training to promote a genuine human rights culture.....	14
Charter Notices.....	15
Further review of the Charter.....	16

Foreword

Victoria Legal Aid (VLA) is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner.

VLA is the biggest legal service in Victoria, providing legal information, education and advice for all Victorians. We have 14 offices across Victoria and help approximately 81,400 unique clients every year. We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria.

Our lawyers deal with practical human rights issues every day in their casework and play a critical role in rights protection in Victoria. Our clients are often people who are socially and economically isolated from society; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas. These groups are more vulnerable to adverse decisions or actions that affect their human rights.

VLA can help people with legal problems about criminal matters, family separation, child protection and family violence, immigration, social security, mental health, discrimination, guardianship and administration, tenancy and debt. In many instances, we will assist our clients to assert their rights in the face of government decisions or actions. We provide:

- free legal information through our website, our Legal Help line, community legal education, publications and other resources
- legal advice through our Legal Help telephone line and free clinics on specific legal issues
- minor assistance to help clients negotiate, write letters, draft documents or prepare to represent themselves in court
- grants of legal aid to pay for legal representation by a lawyer in private practice, a community legal centre or a VLA staff lawyer
- funding to 40 community legal centres and support for the operation of the community legal sector.

VLA also works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring the actions of government agencies are held to account. We take on important cases and advocate for reforms that improve the law and make it fairer for all Victorians.



BEVAN WARNER
Managing Director

Executive Summary

Victoria Legal Aid (VLA) is pleased to contribute a submission to the statutory review of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

The majority of VLA clients are vulnerable and experience social disadvantage. This makes them more likely to interact with public authorities (such as police or public housing providers) or be subject to decisions that impact on their rights (such as involuntary mental health treatment). Our clients are more likely to require recourse to the Charter to enforce or assert their rights, often against powerful agencies or interests.

For these reasons, VLA is one of the primary users of the Charter to achieve fair and positive outcomes, both for individuals seeking legal assistance but also for broader groups that benefit from our efforts to achieve systemic changes. VLA is also a public authority and is therefore subject to obligations under the Charter. We estimate that we have been involved in approximately 13 per cent of cases involving the Charter since its introduction¹, both in assisting clients or as a party to proceedings in our own right.

We consider the Charter an important tool to promote and enforce human rights in Victoria. Our submission contains a number of examples of where we have successfully relied on the Charter in our advocacy on behalf of clients. This has led to benefits for our individual clients, who were able to achieve redress, but has also contributed to reform that benefits Victorians more broadly.

However, we believe there are opportunities to strengthen the Charter and improve its operation. For the Charter to live up to its promise and drive a human rights culture, its protections must be accessible and enforceable. Too often our clients are being prevented from defending their rights under the Charter because of barriers and complexities associated with using the Charter.

Our submission makes a number of recommendations for reform that are borne out of our practical experiencing using the Charter. These relate to:

- expanding the jurisdiction of the Victorian Civil and Administrative Tribunal (VCAT) to consider human rights issue pursuant to the Charter, especially in tenancy matters
- removing the requirement for a non-Charter action to pursue breaches of the Charter
- clarifying legal provisions that cause confusion and complexity for practitioners
- improving the accountability of public authorities (particularly non-government agencies exercising functions of a public nature)
- improving training and resources for magistrates, the judiciary, Victoria Police and legal practitioners on Charter rights and obligations – particularly in a criminal justice context;
- giving courts and tribunals discretion about the notice and intervention functions under the Charter.

We look forward to considering the recommendations of the review.

¹ Based on analysis of the Law Institute of Victoria Audit of Charter cases (VLA involved in an estimated 44 cases of the 336 total). The database is accessible via: < <http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/Charter-Case-Audit>>.

Summary of recommendations

Recommendation 1: Amend legislation (whether the Charter, VCAT Act or the Residential Tenancies Act) to expressly confer VCAT with the power to consider the lawfulness under the Charter of decisions of public authorities in respect of eviction – including decisions to issue notices to vacate, make applications for possession and make applications for warrants of possession.

Recommendation 2: Amend section 39 to confirm that a breach of section 38 of the Charter can constitute a stand-alone ground of judicial review, without the need for a non-Charter ground of unlawfulness.

Include a provision in the Charter that establishes a direct cause of action for breaches of the Charter to VCAT with an appropriate range of remedies, and provide for conciliation by the VEOHRC.

Recommendation 3: Implement a whole of government policy requiring service agreements between government and agencies providing public services to include a standard term deeming the contracted service provider to be a public authority.

Recommendation 4: Introduce a provision that allows for organisations to ‘opt-in’ and be considered public authorities, like 40D of the *Human Rights Act 2004* (ACT).

Recommendation 5: Clarify and simplify provisions relating to the application of the Charter to courts and tribunals. In particular, ensuring there is no confusion stemming from the application of sections 4(1)(j) and 6(2).

Recommendation 6: Clarify the role played in s 7(2) in determining compatibility with the Charter under section 32 and section 38.

Recommendation 7: Invest in, and prioritise human rights training for entities (both government and non-government) on their obligations under the Charter, with a particular focus on the application of the Charter to criminal law proceedings.

Recommendation 8: Limit the notice and intervention provisions in the Charter to give the courts discretion to order parties to give notice and permit intervention in cases of general importance, or where the interests of justice otherwise require it.

Recommendation 9: Rather than introducing a further statutory review provision, allow the Charter to be subject to review, scrutiny, modification and improvement as any other piece of legislation.

The Charter remains an effective tool to protect the rights of disadvantaged Victorians

Victoria Legal Aid (VLA) provides legal assistance to more than 80,000 Victorians, most of whom are disadvantaged and socially isolated. Our clients are more likely than the general community to interact with government agencies and other public authorities (such as police, child protection authorities and public housing providers) and to experience limitations on their human rights (such as loss of liberty, involuntary treatment, eviction and interference in family life). A significant proportion of VLA services focus on assisting clients in interactions with the State that are likely to result in limitations of rights, from criminal law to child protection to mental health and disability advocacy.

For these reasons, VLA is one of the primary users of the Charter in advocacy on behalf of our clients. VLA is also a public authority and is therefore subject to obligations under the Charter and has been the subject of litigation under the Charter. We estimate that we have been involved in approximately 13 per cent of cases involving the Charter since its introduction², both in representing clients and as a party to proceedings in our own right. This places VLA in a unique position to comment on the effectiveness of the Charter and to suggest improvements to its operation.

Our experience is that the Charter is a critical tool to promote and enforce human rights in Victoria, particularly for the most vulnerable. Its introduction has acted to give human rights considerations greater prominence in decisions and actions by public authorities. Where human rights have been limited, it can provide a practical tool for redress.

Slattery v Manningham CC (Human Rights) [2013] VCAT 1869 (30 October 2013)

This matter was a complaint of discrimination under the *Equal Opportunity Act 2010* based on disability relating to access to services provided by the Council and public premises. As well as his discrimination complaint, our client alleged a breach of his right to freedom of expression, to participate in public life and to equality before the law under the Charter.

This followed the banning of Mr Slattery from attending any building owned, operated or managed by the Council. He was also banned from communicating with the Council other than through a lawyer or advocate. This action prevented Mr Slattery from using the local pool, library and public toilets. The justification for this prohibition was that he was considered a health and safety risk to Council staff.

This case represented a lack of compliance with the Charter (specifically section 38) by local government, as council minutes demonstrated that no consideration was given to our client's human rights when the decision to exclude him was made.

At the hearing, the Chief Executive Officer at the Council gave evidence that he had never received training on the rights and responsibilities under the Charter and was not aware of anyone else at the Council receiving Charter training.

² Based on analysis of the Law Institute of Victoria Audit of Charter cases (VLA involved in an estimated 44 cases of the 336 total). The database is accessible via: < <http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/Charter-Case-Audit>>.

VCAT ordered the Council to undertake training on the Charter (the first known remedy of this kind). Further, a declaration was made that the Council breached Mr Slattery's human rights under section 18 (taking part in public life), section 15 (freedom of expression) and section 8 (equality).

Re Beth [2013] VSC 189

'Beth'³ was a teenage girl with multiple disabilities. We became aware through the advice service we provide to Secure Welfare that Beth had been detained in a secure facility for some 60 days, notwithstanding that the statutory time limit was 21 days where there is a substantial and immediate risk of harm to the child, with the possibility of a further 21 days (maximum 42 days) if there are exceptional circumstances.

The Department of Human Services (DHS) applied to the Supreme Court to exercise its *parens patriae* jurisdiction by formulating orders to legalise Beth's detention in a purpose-renovated facility for a duration longer than that authorised under the *Children, Youth and Families Act 2005*.

The broad plan outlined for Beth was generally accepted as being in good faith and in her best interests by all parties,⁴ notwithstanding the limitations on her Charter rights to liberty, privacy and freedom of movement and potentially freedom from medical treatment without consent. However, we considered it important that Beth's detention be subject to appropriate independent oversight and argued that it was appropriate for Beth to be independently represented in future proceedings, which was opposed by DHS. We relied in part on the Charter in arguing that this oversight and representation was necessary.

The Court ultimately granted the order that Beth remain in the secure facility, subject to reporting and oversight that would ensure her detention would occur in the least restrictive way possible. The Court also accepted the argument that Beth be represented independently in future proceedings,⁵ and relied in part on the Charter in making its decision.

The following case is an example of how Charter litigation on behalf of an individual client highlighted unfairness in the law, prompting legislative change with broader benefits for the community.

Victoria Police Toll Enforcement v Taha; State of Victoria v Brookes [2013] VSCA 37

Mr Taha has an intellectual disability and had accumulated fines totalling \$11,000. At the time of sentence, the magistrate was unaware of his intellectual disability and sentenced him to 80 days jail for failure to pay pursuant to s160 of the *Infringements Act 2006*. Even when the disability was subsequently identified, the absence of an appeal right in the legislation prohibited the magistrate from being able to revisit the client's circumstances and review the decision.

Given the constraints of the infringements legislation, an application for judicial review was made to the Supreme Court. One of the issues under consideration was whether s 24(1) of the Charter supported an interpretation of section 160 that imposed a duty to inquire on a magistrate as to Mr Taha's particular circumstances before making an imprisonment order.

The majority found that a unified construction of section 160 was supported by section 32 of the Charter – requiring the rights to equality, liberty and a fair hearing to be taken into account as part of

³ Not the client's real name.

⁴ The Victorian Equal Opportunity and Human Rights Commission and Office of the Public Advocate was parties.

⁵ This occurred almost a year later in *Re Beth (No 3)* [2014] VSC 121.

the interpretive process. In addition, Justice Tate found that the scope not to be arbitrarily detained includes, among other things, a lack of proportionality. Her Honour found that an interpretation of section 160 which required individuals to draw attention to their circumstances (such as a disability) would be incompatible with the right to equal protection before the law, as it would have the effect of unreasonably disadvantaging people with an impairment.

Ultimately, the Court of Appeal upheld the Supreme Court ruling that a magistrate is under a duty to inquire into the circumstances of an infringement offender, including whether the person has a disability or whether there are other special circumstances, before making an imprisonment order against them for a failure to pay fines under the *Infringements Act 2006*.

Importantly, for Mr Taha, the case was remitted to the Magistrates' Court and the remaining fines were discharged. More broadly, the effect of the decision is to impose a duty on magistrates to inquire into the circumstances of all people appearing before them.

The Victorian Parliament has now passed reforms which allow a limited rehearing right, through its *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013*, which carries broader benefit to Victorians.

Changes can be made to enhance the effectiveness of the Charter

Although VLA has used the Charter in a number of important cases that have had a significant impact on the rights of Victorians, there have been relatively few Charter cases in the six and a half years that the court provisions have been in effect, particularly in some areas such as criminal law and housing cases where there has been considerable human rights jurisprudence in comparable jurisdictions.

Too often, our clients are being prevented from defending their rights under the Charter because of barriers and complexities associated with using the Charter. For the Charter to be truly effective, it is important that it is accessible and enforceable. For this reason, we support changes to make the Charter more effective in protecting the rights of Victorians. Most of these changes would involve making the use of the Charter simpler in legal proceedings and more consistent with other legislation protecting and promoting rights.

Improving the operation of the Charter in the Victorian Civil and Administrative Tribunal

VCAT represents a cost-effective and efficient jurisdiction for the resolution of civil and administrative disputes, including in respect of issues with significant human rights issues. VCAT currently has jurisdiction over many legal areas with profound human rights implications under specific legislation other than the Charter, including guardianship, compulsory mental health treatment, discrimination and tenancy matters. In each of these areas, VCAT also has jurisdiction to consider the Charter in making these decisions in relation to other legislation, and in VLA's experience, is able to do so in an effective manner.⁶

⁶ The Hon. Justice Garde AO RFD, President of VCAT, outlines a number of examples of where VCAT has applied the Charter in its deliberations in a paper delivered to a Law Institute of Victoria seminar on 15 May 2013. His Honour noted: "In spite of the limitation of the Tribunal's jurisdiction to hear Charter arguments by the Court of Appeal in *Sudi*, the Charter continues to be considered regularly in the Tribunal. While this occurs most often in relation to discrimination matters and mental health matters in the Human Rights List, the Charter has been considered across

The exception to this is in applications by public and social housing authorities to evict tenants through notices to vacate, applications for possession and warrants of possession. In these cases, following the decision in *Director of Housing v Sudi* ('*Sudi*'),⁷ VCAT does not have the power to undertake collateral review of applications by public authority landlords to evict tenants by considering the Charter compatibility of these applications.

Our experience is that 'no reason' notices in particular are frequently used to evict long-standing and vulnerable tenants without adequate oversight.⁸ The following are examples of the types of scenarios in which we have observed 'no reason' notices being used since the decision of *Sudi*.

- An elderly individual suffering from physical medical conditions had lived in community house for 12 years. She had a minor dispute with a newly appointed manager of the premises, after which she was issued with a 'no reason' notice to vacate.
- A young mother, who was a reformed alcoholic and drug user, found long-term housing after a long struggle to obtain this type of service. She and her young daughter were issued with a 'no reason' notice to vacate. She was eventually told that the reason was that she received too many guests at times, and because of those guests ringing the doorbell when she was not home.

This means that vulnerable individuals and families, who are facing eviction from public housing, must undertake a complex and lengthy legal process to test whether the decision to evict them is a proportionate and reasonable limitation on their human rights. The decision of *Burgess & Anor v Director of Housing & Anor*⁹ ('*Burgess*') has further complicated the process for seeking redress of possible human rights breaches when facing eviction. Following the decision in *Burgess*, a person must either:

- apply to the Supreme Court after the decision is made to issue the notice to vacate but *before* the VCAT makes the possession order; *or*
- apply to the Supreme Court very quickly after the decision is made to purchase a warrant order.

An example of the difficulty in achieving redress is explained in the case study below.

Case study

Mr Forbath, an elderly pensioner, had been living in the same community housing complex for eight years when he was served with a 'no reason' notice to vacate. He challenged the notice and believed it was issued unlawfully because of an argument with the gardener about pruning bushes outside his window. Six months later, VCAT dismissed the challenge to the notice – which following the decision in *Sudi* could only be made on the basis of retaliation under s266(2) of the *Residential Tenancies Act 1997* – and made a possession order in favour of the landlord, with a warrant to be issued after one month.

many jurisdictions within the Tribunal and, even where it does not apply directly to the subject matter of the dispute, can be considered in relation to process and procedure..". Accessible via: <
https://www.vcat.vic.gov.au/system/files/VCAT_charter_cases_a_review.pdf>.

⁷ [2011] VSCA 266.

⁸ Victorian Equal Opportunity and Human Rights Commission 2013 *Report on the operation of the Charter of Human Rights and Responsibilities*, p27.

⁹ [2014] VSC 648.

Before the warrant was purchased, VLA contacted the housing provider, to request a delay in arranging the warrant because Mr Forbath was experiencing difficulty securing alternative accommodation. The housing provider refused. After this we asserted that, following the decision in *Burgess*, the decision to apply for a warrant might be the subject of judicial review and an argument of Charter unlawfulness before the Supreme Court.

As there is no notification requirement, VLA had to regularly check with VCAT as to whether the application for a warrant had been made as it was the trigger for judicial review proceedings.

Once the application for a warrant was made, VLA immediately filed judicial review proceedings and sought an urgent injunction to prevent VCAT from issuing the warrant. The injunction was granted and listed for further argument at the Supreme Court. The Court agreed that the matter was arguable. The injunction was extended and the matter listed for determination by the Court.

Ultimately, the matter did not proceed as the housing authority withdrew the application for a warrant, leaving nothing for the court to hear. Although the practical outcome was favourable for Mr Forbath, it removed the opportunity to test and clarify Charter obligations in the public housing context.

This case study illustrates the difficulty of using the Charter as the law currently stands, for the following reasons:

- Mr Forbath could have sought judicial review of the decision by the housing provider to issue a notice to vacate. However, understandably a person would be reluctant to do this before the hearing at VCAT, and most vulnerable tenants would be unaware of this right and do not seek legal assistance, or do so only on the day of the hearing at VCAT.
- Mr Forbath could challenge the decision to seek possession by way of judicial review proceedings in the Supreme Court, but only before the warrant of possession was issued. He could also challenge the decision to seek a warrant of possession in the Supreme Court, but only in the short window between the making of the application for a warrant and its execution and his final eviction. Different considerations would apply in challenges to each of these steps.

In the case of Mr Forbath and other cases that VLA has been involved in, the matter settled before proceeding to hearing. While such settlements may occur on terms that are favourable to individually assisted clients, it is important to acknowledge that the vast majority of residential tenancy matters are resolved without legal assistance for the party threatened with eviction. Preventing VCAT from considering Charter compatibility of decisions to evict public and social housing tenants means that the Charter provides no practical protection for them.

The lack of decided cases means that there is limited authority on key issues such whether social housing landlords are public authorities and what the content of Charter obligations are in seeking to evict tenants. Such jurisprudence, combined with greater access to VCAT, would provide public authorities with meaningful assistance in what is and is not lawful under the Charter in respect of eviction. This guidance is currently lacking.¹⁰

VLA considers that VCAT should be expressly conferred with the power to consider the lawfulness under the Charter of decisions of public authorities in respect of eviction – including decisions to

¹⁰ Note the submission of the Community Housing Federation of Victoria to the Charter Review (Submission 45), accessible via < <https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights> > at p5.

issue notices to vacate, make applications for possession and make applications for warrants of possession. Consideration of Charter lawfulness should take place at the same time that VCAT considers whether the actions of the landlords were consistent with the Residential Tenancies Act.

We do not agree with concerns that VCAT is not equipped to undertake this task.¹¹ As noted above, VCAT already has the power to consider the Charter in all other key areas where its decisions have a significant impact on rights. Before the Court of Appeal decision in *Sudi*, VCAT exercised this power and made a number of decisions considering the lawfulness of evictions under the Charter.¹²

Recommendation 1: Amend legislation (whether the Charter, VCAT Act or the Residential Tenancies Act) to expressly confer VCAT with the power to consider the lawfulness under the Charter of decisions of public authorities in respect of eviction – including decisions to issue notices to vacate, make applications for possession and make applications for warrants of possession.

Clarifying the operation of section 39 of the Charter

Section 39 of the Charter limits the use of the Charter in litigation to circumstances where a person may seek relief and remedy in respect of unlawfulness other than under the Charter. In practice this means that a claim in respect of Charter unlawfulness must “piggyback” on a claim of non-Charter unlawfulness. The complexity of section 39 has been widely recognised.¹³

VLA agrees that section 39 is unnecessarily complex and presents a barrier to using the Charter in meritorious human rights cases. This complexity is particularly felt in judicial review proceedings – one of the most common ways of holding public authorities to account – and means that time is spent on considering the availability and merit of non-Charter grounds rather than on the actual Charter rights issues that should be the focus of litigation.

For example, in the Forbath case described above, VLA relied on a ground of lack of procedural fairness as well as the Charter in the judicial review application. Had there not been a viable ground in relation to procedural fairness, arguably Mr Forbath could not have sought redress under the Charter although it was patently clear that his Charter rights had not been taken into account in the decision to evict him. It is hard to see how the strength of a non-Charter ground of judicial review provides a rational basis on which to determine whether Charter rights can be protected through judicial review.

Section 39 should be amended to make it clear that breach of the Charter can constitute a standalone ground of judicial review, without the need for a non-Charter ground of unlawfulness.

However, there will also be cases in which judicial review is not the most cost-effective and timely way to protect Charter rights. The case study below is one such case.

¹¹ As was noted by the Chief Justice in *Sudi*: “The VCAT Act sets up VCAT as a forum for speedy and inexpensive resolution of specific kinds of disputes. The RTA confers jurisdiction on VCAT to hear applications under that Act. In doing so, the RTA [Residential Tenancies Act] is implementing its stated purpose of providing ‘for the inexpensive and quick resolution of disputes under [the] Act’. A power to undertake collateral review would be wholly inconsistent with this purpose.”

¹² For example, [Director of Housing v TK](#) (*Residential Tenancies*) [2010] VCAT 1839 and [Director of Housing v KJ](#) (*Residential Tenancies*) [2010] VCAT 2026.

¹³ Victorian Parliament (57th), Scrutiny of Acts and Regulation Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006*, September 2011, at p126.

Case study

Albert¹⁴ has Parkinson's disease and is on a guardianship order, which gives the Office of the Public Advocate the power to make decisions in relation to his accommodation. His guardian decided to place him in a locked nursing home, and directed that he be prevented from leaving the home unless escorted. Albert has no friends or family and no professional escort had been arranged for him. This raised real questions about whether the direction was a proportionate and justifiable limitation on his right to liberty, which should be able to be tested before a court or tribunal.

There is a provision in the *Guardianship and Administration Act 1986* that allows a guardian to seek advice from VCAT as to the scope and exercise of their powers. However, there is no provision that allows a person subject to an order to challenge the decision of a guardian. Although a person subject to an order may seek a reassessment of the order, this does not give power for the Tribunal to assess particular decisions of the guardian. The decision could theoretically be judicially reviewed, but this would be time consuming, costly and complicated.

The Charter is unusual among pieces of legislation that protect key rights in Victoria in that it does not explicitly provide an accessible, timely means to seek redress for breaches of rights. Breaches of the *Equal Opportunity Act 2010* and *Information Privacy Act 2000*, for example, can both be taken directly to VCAT, and VCAT can provide a range of remedies when it finds there has been a breach of rights. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) also has conciliation power in respect of complaints under the Equal Opportunity Act. A similar approach should be taken in respect of the Charter.

VLA appreciates the concern present when the Charter was enacted, that it would lead to a flood of litigation, and particularly unmeritorious litigation. After seven years, concerns about a flood of unmeritorious litigation have proven to be unfounded. Rather, at present diligent advocates are deterred from running meritorious human rights cases for vulnerable clients. In any event, courts and tribunals already have mechanisms in place to manage vexatious or unmeritorious claims, which can arise under any legislation.

Recommendation 2: Amend section 39 to confirm that a breach of section 38 of the Charter can constitute a stand-alone ground of judicial review, without the need for a non-Charter ground of unlawfulness.

Include a provision in the Charter that establishes a direct cause of action for breaches of the Charter to VCAT with an appropriate range of remedies, and provide for conciliation by the VEOHRC.

Improving the accountability of existing public authorities

While in many cases we successfully assist clients to ensure public authorities comply with their Charter obligations, we do encounter difficulties in circumstances where some organisations do not consider themselves bound by the definition of 'public authority', despite carrying out functions of a public nature.

¹⁴ Not his real name.

We consider this to be contrary to the intention of Parliament, which expressly intended for the Charter to apply "...to 'downstream' entities, when they are performing functions of a public nature on behalf of another public authority" recognising the "...reality that modern governments utilise diverse organisational arrangements to manage and deliver government services."¹⁵ This can include such functions or services as privately operated prisons or residential care facilities for vulnerable children.

For example in the case of Mr Forbath, when legal representatives highlighted potential breaches of the Charter with the housing provider, it claimed the Charter did not apply to it as it was not a public authority.

The limited ability to seek redress in VCAT for these housing matters compounds this problem, as tenants are required to obtain relief from the Supreme Court but are often forced to withdraw applications when applications to evict are revoked by the housing provider. This removes the opportunity to clarify the law for the thousands of other tenants who are subject to decisions by public housing landlords but do not access legal assistance.

Our experience is that pursuing such cases as Mr Forbath's does not have the effect of changing the position of community housing providers regarding their status as public authorities. For example, although in Mr Forbath's case the landlord withdrew its application for a warrant of possession after Charter arguments was raised, just a few months later the same provider contended again in another case that it was not a public authority.

We note that the Australian Capital Territory (ACT) *Human Rights Act 2004* has a more comprehensive definition of what constitutes functions of a public nature.¹⁶ For example, it expressly lists public housing, public transport, emergency services, public education and other services as services of a public nature. One option would be to amend the Charter to adopt a similar approach to that taken in the ACT.

However, on balance we think that the main reason for the lack of clarity about the definition of functional public authorities is the lack of decided cases, caused by the absence of timely and accessible access to courts and tribunals in respect of the Charter. Without undue barriers to obtaining legal relief, we think it is likely that the status of organisations such as community housing providers as public authorities would be quickly confirmed.

While we do not think there is currently a need to amend the definition of public authority under the Charter, two steps could be taken to assist in ensuring that more functional public authorities take steps to comply with their Charter obligations. First, the Government should expressly include conditions in service agreements with private entities requiring those entities to be subject to the same obligations as public authorities under the Charter. We note that VEOHRC reports that Public Transport Victoria ensures that its service agreements with third party contractors include an obligation to comply with the Charter.¹⁷

¹⁵ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill, 2006, p4. Accessible via: <
[http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA2570CE0018AC6DCA257162001D4B2B/\\$FILE/551406exa1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA2570CE0018AC6DCA257162001D4B2B/$FILE/551406exa1.pdf)>.

¹⁶ *Human Rights Act 2004* (ACT), s40A.

¹⁷ Victorian Equal Opportunity and Human Rights Commission *2013 Report on the operation of the Charter of Human Rights and Responsibilities*, p.32.

Second, private and non-government agencies should be able to ‘opt-in’ to being public authorities, as occurs in the ACT pursuant to the *Human Rights Act 2004*. Although obligations of public authorities under the Charter should be mandatory and not opt-in, this would assist some public authorities to proactively implement Charter obligations in the absence of litigation in their areas, as well as allowing some private or community organisations that may not meet the definition of public authority to adopt a human rights culture.

Recommendation 3: Implement a whole of government policy requiring service agreements between government and agencies providing public services to include a standard term deeming the contracted service provider to be a public authority.

Recommendation 4: Introduce a provision that allows for organisations to ‘opt-in’ and be considered public authorities, like 40D of the *Human Rights Act 2004* (ACT)

Use of the Charter in the Magistrates’ and Children’s Courts

Our experience is that the Charter is infrequently relied upon in criminal proceedings in the Magistrates’ Court, Children’s Court and in the County Court. This is so despite many human rights issues arising in these jurisdictions, for example, in the context of considering of the appropriateness of diversion, freedom of movement considerations relating to bail or the rights of children in criminal proceedings.

The tendency for Charter arguments to be largely heard in superior courts can perpetuate a sense that Charter arguments do not have a place in the day-to-day business of Magistrates’ Courts and Children’s Courts.

Our experience has been that the practitioners can feel that the Charter is too complex to raise, as the relevance of the Charter is often questioned or challenged by magistrates. This is a particular disincentive in the context of busy duty lawyer lists, but remains a disincentive even for pre-prepared matters. In many instances, practitioners rely on alternative means to address human rights issues without recourse to the Charter. This represents a missed opportunity to clearly embed human rights considerations in jurisdictions which determine issues with direct relevance to many vulnerable peoples’ human rights.

We find that typically when the Charter is raised in these jurisdictions, that the Court discourages this discussion and does not wish to entertain the submissions, as they typically advise that there are ‘other relevant laws and considerations’ in which they can rely on first (for example, case law, legislation, policies) rather than the Charter.

In our practice experience, we have seen a great reluctance in magistrates in both the Children’s Court and Magistrates’ Court to have open and fruitful discussions about how the Charter could or does apply to cases and how it should be a consideration in their decision-making. Secondly, we see a tendency from the bench to want to avoid discussing the Charter as they indicate that it brings unnecessary ‘added complexity’ into a case at particularly a ‘lower level’ jurisdiction where it is ‘not needed’.

Case study

Shelly¹⁸ had previously been granted the ROPES program for a shop theft matter after being represented by VLA. Shelly successfully completed the ROPES program and a conviction was not recorded. Shelly reapproached VLA 6 months later and advised that she had been charged for

¹⁸ Not the client’s real name. Some facts have been changed for privacy reasons.

another shop theft matter that was committed around the same time as the initial (first) shop theft, and prior to the granting of the ROPES application by a magistrate.

The lawyer was able to negotiate with the prosecution and informant to recommend the child, (who was 16) for the diversion program on the basis that they could not undertake the ROPES program for a second time. Diversion was the only way for Shelly to avoid having a criminal record (as the charge was made out on the evidence), and it was recommended by police on the basis that it would be unfair for her to receive a criminal record for this second matter simply because the police did not list their charge in a prompt manner.¹⁹

VLA appeared and made submissions for diversion to be granted under section 59 of the *Criminal Procedure Act 2009* along with other relevant submissions. In addition, VLA made submissions that section 528 of the *Children Youth and Families Act 2005* should be read in conjunction and interpreted consistently with section 32 of the Charter, which would support the submission that diversion is a disposition that would be open to the Children's Court.

In response to this the relevant magistrate said: "Hang on, there is no need to discuss the Charter at this stage. There are other ways to deal with this. Don't get ahead of yourself and bring the Charter into this!" The magistrate then refused to engage on any submissions, but ultimately agreed to strike out the charge on an "OTH" (other order in Courtlink) on the basis of the completion of the ROPES program. However, this case, which is not atypical in our practice, illustrates the chilling effect of magistrates not wishing to countenance human rights issues.

We believe this could be addressed by removing some of the complexity in the Charter and through human rights training for both magistrates and legal practitioners. This is discussed further below.

Clarifying and simplifying the Charter's application to courts and tribunals

The way the Charter applies to courts and tribunals can create confusion in light of the interpretation of sections 4(1)(j) and 6(2)(b) of the Act.

In our view the combination of these sections is difficult and confusing in practice and acts as a disincentive for practitioners to challenge court and tribunal decision-making. This is because it:

- requires parties to understand when a court or tribunal is acting in an 'administrative capacity' as opposed to a judicial capacity for the purposes of section 4(1)(j).
- is difficult to understand the purpose of including Part 2 of the Charter in section 6(2)(b) in light of the obligation of courts and tribunals to comply with the charter in their administrative capacity by virtue of section 4(1)(j), and by extension section 6(2)(c).

To ensure the Charter's effectiveness and to prevent an unnecessary barrier to the promotion of human rights, we recommend clarifying and simplifying the drafting in relation to how the Charter applies to courts and tribunals.

We note the important role that tribunals including VCAT, the Mental Health Tribunal and others have played as public authorities when undertaking merits review. Care should be taken in any change to the jurisdiction of courts to retain these functions of tribunals.

¹⁹ It is noted that this diversion request was before the new policy of Victoria Police and the Children's Court where they now accept that diversion can apply in the Children's Court.

Recommendation 5: Clarify and simplify provisions relating to the application of the Charter to courts and tribunals. In particular, ensuring there is no confusion stemming from the application of sections 4(1)(j) and 6(2).

Clarifying how section 32 and section 7 of the Charter are to be interpreted

The High Court decision of *Momcilovic v The Queen*²⁰ was instrumental in upholding the validity of section 32 of the Charter, and therefore in informing how the Charter should be used by courts and tribunals. However, the *Momcilovic* decision left the relationship between section 32 and section 7 of the Charter unclear.

Thus uncertainty creates challenges in practice for lawyers seeking to use the Charter in statutory interpretation particularly in lower courts where time is more limited.

We therefore note that the Charter review provides a much-needed opportunity to make the relationship between section 32 and section 7 clear. We note that a number of rights that are frequently used in Charter litigation by our clients, including the protections against arbitrary interference in privacy and arbitrary detention, are already subject to internal limitations that require a proportionality analysis, and it would be possible to extend this to all rights by clarifying that section 7(2) does have a role in determining “compatibility” with the Charter.

Recommendation 6: Clarify the role played in s 7(2) in determining compatibility with the Charter under section 32 and section 38.

Education and training to promote a genuine human rights culture

In our view, there is need for greater awareness of the Charter, and greater clarity regarding how it operates. While there has undoubtedly been a steady improvement in awareness and understanding of the Charter since its introduction, some of the cases articulated in our submission demonstrate how a lack of understanding of the Charter can significantly impact on individuals’ lives, create avoidable legal disputes or inhibit a true human rights culture in Victoria.

In addition to addressing some of the complexity of the charter, we believe many of the issues outlined in our submission could be addressed through human rights training for public authorities – with a particular emphasis on the criminal justice system (magistrates, judicial officers, Victoria Police and legal practitioners).

We believe that there should be specific training for magistrates and judicial officers to empower them to understand the obligations and rights under the Charter, and how certain sections of the Charter have a direct interplay with the criminal law system (e.g. for bail, diversion, adjournments and other proceedings). Ideally, this training should encourage decision-makers to use the Charter to inform their approach to limitations of rights in a criminal context. We also consider value in Victoria Police receiving detailed training in the Charter – specifically the interplay that the Charter has in the collation of evidence and how it can also impact the admissibility of evidence under section 138 *Evidence Act 2008*.

By virtue of Part 4 of the Charter, we note that the VEOHRC has considerable experience and expertise in educating both the public and entities’ bound by the Charter on human rights. This role should be supported.

²⁰ [2011] HCA 34.

Finally, we believe that criminal lawyers should be provided with further support and training about how to best raise Charter arguments (especially in the lower courts). VLA has a role to play in this and is actively considering ways to improve awareness and understanding of how the Charter can be used effectively in advocacy.

Recommendation 7: Invest in, and prioritise human rights training for entities (both government and non-government) on their obligations under the Charter, with a particular focus on the application of the Charter to criminal law proceedings.

Charter Notices

Section 35 requires the giving of notice to the Attorney-General and the VEOHRC in matters in the County and Supreme Courts in which a question of law under the Charter arises. Sections 34 and 40 give the Attorney-General and VEOHRC the right of intervention in all matters in which the Charter arises, regardless of the court or tribunal in which they are being heard.

VLA practitioners involved in Charter cases have noted with appreciation the role that the VEOHRC has played in its interventions, and found that the role has been helpful in the clarification of Charter arguments. VLA also notes the positive role that the VEOHRC's intervention has played in cases where a party is unrepresented,²¹ or where there is no other contradictor on Charter issues.²²

However, we also note consistent feedback from VLA practitioners that the notice and intervention functions serve as a disincentive to raising Charter arguments. There is a perception that preparing and serving notices, combined with possible adjournment and additional time required to accommodate intervening parties can extend and delay proceedings. In our experience, particularly criminal matters, sometimes practitioners will be reluctant to raise Charter arguments for this reason, particularly in circumstances where a client is in custody. While the possibility of delay may be more perception than reality, the disincentive it creates is real and should be addressed.

In Victoria's first guideline judgment on community correction orders,²³ the court received significant assistance from Victoria Legal Aid, the Office of Public Prosecutions and the Sentencing Advisory Council, as this case was of general importance to sentencing in Victoria. These organisations have a right of intervention under 6AD of the *Sentencing Act 1991*. We also note that in that case the Attorney-General was granted leave by the Court to intervene, even though there is no right of intervention under the Sentencing Act.

Accordingly, we support limiting the notice and interventions functions to cases of general importance, or cases (such as where a Charter litigant is unrepresented) where notice and intervention are otherwise in the interests of justice.

Recommendation 8: Limit the notice and intervention provisions in the Charter to give the courts discretion to order parties to give notice and permit intervention in cases of general importance, or where the interests of justice otherwise require it.

²¹ *Goode v Common Equity Housing Ltd* [2014] VSC 585.

²² *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381.

²³ *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342.

Further review of the Charter

We consider that the two statutory reviews of the Charter have been valuable and created an opportunity to reflect on its operation in two pivotal stages. However, we consider that almost a decade after introduction, we think the 'special' status afforded the new and novel Charter is no longer necessary.

The Charter should not be viewed as something distinct or separate from the everyday legal obligations that govern the Victorian community. It should be afforded the same status as other key pieces of legislation – and therefore be subject to review, scrutiny, modification and improvement as any other piece of legislation when the circumstances of the day require it.

Recommendation 9: Rather than introducing a further statutory review provision, allow the Charter to be subject to review, scrutiny, modification and improvement as any other piece of legislation.