



From Commitment to Culture

The 2015 Review of the Charter of Human Rights
and Responsibilities Act 2006

MICHAEL BRETT YOUNG

SUMMARY REPORT

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Summary Report: From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006

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Terms of reference

Pursuant to section 45 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), to inquire into and report by 1 September 2015 on the operation of the Charter, including:

1. Ways to enhance the effectiveness of the Charter, including, but not limited to:

- a. reviewing the submissions from the 2011 Scrutiny of Acts and Regulations Committee review and the Committee's report
- 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
- c. the effectiveness of the scrutiny role of the Scrutiny of Acts and Regulations Committee
- d. the development of a human rights culture in Victoria, particularly within the Victorian public sector
- e. the application of the Charter to non-State entities when they provide State-funded services.

2. Any desirable amendments to improve the operation of the Charter, including, but not limited to:

- a. clarifying the provisions regarding public authorities, including the identification of public authorities and the content of their human rights obligations
- b. clarifying the provision(s) regarding legal proceedings and remedies against public authorities
- c. clarifying the role of human rights in statutory construction
- 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
- e. clarifying the obligations of courts including under sections 4(1)(j) and 6(2)(b)
- f. the need for the provision for an override declaration by Parliament under section 31
- g. the effectiveness of the declaration of inconsistent interpretation provision under section 36
- h. the usefulness of the notification provision(s) including under section 35
- i. any other desirable amendments.

3. A recommendation under section 45(2) as to whether any further review of the Charter is necessary.



Introduction

The *Charter of Human Rights and Responsibilities Act 2006 (Vic)* is about the relationship between government and the people it serves. Through the Charter, the Victorian Parliament requires state and local government to treat people fairly by acting compatibly with 20 fundamental rights and freedoms.

The Charter requires a review of the legislation to be undertaken after a period of four years and again after eight years of operation. These reviews were built into the Charter because Parliament recognised the community conversation about human rights was continuing, and because it wanted there to be regular reflection points on how the Charter was operating and whether it was meeting the needs of the community.

The first review was conducted in 2011 by the Victorian Parliament's Scrutiny of Acts and Regulations Committee.

On 2 March 2015 the Attorney-General, the Hon Martin Pakula MP, issued the terms of reference for the eight-year Review and appointed Michael Brett Young as the independent reviewer.

To conduct the Review, Mr Brett Young attended more than 60 face-to-face meetings with a wide range of people and organisations, held eight open community forums, and received 109 written submissions.

The terms of reference asked Mr Brett Young to consider ways to enhance the effectiveness of the Charter. The recommendations are guided by the key goal of making the Charter more effective in achieving its statutory purpose: to protect and promote human rights.

The Review looks for ways to improve the Charter to make it more:

1. accessible—How could the Charter be simpler, clearer and easier to work with?
2. effective—What would support better decision making and human rights outcomes?
3. practical—What would help the Charter to achieve results?

The Report of the Review is structured around:

- key areas in which the Charter does its work
- the need to build a strong human rights culture and for public authorities to give life to human rights in their everyday work
- the role of oversight bodies
- Parliament's foundational role in human rights scrutiny of new laws.

The Report notes that the Charter has helped to promote and protect human rights in Victoria and outlines 52 recommendations on how the Charter could be more accessible, effective and practical.

This is a summary of the full Report of the Review. The full Report is available from the Department of Justice & Regulation on (03) 8684 7512, at www.justice.vic.gov.au, or by writing to: Human Rights Unit, Department of Justice & Regulation, Level 24, 121 Exhibition Street, Melbourne VIC 3000.

The Charter requires the Attorney-General to table the full Report of the Review in Parliament on or before 1 October 2015. The Parliament will then decide whether to make any legislative changes to the Charter, and the Government will decide whether to change any policy or practice as a result of the Review.



How the Charter works now

Human rights are the basic rights that belong to everyone, regardless of age, race, sex or disability, income or education. They are about treating people fairly, with dignity and ensuring individual rights are respected.

The Charter is an ordinary Act of Parliament that sets out the rights, freedoms and responsibilities shared by everyone in Victoria and protected by law. It aims to promote a culture where everyone’s human rights are protected and considered in government service delivery, policy and legislation.

The Charter is about the work of Parliament, the Government and the courts. It places obligations on state and local government public authorities to respect the human rights of all people in Victoria.

The human rights in the Charter

The Charter contains the following 20 human rights. The rights in the Charter are based on, but are not identical to, the rights in the International Covenant on Civil and Political Rights (ICCPR).

| | | | |
|-------------------|---|-------------------|--|
| section 8 | right to recognition and equality before the law | section 18 | right to take part in public life |
| section 9 | right to life | section 19 | cultural rights |
| section 10 | right to protection from torture and cruel, inhuman and degrading treatment | section 20 | property rights |
| section 11 | right to freedom from forced work | section 21 | right to liberty and security of the person |
| section 12 | right to freedom of movement | section 22 | right to humane treatment when deprived of liberty |
| section 13 | right to privacy and reputation | section 23 | rights of children in the criminal process |
| section 14 | right to freedom of thought, conscience, religion and belief | section 24 | right to fair hearing |
| section 15 | right to freedom of expression | section 25 | rights in criminal proceedings |
| section 16 | right to peaceful assembly and freedom of association | section 26 | right not to be tried or punished more than once |
| section 17 | right to protection of families and children | section 27 | right to protection from retrospective criminal laws |



The rights in the Charter are not absolute but they can only be subject to reasonable limitations that can be justified. Section 7(2) of the Charter sets out factors for determining whether a limitation on a right is justified:

- the nature of the right
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose
- any less restrictive means reasonably available to achieve the purpose.

How the Charter protects human rights

The Charter works to protect human rights in three main ways:

1. public authorities in state and local government must act in ways that are compatible with human rights
2. human rights must be taken into account when developing new laws
3. people and public institutions, including the courts, must interpret and apply all laws in a way that is compatible with human rights, as far as possible.

The Charter is primarily about the relationship between Victorian state and local government and the community, ensuring that public authorities take people's human rights into account when they provide services. Private entities are also bound to act compatibly with human rights and consider human rights in decision making when they perform public functions on behalf of government. For example, the Charter makes clear that a private company managing a Victorian prison has human rights obligations.

The Government must also consider human rights when it drafts new laws. Every new Bill that is introduced into Parliament is accompanied by a statement of compatibility and all new Regulations must have a human rights certificate. These documents consider whether the new law limits any human rights and, if so, whether the limitation can be justified. If a Bill limits human rights and the limitation cannot be justified, the Bill is incompatible with human rights and the statement must say this. The Scrutiny of Acts and Regulations Committee of the Victorian Parliament then considers whether new laws are compatible with human rights and reports on this to Parliament.

Importantly, the Charter does not prevent Parliament from passing legislation that is incompatible with human rights. The Charter does not override other legislation or allow the courts to strike down legislation that is incompatible with human rights. Courts must try to interpret laws in a way that is compatible with human rights, but they cannot go against the purpose of a legislative provision to make it compatible with human rights. Instead, the Charter promotes human rights compatible laws by making sure that human rights are taken into account in the legislative process. It sets up a mechanism for the Supreme Court to notify the Government and Parliament if it considers a law cannot be interpreted compatibly with human rights.

The roles of statutory bodies under the Charter

In addition to placing human rights obligations on public authorities, and making sure that human rights are considered when laws are made and interpreted, the Charter creates particular roles for some statutory bodies.

The Victorian Equal Opportunity and Human Rights Commission is an independent statutory agency and has a range of advisory and educative functions under the Charter, including:

- reporting to the Attorney-General annually on the operation of the Charter
- advising the Attorney-General on anything relevant to the operation of the Charter



- by request, reviewing public authorities' programs and practices to determine whether they are compatible with human rights
- providing human rights education
- intervening in legal proceedings when a legal question arises about the Charter's application or the human rights compatible interpretation of a law
- assisting with the statutory reviews of the Charter.

The Commission can receive complaints under the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic) and offer dispute resolution, but it cannot take human rights complaints under the Charter.

The Victorian Ombudsman is an independent officer of the Victorian Parliament. Her office performs an oversight function, investigating complaints about administrative actions taken by a wide range of Victorian public authorities. The Ombudsman has power to enquire into and investigate complaints about alleged breaches of the Charter within her jurisdiction.

Police and protective services officers are excluded from the Ombudsman's jurisdiction. The Independent Broad-based Anti-corruption Commission has a function to ensure that police and protective services officers have regard to the human rights in the Charter and it can investigate police misconduct, including allegations of a breach of human rights.

The Ombudsman and the Independent Broad-based Anti-corruption Commission have power to compel the production of information to support their investigations.



Review summary and recommendations

Chapter 1 Building our human rights culture

Chapter 1 of the Report looks at building a human rights culture and addresses term of reference 1(d) on an effective human rights culture.

The Charter and our culture are strongly linked. We created the Charter in Victoria because of our existing culture and values.

Melbourne CBD community forum participant, 13 May 2015

The Report outlines that for the Charter to be effective, the Victorian Government must prioritise work to build a stronger human rights culture, particularly in the Victorian public sector. A strong human rights culture facilitates better government decision making. Having the law is not enough to achieve human rights protection: Victoria also needs a culture that makes human rights real in people's everyday interaction with government. For this reason, the reviewer recommends that the Government's primary focus be on this front end of the system.

...after eight years of operation, the use of the Charter has matured beyond simple compliance with the law. The Charter is not only part of 'everyday business' for many public authorities, but drives important human rights initiatives to address systemic issues. In this way, it prompts organisations to take a proactive, rather than reactive, approach to their operations and the way they engage with the community.

Victorian Equal Opportunity and Human Rights Commission,
2014 Report on the Operation of the Charter of Human Rights and Responsibilities

There is no 'one size fits all' approach to building an effective human rights culture. The Report outlines three influences that require attention:

- 1. Senior leadership and organisational vision**, including from Ministers and senior public servants
- 2. Operational capacity**, including the role of supervisors and team behaviour, and the need to build the knowledge and capacity of staff
- 3. External input and oversight**, including community attitudes and expectations, capacity in the legal sector, and the role of external accountability and oversight.

The reviewer makes recommendations to re-engage each of these influences to support the development of an effective human rights culture and build on work that is already being done by public authorities. This re-engagement will require government commitment to support human rights education in particular.



Recommendations

1. The Victorian Government make a public statement of commitment to human rights and Ministers reinforce in their dealings with departments and agencies their expectation that they should act compatibly with human rights.
2. The Victorian Secretaries Board include the development of a human rights culture as part of its work in setting values and standards across the Victorian public sector. An inter-departmental committee should support this work by providing leadership and coordination for departments and agencies at the State government level.
3. The Victorian Government encourage public sector entities to promote a human rights culture in their organisations, including by:
 - (a) ensuring their organisational vision, plans, policies and procedures support good human rights practice
 - (b) building relevant human rights capabilities into staff position descriptions and ongoing professional development.
4. The Victorian Government review the structure and placement of the Human Rights Unit so that it can provide centralised expertise on human rights within government. The Unit's role should include providing advice, developing and maintaining human rights resources for use within the Victorian government, and providing specialist training (such as training on how to develop human rights compatible policy and legislation, and how to draft statements of compatibility).
5. The Human Rights Unit update the Charter Guidelines for Legislation and Policy Officers. The Unit should also work with departments and agencies to continue to develop specialist guidance and promotional materials in key areas of policy and service delivery, such as policing, corrections, health services, disability services, child protection and education.
6. The Victorian Equal Opportunity and Human Rights Commission be given responsibility to provide human rights education within the public sector to:
 - (a) leaders across the Victorian public sector to ensure that they can influence a positive culture of human rights
 - (b) local government councillors. As a priority, materials should be available to support the induction of new councillors after the October 2016 local government elections
 - (c) staff of Victorian public sector departments, agencies and local government. Where possible, the training should be tailored to the needs of particular work areas and be delivered in consultation with front line staff who understand the operational aspects of the work area
 - (d) private entities that perform functions of a public nature and have obligations under the Charter.
7. The Victorian Equal Opportunity and Human Rights Commission facilitate opportunities for public and community sector workers to share experience and expertise on the Charter. Such opportunities could include Human Rights Network events, the production of resources, the establishment of communities of practice sponsored by a senior executive, and the use of existing networks.
8. The Victorian Equal Opportunity and Human Rights Commission provide further human rights education to the community and community advocates.
9. Public authorities make relevant human rights information available when providing services to the community and provide a way for people to have a say about issues that affect them.



10. The Victorian Equal Opportunity and Human Rights Commission look for ways to engage with the private sector to build a broader human rights culture in Victoria. Such engagement could include establishing a Corporate Charter Champions group, partnering with businesses on activities, or working with business networks to build understanding of the Charter.
11. The Judicial College of Victoria be responsible for educating judicial officers and tribunal members regularly on how the Charter operates. Where appropriate, this education could be done in conjunction with professional development for the legal profession.

Chapter 2 Clarifying responsibilities for human rights – acts and decisions of public authorities

Chapter 2 addresses what is needed to clarify responsibilities for human rights. It covers terms of reference 2(a) on clarifying the provisions regarding public authorities; 1(e) on applying the Charter to non-State entities; and 2(e) on clarifying the obligations of courts and when they have public authority obligations.

The reviewer makes recommendations to ensure greater certainty about who is a public authority, so individuals are aware of their rights and entities are aware of their obligations. This awareness is a particular issue for private entities delivering public services. These entities already have public authority obligations under the Charter when they are performing functions of a public nature on behalf of the state. The reviewer proposes improvements to the current definition of 'public authority' to make this clearer, while allowing for future changes in how government operates. He recommends, for example, adding a non-exhaustive list of public functions to the Charter, providing a mechanism for private entities to voluntarily 'opt in' to public authority obligations, and encouraging government to make the Charter's application clearer in its contracts with the private sector.

Despite uncertainty about when the Charter may apply to the courts as public authorities, the reviewer concludes that case law now provides guidance on this matter. For this reason, he does not make any recommendations to change the balance struck by the courts. There is a recommendation to clarify the note that appears in the Charter about when a court may be acting in an administrative capacity.

Recommendations

12. Section 4 of the Charter be amended to set out a non-exhaustive list of functions of a public nature under section 4(1)(c), including:
 - (a) the operation of prisons and other correctional facilities
 - (b) the provision of public health services
 - (c) the provision of public education, including public tertiary education
 - (d) the provision of public housing, including by registered housing providers
 - (e) the provision of public disability services
 - (f) the provision of public transport
 - (g) the provision of emergency services
 - (h) the provision of water supply.
13. The Victorian Government use the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013 (Vic)* to prescribe entities to be or not be public authorities—including entities that provide services under national schemes—where necessary to resolve doubt.
14. A whole-of-government policy be developed for relevant State contracts to include terms that contracted service providers will have public authority obligations when performing particular functions under the contract and a provision be included in the Charter to authorise this.

15. The Charter provide for any entity to 'opt in' to public authority obligations by requesting the Attorney-General declare them to be a public authority, as in section 40D of the *Human Rights Act 2004* (ACT).
16. The Victorian Government review and clarify how the Charter applies to public sector employees who are not employed under the *Public Administration Act 2004* (Vic) (such as teachers).
17. The Charter be amended to clarify that decisions of public authorities must be substantively compatible with human rights, whether by defining 'to act' as including 'to make a decision' or by specifying in section 38(1) that it is unlawful for a public authority to make a decision that is incompatible with a human right.
18. The Victorian Government consider the exception from public authority obligations in section 38(4) of the Charter (an exception relating to the religious doctrines, beliefs and principles of a religious body), as part of its current examination of religious exceptions and equality measures in other Victorian laws, so it can apply a consistent approach.
19. The second sentence in the note to section 4(1)(j) of the Charter be removed or amended, because listing cases and adopting practices and procedures may sometimes involve acting in a judicial capacity rather than in an administrative capacity.

Chapter 3 Facilitating good practice and dispute resolution – the role of statutory authorities

Chapter 3 looks at the roles of relevant statutory authorities under the Charter and addresses term of reference 1(b) on the functions of the Victorian Equal Opportunity and Human Rights Commission and the Victorian Ombudsman. The reviewer considers the Charter as a limb of the new administrative law, being part of the system that guides, informs and legitimises public administration. Putting the Charter in this context, he considers what is needed to build an effective regulatory framework.

The Report sets out recommendations to better facilitate compliance with the Charter, support the resolution of issues when a member of the community is concerned government has not complied with the law, and clarify oversight roles.

Drawing on the Ayers and Braithwaite model of the enforcement pyramid, the reviewer found the Charter is missing key elements of an effective regulatory system. To address this issue, the Report recommends the Charter be enhanced to enable the Victorian Equal Opportunity and Human Rights Commission to offer dispute resolution under the Charter (as it does under the Equal Opportunity Act and the Racial and Religious Tolerance Act). This enhancement would support the Commission's facilitative role in the compliance pyramid and provide a clear path for people to raise concerns with government if they feel their human rights are not being respected. Flexible alternative dispute resolution can be particularly effective in delivering access to justice when disputes arise between government and the community it serves.

Alternative dispute resolution provides a quick, cheap, accessible, informal and easy-to-navigate method of redress outside the traditional court system. Parties can negotiate an outcome that is mutually acceptable and which can provide a personal remedy for the complainant, such as compensation or an apology, or system change such as ... changes to internal or staff practice and procedures ... and provision of training.

Victorian Equal Opportunity and Human Rights Commission
Submission 90



An effective regulatory framework also needs agencies with authority to investigate serious or systemic issues. The Victorian Ombudsman already has this jurisdiction for most public authorities, and the Independent Broad-based Anti-corruption Commission has this jurisdiction for police and protective services officers. These roles sit largely in the oversight section of the compliance pyramid for the Charter, although their functions also have an educative and facilitative role and can lead to enforcement activities.

The reviewer concludes that the Ombudsman's jurisdiction over private entities when they are performing work on behalf of government could be more clearly stated to ensure the Ombudsman can consider the human rights compliance of all functional public authorities under the Charter. At the moment, people have to look through multiple definitions in several different Acts to work this out. The reviewer recommends the Victorian Government ensure the Independent Broad-based Anti-corruption Commission has capacity to investigate allegations of serious human rights abuses by police and protective services officers.

Chapter 3 also sets out recommendations to facilitate the Charter's consideration by all relevant government complaint-handling and oversight bodies when Charter issues arise within their jurisdiction. This will support the original approach to implementation of the Charter by integrating it across the Victorian public sector. The Charter is everyone's business in the public sector. Public sector entities, including complaint-handling bodies, should have capacity to deal with human rights issues when they arise in their work. The reviewer does not recommend that all human rights related complaints should shift to the Victorian Equal Opportunity and Human Rights Commission. Specialist complaint-handling bodies like the Mental Health Complaints Commission, for example, should continue to be able to consider human rights issues that are raised in relation to public mental health service providers. The reviewer also makes recommendations to facilitate communication between complaint-handling and oversight bodies. This would allow, for example, the Ombudsman to advise the Victorian Equal Opportunity and Human Rights Commission about systemic issues which the Commission may want to target by education.

Recommendations

20. The Victorian Equal Opportunity and Human Rights Commission be given the power to request information to assist with its statutory functions under the Charter and public authorities be given a duty to assist, as exists under the *Privacy and Data Protection Act 2014 (Vic)*.
21. The Victorian Equal Opportunity and Human Rights Commission be given the discretion to charge for the reasonable costs of voluntary compliance reviews, and education and training services.
22. The Victorian Ombudsman, the Independent Broad-based Anti-corruption Commission, and other relevant oversight bodies be given the power to request the Victorian Equal Opportunity and Human Rights Commission to help them when they exercise their statutory powers in relation to human rights issues.
23. The Victorian Equal Opportunity and Human Rights Commission be given the statutory function and resources to offer dispute resolution for disputes under the Charter.
24. The *Ombudsman Act 1973 (Vic)* make clear that the Ombudsman can consider human rights issues relating to the administrative actions of all public authorities under the Charter, except police and protective services officers. The Charter should note this jurisdiction.
25. All relevant public sector oversight bodies should have the ability to consider human rights issues that arise within their jurisdiction, for example, the Mental Health Complaints Commissioner should continue to be able to consider human rights issues that relate to public mental health service providers. Mechanisms should be established to enable referral and appropriate information sharing between complaint-handling and oversight bodies. The Charter should note these roles.
26. The Victorian Government ensure the Independent Broad-based Anti-corruption Commission has capacity to investigate allegations of serious human rights abuses by police and protective services officers.



Chapter 4 Remedies and oversight – the role of the courts

Chapter 4 examines the role of the courts in determining whether a person's human rights have been breached and deciding what should happen. It addresses term of reference 2(b) on clarifying the provisions regarding legal proceedings and remedies.

In a few cases at the pointy end of the regulatory pyramid, the Charter needs to provide for someone to decide whether there has been a breach of a person's human rights and whether to order an appropriate remedy. The reviewer proposes a remedies provision modelled on section 40C of the *Human Rights Act 2004* (ACT) to provide a clear framework to achieve these outcomes.

The proposed model would give community members access to dispute resolution at the Victorian Equal Opportunity and Human Rights Commission, and an avenue to have the Victorian Civil and Administrative Tribunal decide whether their rights have been breached. People could continue to raise the Charter in other legal proceedings where relevant. Government oversight bodies could continue to look at Charter issues that are relevant to their jurisdiction.

The Charter is an asymmetrical document: it speaks loudly about the principles of human rights but it speaks very softly with respect to enforcement.

Meeting participant, April 2015

If not changed, the current system will continue to present four key problems:

- (a) Lack of consequence.** Without a clear way to remedy a breach of someone's human rights, the regulatory model for the Charter will continue to be flawed. The likelihood of consequences drives change in behaviour, as in occupational health and safety, privacy and discrimination law.
- (b) A focus on government administration and not on a remedy for the individual.** From a community perspective, people do not always have a clear place to raise a human rights concern with government and get a response. Sometimes, no available process focuses on a remedy for the individual for a potential breach of their rights. An investigation about police misconduct by the Independent Broad-based Anti-corruption Commission, for example, can be a confidential process that focuses on a government employee's duties to the state. These types of processes focus on public administration and governance questions, and do not directly address the relationship between government and the community member with the concern.
- (c) Accessibility.** In some cases, the only way for a person to have their human rights considered by an independent person is to raise the matter with a superior court. Access to justice, therefore, can be out of reach for many Victorians and involves a more expensive jurisdiction. This restriction is both a barrier to the Charter's use and an inefficient use of government resources (when other areas of law deal with such issues as a matter of course in the Human Rights List at the Victorian Civil and Administrative Tribunal).
- (d) Convoluted litigation.** As the case law stands, people can bring Charter issues before a court or tribunal only if they can 'piggy back' it onto another claim such as a discrimination claim. The Charter question has to relate to the same conduct as the other claim, but the other claim does not have to be successful. As a result, people can only argue human rights issues in convoluted ways that raise difficult jurisdictional questions. These issues are also likely to end up in the Supreme Court.



The reviewer proposes to address these issues by:

- promoting a culture of human rights as a legal obligation that people take seriously. This culture will support **better decision making**.
- giving community members a clear pathway to raise their human rights concerns with government. This pathway will deliver **access to justice**.
- facilitating alternative dispute resolution to give people an opportunity to resolve issues at an early opportunity. This approach will support **the relationship between government and the community and the efficient use of resources**.
- providing an independent forum to determine whether human rights have been breached and how to address this breach for the individual concerned. This independent forum will promote **transparency and confidence in government**.

Recommendations

27. The provisions and process for obtaining a remedy under the Charter be clarified and improved by:

- (a) amending the Charter to enable a person who claims a public authority has acted incompatibly with their human rights, in breach of section 38 of the Charter, to either apply to the Victorian Civil and Administrative Tribunal for a remedy, or rely on the Charter in any legal proceedings. The amendment should be modelled on section 40C of the *Human Rights Act 2004* (ACT).

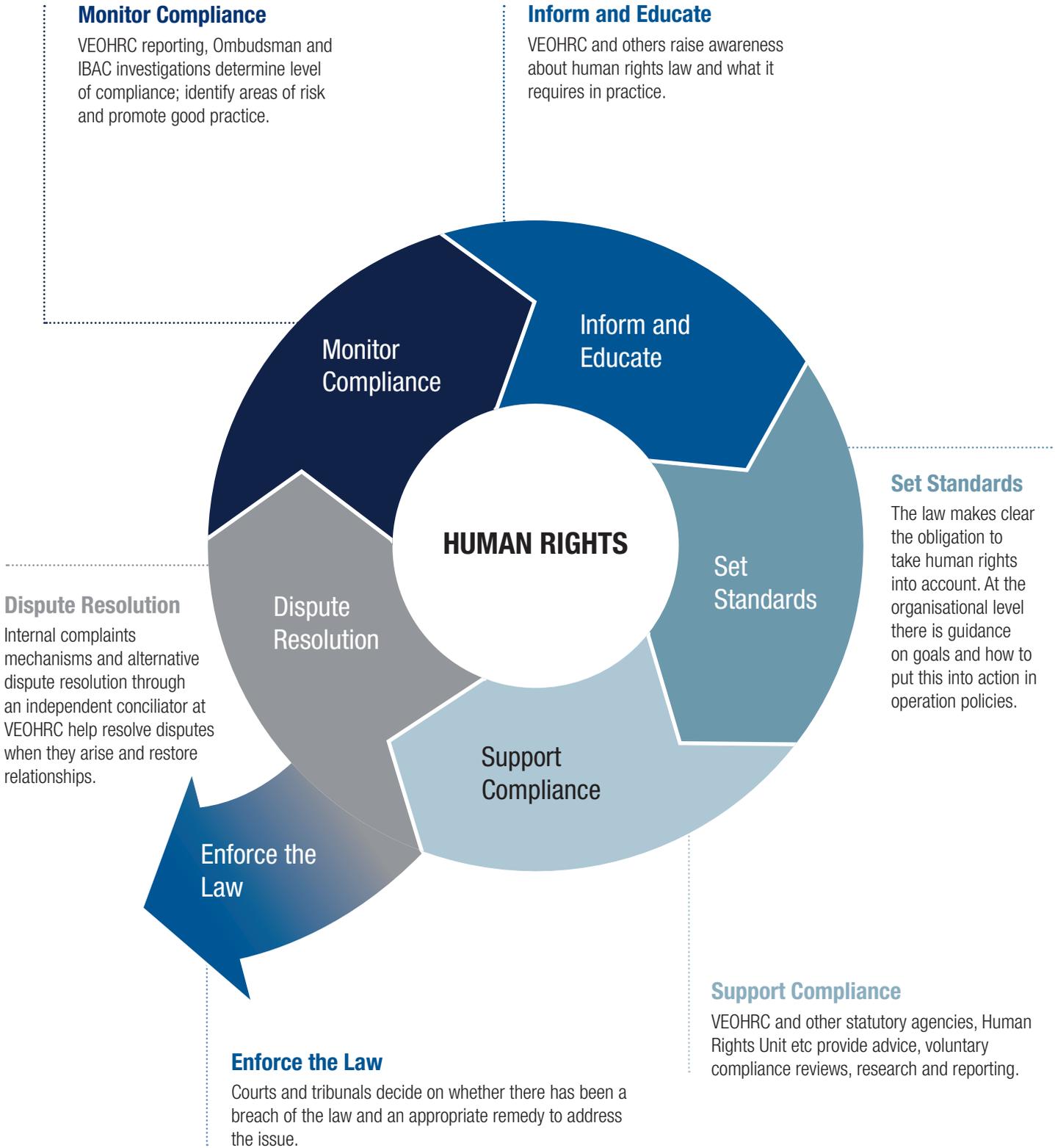
The Tribunal's jurisdiction to determine whether a public authority has breached section 38 of the Charter should be similar to its jurisdiction in relation to unlawful discrimination under the *Equal Opportunity Act 2010* (Vic). If the Tribunal finds that a public authority has acted incompatibly with a Charter right, it should have power to grant any relief or remedy that it considers just and appropriate, excluding the power to award damages.

- (b) if the Charter is raised in another legal proceeding, the court or tribunal should retain the ability to make any order, or grant any relief or remedy, within its powers in relation to that proceeding. It should remain the case that a person is not entitled to be awarded any damages because of a breach of the Charter, in accordance with existing section 39(3) of the Charter.
- (c) amending the Charter to make it clear that a person who claims that a decision of a public authority is incompatible with human rights, or was made without proper consideration of relevant human rights, can seek judicial review of that decision on the ground that the decision is unlawful under the Charter, without having to seek review on any other ground.

The diagram on the following page outlines the overall regulatory approach proposed for the Charter: setting standards; providing education and mechanisms to support compliance; monitoring and resolving disputes; and only drawing on mechanisms to enforce the law when other elements fail.



Proposed Regulatory Approach for the Charter



Chapter 5 Interpreting and applying the law

Chapter 5 considers other issues that have arisen with the Charter's operation, including some of the more technical legal debates about its operation. It addresses terms of reference 2(c) on clarifying the role of human rights in statutory construction; 2(d) on clarifying the role of the proportionality test in section 7(2) (particularly as the test relates to statutory construction and the obligations of public authorities); 2(g) on the effectiveness of the declaration of inconsistent interpretation by the Supreme Court; and 2(h) on the usefulness of the notification provision that lets the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission know when Charter issues are raised in superior courts.

First, the reviewer observes that there was overwhelming agreement from his consultations that the legislation needs to clarify the role of human rights in statutory construction.

Momcilovic has produced uncertainty about the scope of this important aspect of the Charter. This is a major barrier to the effectiveness of the instrument, especially since one of the primary objects of the Charter is to provide a clear and well understood means of interpreting Victorian statutes in line with human rights guarantees.

**Professor Rosalind Dixon and Professor George Williams AO,
Submission 8**

The reviewer recommends the Charter require statutory provisions to be interpreted, as far as possible, in the way that is most compatible with human rights. When a choice must be made between possible meanings that are incompatible with human rights, the provision should be interpreted in the way that is least incompatible with human rights. The amendment should require the use of section 7(2) to assess which interpretation is most compatible, or least incompatible, with human rights. The Charter should also set out the steps for interpreting statutory provisions compatibly with human rights.

The reviewer also recommends the Charter define 'compatibility' and 'incompatibility' to make clear that an action that does not limit a human right, or a limit on a human right that is reasonable and demonstrably justified in the terms of section 7(2), is compatible with human rights. Further, he recommends the terms 'compatibility' and 'incompatibility' with human rights be used consistently in the Charter, and the internal limitation on the freedom of expression (section 15(3)) be removed to ensure the general limitations clause in section 7 can be applied consistently across the Charter. The reviewer notes he is satisfied that the general limitations clause can do the same work that the internal limitation in section 15(3) was intended to cover.

When the Supreme Court is unable to find a human rights compatible interpretation of a statutory provision, it can issue a declaration of inconsistent interpretation. The reviewer recommends renaming this declaration as a declaration of incompatible interpretation, to ensure consistent language and clarity of use. This declaration initiates communication between the Executive Government and Parliament about the provision. It does not make the provision invalid or change the rights of the parties in the proceedings. The reviewer does not recommend changing the substantive operation of this provision.

Finally, Chapter 5 considers the usefulness of the provision requiring notice to interveners when Charter issues are raised in superior courts. The reviewer notes the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission play useful roles as interveners. They provide their institutional views on key questions of law to assist the court or tribunal.

[I]nterventions 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.

Law Institute of Victoria, Submission 78



The reviewer recommends retaining the right to intervene, but removing the automatic requirement to notify in County Court matters. He notes the County Court does not create law, and that this is also the case with lower courts and the Victorian Civil and Administrative Tribunal, where notice is not currently required. Removing the notice requirement in the County Court helps address perceived barriers to raising the Charter, particularly in criminal trials. The reviewer recommends all judicial officers and tribunal members be given discretion to require notification when the matter is of general importance or otherwise in the interests of justice, to ensure the Attorney-General and the Commission are still aware of significant matters. He encourages active case management of interveners, and proposes that interveners should publish information about how they respond to notices and their positions on costs.

Recommendations

28. Section 32 of the Charter be amended to:

- (a) require statutory provisions to be interpreted, so far as it is possible to do so consistently with their purpose, in the way that is most compatible with human rights
- (b) require, where a choice must be made between possible meanings that are incompatible with human rights, that the provision be interpreted in the way that is least incompatible with human rights
- (c) make it clear that section 7(2) applies to the assessment of the interpretation of what is most compatible, or least incompatible, with human rights
- (d) set out the steps for interpreting statutory provisions compatibly with human rights, to ensure clarity and accessibility.

29. The Charter define the concepts of ‘compatibility’ and ‘incompatibility’ to make it clear that an act, decision or statutory provision is compatible with human rights when it places no limit on a human right, or it limits human rights in a way that is reasonable and demonstrably justifiable in terms of section 7(2). The Charter should use the two terms consistently, in relation to scrutiny of legislation (sections 28 and 30), the interpretation of legislation (sections 32, 36 and 37) and the obligations of public authorities (section 38).

30. Section 7, containing the general limitations clause, be excluded from the Charter’s definition of ‘human rights’ and the definition of ‘human rights’ refer to all the rights in Part 2, not only the civil and political rights.

31. The internal limitation on freedom of expression in section 15(3) be repealed, so the general limitation provision in section 7(2) can be applied as the Charter’s common test to balance competing rights and interests.

32. Sections 36 and 37 of the Charter be amended to use the words ‘declaration of incompatible interpretation’ and ‘cannot be interpreted compatibly with a human right’, for consistency with terminology used in related sections, including section 32.

33. Section 35 of the Charter be amended to remove the notice requirement for proceedings in the County Court and to give a judicial officer or tribunal member power to require a notice to be issued for a Charter issue of general importance or when otherwise in the interests of justice (at their discretion). Further, an explanatory note should be added to section 35 to make clear that proceedings do not have to be adjourned while notice is issued and responded to. The Attorney-General and the Commission should retain their right to intervene in all proceedings.

34. Sections 34 and 40 of the Charter be amended to explicitly give a judicial officer or tribunal member power to place conditions on interventions to support case management. Conditions may include, for example, timetabling, setting how the interveners may participate in proceedings, and confining the matters that submissions may address.



35. The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission publish guidance on how they will consider and process Charter notifications and their cost policies as an intervener (when they do not already do so). The Attorney-General and the Commission should make this guidance available to the public and promote it in the legal sector.

Chapter 6 Firming the foundations—more effective parliamentary scrutiny

Chapter 6 considers the role of human rights scrutiny in law making. It addresses terms of reference 1(c) on the effectiveness of the scrutiny role of the Scrutiny of Acts and Regulations Committee of the Victorian Parliament, and 2(f) on the need for a provision permitting override declarations by Parliament.

The Report notes that parliamentary human rights scrutiny has had a positive impact on the human rights compatibility of new laws, but some small changes are needed to increase the robustness and transparency of the human rights scrutiny process for it to be as effective as it could be.

The main criticism of the scrutiny process raised in consultation and submissions to the Review was the short timeframes within which the Committee must consider and report on Bills. This also means the public has little opportunity to make submissions on the human rights impacts of proposed legislation, and the Committee lacks the time and capacity to consider in detail any submissions.

One of the purposes of the Charter is to ensure that human rights are appropriately considered in developing laws: debating Bills in Parliament without adequate time for scrutiny undermines the impact and benefit of the Charter.

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The reviewer recommends the Government consider how best to ensure the Committee has sufficient time to scrutinise Bills raising significant human rights issues. Human rights training for Committee members would assist them to fulfil their human rights scrutiny role under these time pressures.

The reviewer also makes a range of other recommendations to ensure, for example, that local laws made by councils can be considered for compatibility with human rights by the responsible Minister, and that House Amendments to Bills can be subjected to retrospective human rights scrutiny by the Committee (within a limited time of an Act receiving Royal Assent). Additionally, he recommends that the Committee's human rights scrutiny functions under the *Parliamentary Committees Act 2003 (Vic)* and the Charter be made consistent.

Finally, Chapter 6 considers the use of, and need for, the provision for override declarations by Parliament in section 31 of the Charter. This provision allows Parliament to expressly declare that an Act or a provision has effect despite being incompatible with one or more of the human rights in the Charter. The reviewer recommends repealing section 31. In the statutory human rights model adopted for the Charter, Parliament retains its supremacy and does not need (in an emergency or at any time) a provision to allow it to pass legislation that is incompatible with human rights. The reviewer concludes that the use of the provision has been inappropriate and confusing to the public. When the Government intends to pass legislation that is incompatible with human rights, he encourages it to be clear in the text of the Bill and in its statement of compatibility.

Recommendations

36. The secretariat of the Scrutiny of Acts and Regulations Committee arrange for human rights induction training for members of the Committee and the Victorian Equal Opportunity and Human Rights Commission offer a human rights briefing to all new parliamentarians.
37. The process for human rights scrutiny of Bills by the Scrutiny of Acts and Regulations Committee be improved and public engagement in the process be enhanced by:
- (a) the Victorian Government considering how best to ensure that the Committee has sufficient time to scrutinise Bills that raise significant human rights issues



- (b) the Committee establishing an electronic mailing list to notify individuals and organisations of Bills that it is considering and to invite submissions
 - (c) the Committee referring to the content of submissions made to it in its Alert Digests on Bills.
38. The Victorian Government refer amendments to non-Victorian laws that apply in Victoria under a national scheme, and to Regulations under those laws, to the Scrutiny of Acts and Regulations Committee for consideration.
 39. Section 29 of the Charter be amended to specify the Scrutiny of Acts and Regulations Committee's failure to report on the human rights compatibility of any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or any other statutory provision.
 40. To ensure that House Amendments can be subject to human rights scrutiny and to make the Charter and the *Parliamentary Committees Act 2003* (Vic) consistent, the Scrutiny of Acts and Regulations Committee should be given clear power to consider and report on provisions of Acts that it did not consider when a Bill was before Parliament (within a limited time).
 41. The human rights analysis in statements of compatibility be improved by:
 - (a) amending section 30 of the Charter to clarify that the Scrutiny of Acts and Regulations Committee may report to Parliament on statements of compatibility
 - (b) the Victorian Government publishing draft statements of compatibility when exposure drafts of Bills are released for public comment.
 42. The Victorian Government facilitate the identification of human rights impacts of legislative proposals and options for addressing them by consulting the Human Rights Unit in the Department of Justice & Regulation at an early stage of developing legislation and drafting statements of compatibility.
 43. Members of Parliament are encouraged to provide a short statement on the human rights compatibility of their proposed House Amendments to Parliament, when time permits.
 44. Human rights scrutiny of statutory rules and legislative instruments be made more transparent and effective by:
 - (a) publishing all human rights certificates in an online repository maintained by the Scrutiny of Acts and Regulations Committee
 - (b) amending section 30 of the Charter to require the Scrutiny of Acts and Regulations Committee to consider all statutory rules and legislative instruments and report to Parliament if it corresponds with a Minister about the human rights impact of any statutory rule or legislative instrument or considers the statutory rule or legislative instrument limits human rights.
 45. Local laws be made subject to the Charter by amending item 2(f) of Schedule 8 to the *Local Government Act 1989* (Vic) to refer to the human rights in the Charter, making incompatibility with the human rights in the Charter a factor for the Minister's consideration when deciding whether to recommend revocation of a local law.
 46. The provision for override declarations in section 31 of the Charter be repealed. The explanatory materials for the amending statute should note that Parliament has continuing authority to enact any statute (including statutes that are incompatible with human rights), and the statement of compatibility is the mechanism for noting this incompatibility. If legislation is passed that is incompatible with human rights, the responsible Minister should report to Parliament on its operation every five years.



Chapter 7 Emerging issues

Chapter 7 examines other issues that arose during the Review. It addresses term of reference 2(i) on any other desirable amendments to improve the operation of the Charter. The reviewer identified three main areas for attention.

(a) The application of the Charter to national schemes. Victoria has engaged with the Charter inconsistently when entering into national schemes. The reviewer recommends the Victorian Government adopt a whole-of-government policy, that either the Charter should apply to national schemes to the fullest extent possible or the scheme should include equivalent human rights protections. The reviewer also recognises the Charter's application to national schemes does not have to be all or nothing: the Victorian Government should separately consider scrutiny of legislation, interpretation of legislation, public authority obligations, and monitoring and compliance mechanisms.

(b) Additional rights. While the human rights in the Charter are primarily drawn from the ICCPR, the Charter does not include all aspects of the ICCPR. It excludes some rights because they relate to federal responsibilities, do not resonate in the Victorian context, or are unclear in a domestic law context. The reviewer re-examines this balance where issues were raised with him by members of the community.

The reviewer recommends the principles in the Preamble to the Charter be amended to include the self-determination of Aboriginal Victorians and participation of people in decisions that affect them. This would complement the existing recognition in the Preamble that 'human rights have special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationships with their traditional lands and waters', and the recognition of Aboriginal cultural rights in section 19.

The reviewer also recommends section 17 of the Charter on the protection of families and children include a new provision recognising the right of every person born in Victoria to have a name and to be registered as soon as practicable after birth.

(c) Defining discrimination. Uncertainty about the scope of the term 'discrimination' in the Charter has been compounded by amendments to the Equal Opportunity Act in 2010. The reviewer recommends the Charter's definition of discrimination be clarified by defining it as 'direct and indirect discrimination' on the basis of a protected attribute in the Equal Opportunity Act.

Recommendations

47. The Victorian Government adopt a whole-of-government policy that, in developing a national scheme, the Charter should apply to the scheme in Victoria to the fullest extent possible. Alternatively, the national scheme should incorporate human rights protections equivalent to, or stronger than, the Charter. In developing a national scheme, the Government should consider separately the question of protection and promotion of human rights through scrutiny of legislation, the interpretation of legislation, whether regulators and others involved in administering a national scheme in Victoria are public authorities, and oversight and compliance mechanisms.
48. The principles in the Preamble to the Charter be amended to:
 - (a) recognise the need for public authorities to take steps to respect, protect and promote human rights
 - (b) recognise the importance of individuals and communities being able to have a say about policies, practices and decisions that affect their lives
 - (c) refer to self-determination having special importance for the Aboriginal people of Victoria, as descendants of Australia's first peoples.



49. The Victorian Government work with Victorian Aboriginal communities to promote, protect and respect self-determination and the empowerment of Aboriginal people. This work could be pursued through existing forums, such as the Premier's meetings with members of the Aboriginal communities.
50. Section 17 of the Charter include a new provision that every person born in Victoria has the right to a name and to be registered as soon as practicable after birth.
51. 'Discrimination' in the Charter be defined as 'direct and indirect discrimination' on the basis of a protected attribute in the *Equal Opportunity Act 2010* (Vic).

Chapter 8 The need for a further review

Chapter 8 addresses term of reference 3, on whether further review of the Charter is necessary. Two statutory reviews were initially built into the Charter—one after four years (2011) and one after eight years (2015) so the Government and community could reflect on how the Act is working and whether it continues to reflect the values and aspirations of the Victorian community.

The reviewer observes that the four-year review had a destabilising effect on the Charter, but notes the Charter is foundational to the work of government and its relationship with the community. The reviewer concludes that Victoria should continue to reflect on its human rights practice and ensure the legislation meets the ongoing needs of the community. For these reasons, he recommends a further review four years after the commencement of the proposed complaints and remedies provision.

The work from compliance to culture is a long one, and can be characterised as a 'learning journey' for both state and local government sectors in Victoria. ... A regular, mandated review is important to support this learning over time.

City of Darebin, Submission 52

Recommendations

52. The Charter be amended to require the Attorney-General to cause there to be a further review of the Charter four years after the commencement of the proposed complaints and remedies provision. The review should consider the operation of the Charter and how it could be improved, including the application of economic, social and cultural rights and the range of remedies available when human rights are interfered with.



