

Charter Review: Background brief on the Terms of Reference

21 April 2015



CHARTER REVIEW 2015

Human rights

The following information provides brief background context on each item in the Terms of Reference. It is not a comprehensive analysis of issues that may or do arise under each item, which will be considered during the review.

1. Ways to enhance the effectiveness of the Charter

1(a) reviewing the submissions from the 2011 Scrutiny of Acts and Regulations Committee review and the Committee's Report

The reviewer will consider the 2011 review, its report and submissions. Submissions to the 2011 review and the report of the Scrutiny of Acts and Regulations Committee (SARC) are available on its website <http://www.parliament.vic.gov.au/sarc/inquiry/297>.

Among the 35 recommendations set out in its report, the majority of SARC recommended that consideration be given to:

- only retaining the scrutiny of new laws provisions of the Charter, and that Divisions 3 (interpretation of laws) and 4 (obligations of public authorities) be repealed, or
- that if retained, the Charter be subject to a number of changes, including that:
 - a number of procedural changes be made to support the scrutiny of bills and legislative instruments (such as regulations), for compatibility with human rights
 - additional consideration be given to whether rights contained in the International Covenant on Civil and Political Rights omitted from the Charter should be included
 - section 7(2) on proportionate limitations be reframed in plain language with the removal or reduction of the list of factors to be considered
 - the provision for an override declaration by Parliament be repealed
 - an exhaustive list of public authorities be included and that the courts be excluded from all obligations as public authorities
 - the public authority obligations in section 38 be limited to a requirement to consider any relevant human right (removing the duty not to act incompatibly with human rights)
 - consideration be given to whether the duty to interpret legislation consistently with human rights in section 32 is necessary in light of the common law
 - the Charter not be amended to provide for an independent legal remedy or compensation when a public authority breaches its obligations, and
 - the government develop a framework for assessing the benefits and costs of the Charter.

The Parliament has not made any legislative changes to the Charter as a result of the 2011 review.

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

The Victorian Equal Opportunity and Human Rights Commission and the Victorian Ombudsman both have functions in relation to the Charter.

When the Charter was introduced, the then Equal Opportunity Commission Victoria was given broader human rights functions to provide education, voluntary reviews and information to the government, the public and the courts.

The Victoria Ombudsman, which already received complaints about the administrative actions of public authorities, was given a new mandate which allowed it to specifically consider human rights issues within its jurisdiction as well.

The functions of the Victorian Equal Opportunity and Human Rights Commission and the Victorian Ombudsman are described in more detail below.

Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity and Human Rights Commission is an independent statutory authority reporting to Parliament through the Attorney-General.¹ It has functions under the Charter, the *Equal Opportunity Act 2010* (EOA) and the *Racial and Religious Tolerance Act 2001* (RRTA).

The Charter gives the Victorian Equal Opportunity and Human Rights Commission a number of specific powers and functions. These are:

- a right to intervene in proceedings before any court or tribunal in which a question of law arises that relates to the application of the Charter or that arises with respect to the interpretation of a law in accordance with the Charter (section 40(1)) – the Attorney-General also has this right
- a requirement to present an annual report to the Attorney-General on the operation of the Charter, including its interaction with other laws; all declarations of inconsistent interpretation made during the year; and all override declarations made during the year (section 41(a))
- when requested by the Attorney-General, to review the effect of statutory provisions and the common law on human rights² and report to the Attorney-General in writing (section 41(b))

¹ More information about the Commission is available on its website <http://www.humanrightscommission.vic.gov.au/>

² In this paper a reference to 'human rights' is used as defined in section 3 of the Charter and refers to the 20 human rights set out in Part 2 of the Charter, unless otherwise specified.

- when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights (section 41(c))
- to provide education about human rights and the Charter (section 41(d))
- to assist the Attorney-General in the four- and eight-year reviews of the Charter (section 41(e)), and
- to advise the Attorney-General on anything relevant to the operation of the Charter (section 41(f)).

The Commission runs a free enquiry line and publishes information about human rights. In 2013-14 it handled 9,157 enquiries about human rights and equal opportunity issues.³

The Commission also conducts training for public authorities, community organisations and private individuals. In 2013-14, it delivered 616 workshops to over 9,000 participants across human rights and equal opportunity issues.⁴

The Commission does not have jurisdiction to receive complaints under the Charter. The Commission can receive individual complaints under the EOA and RRTA and offers free and impartial dispute resolution for complaints of discrimination, sexual harassment, racial and religious vilification and victimisation made under the EOA and the RRTA. It can receive these complaints against public authorities and private entities. The Commission can also conduct investigations into breaches of the EOA.

In 2013-14 the Commission handled 1,053 complaints raising 2,718 issues under the EOA and the RRTA.⁵ Dispute resolution is a voluntary process for both parties. Under both the EOA and the RRTA, a complainant also has the option of making an application directly to the Victorian Civil and Administrative Tribunal to have a matter determined.

Victorian Ombudsman

The Victorian Ombudsman is an independent officer of the Victorian Parliament.⁶ Her office investigates complaints about administrative actions taken by a wide range of Victorian public authorities.

The Victorian Ombudsman has jurisdiction to consider Charter issues under the *Ombudsman Act 1973*. Section 13 states:

(1) The principal function of the Ombudsman is to enquire into or investigate any administrative action taken by or in an authority ...

³ Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013/14* 9.

⁴ Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013/14* 10.

⁵ Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013/14* 22.

⁶ More information about the Victorian Ombudsman is available on its website

<https://www.ombudsman.vic.gov.au/>

*(2) The function of the Ombudsman under subsection (1) includes the power to enquire into or investigate whether any administrative action that he or she may enquire into or investigate under subsection (1) is incompatible with a human right set out in the **Charter of Human Rights and Responsibilities Act 2006**.*

The Ombudsman has jurisdiction over more than 1,000 Victorian public bodies, including government departments, statutory authorities, professional boards, councils, universities and government schools, prisons (including private prisons) and authorised officers on public transport. In addition, the Ombudsman can also exercise her jurisdiction to investigate private organisations contracted to perform functions for government agencies when they are exercising functions under that contract. The Ombudsman does not have jurisdiction over police—see information about the jurisdiction of the Independent Broad-based Anti-corruption Commission (IBAC) below.

Any person can make a complaint to the Ombudsman about a matter which affects them. The Ombudsman generally expects that the issue has been raised with the relevant public authority first. A person can make a complaint about the administrative action of a public authority (section 14, Ombudsman Act). The Ombudsman may enquire into or formally investigate complaints.

The Ombudsman must investigate matters referred by Parliament, other than a matter concerning judicial proceedings, even where the subject matter would otherwise be outside her jurisdiction (section 16, Ombudsman Act).

The Ombudsman can investigate complaints or other matters referred to her by IBAC or another person or body.

The Ombudsman can herself initiate an investigation. This is called an 'own-motion' investigation (section 16A, Ombudsman Act).

The Ombudsman is able to access information and deal with matters through a cooperative approach or by using her formal powers. These powers allow the Ombudsman to summons any person to attend, provide any document and give evidence on oath or affirmation.

The Ombudsman can consider broader issues arising from an investigation and is not limited to considering the procedural or legal correctness of an administrative action. Section 23 of the Ombudsman Act provides that she can conclude and report where she is of the opinion that the administrative action is:

- taken contrary to law
- unreasonable, unjust, oppressive or improperly discriminatory
- taken for an improper purpose or on irrelevant grounds
- based wholly or partly on a mistake of law or fact, or
- wrong.

When an investigation is finalised, the Ombudsman:

- must provide a report to the relevant agency and to the relevant Minister
- may provide a copy of a report to the Premier
- can present her report to Parliament, and
- where relevant, inform the original complainant of the result of the investigation.

The Ombudsman makes recommendations in her reports. She does not have statutory power to compel a particular outcome or remedy. She may, however, request information about the steps that have been taken, or any proposed action to give effect to a recommendation (section 23(4), Ombudsman Act). The Ombudsman may report to the Governor in Council (and the Parliament) if she is not satisfied that appropriate steps have been taken to give effect to a recommendation (section 23(5), Ombudsman Act).

Information sharing

The Victorian Equal Opportunity and Human Rights Commission is a body to whom the Victorian Ombudsman may refer complaints.

The confidentiality and secrecy provisions in the various laws limit what information can be shared between these agencies. For example:

- Section 26A of the Ombudsman Act means that an Ombudsman officer cannot disclose any information acquired by them in the course of their duties except for the performance of the duties and functions of the Ombudsman or other limited specified grounds in the Act. This can limit their ability to share information about trends and issues with other agencies.
- The secrecy provision in section 176 of the EOA means that the Victorian Equal Opportunity and Human Rights Commission cannot confirm with the Victorian Ombudsman whether a discrimination complaint (which can also raise the obligations of a public authority to act compatibly with the right to equality under the Charter) is already being addressed through its dispute resolution procedures, unless the Commission first obtains the consent of the complainant and the respondent.

The review will consider ways to enhance the effectiveness of the Charter in relation to the functions of these key agencies.

Other complaint bodies

There are a number of other bodies that can take complaints about public authorities in Victoria.

For example, the:

- IBAC has jurisdiction over police misconduct. It has an obligation under the *Independent Broad-based Anti-corruption Commission Act 2011* (IBAC Act) to ensure police and protective services officers have regard to human rights as set out in the Charter (section 15(3)(b)(iii), IBAC Act). A person can make a complaint to IBAC, which has extensive powers to assist its investigations
- Mental Health Complaints Commissioner is an independent statutory body that can receive complaints about Victorian public mental health services
- Health Services Commissioner conciliates formally and informally, between consumers and providers of health services (including public providers), and
- Disability Services Commissioner can assist in the resolution of complaints about disability services.

This is not an exhaustive list.

1(c) the effectiveness of the scrutiny role of the Scrutiny of Acts and Regulations Committee

SARC is a bipartisan committee of the Victorian Parliament. Before the Charter was enacted, SARC already had a role in reviewing Bills. The Charter gave SARC an expanded role in undertaking human rights scrutiny of laws.

The scrutiny provided by SARC is a cornerstone of the parliamentary model of human rights protection in the Charter. This process ensures that the government considers human rights when drafting laws and that members of Parliament have information to support their consideration of human rights when making laws. The report of the Human Rights Consultation Committee in 2005, which recommended the creation of the Charter, noted that:

The Victorian Scrutiny of Acts and Regulations Committee (SARC) (Submission 22) has said that a parliamentary committee could expose legislation to effective scrutiny in a way that is independent of the executive and also allow for public participation in the process. This would promote greater awareness of rights and freedoms within the Parliament, the executive and the community.⁷

⁷ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 76.

The process set out in the Charter is that the Minister introducing a Bill must, at the same time as tabling a Bill, provide a statement of compatibility which states how a Bill is compatible with the human rights in the Charter, or alternatively, the extent of the incompatibility with those human rights (section 28, Charter). Statements of compatibility explain whether and how human rights are limited by the Bill and if so, whether that limitation is reasonable.

SARC is required to consider any Bill introduced into Parliament and report to Parliament as to whether the Bill is compatible with human rights (section 30, Charter). SARC publishes a Charter Report or 'Alert Digest' each sitting week of Parliament with the aim that its analysis is available when a Bill is debated in Parliament.

SARC must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with the human rights in the Charter (section 21, *Subordinate Legislation Act 1994*). Information about SARC and copies of its reports and Alert Digests are available on its website <http://www.parliament.vic.gov.au/sarc>.

There are similar committees in the United Kingdom and the Australian Capital Territory, which also have parliamentary human rights models.

The Australian Parliament also established the Parliamentary Joint Committee on Human Rights to examine and report on Bills for compatibility with human rights with reference to seven core human rights treaties to which Australia is a party. This was one of the outcomes of the National Human Rights Consultation in 2009.

The 2015 Charter review will consider the effectiveness of this parliamentary scrutiny process in supporting the consideration of human rights by Parliament. There are different views on the extent to which this process influences human rights considerations and outcomes and the culture needed to support it. The review will also look at the recommendations SARC made in the 2011 review to improve the effectiveness of the scrutiny processes.

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

In the second reading speech for the Charter, the then Attorney-General, the Hon Rob Hulls MP, said that the Charter would be 'a powerful symbolic and educative tool for future generations and new arrivals in Victoria. This will help us become a more tolerant society, one which respects diversity and the basic dignity of all'.⁸

⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1289 (Rob Hulls, Attorney-General).

He said that the functions of the Victorian Equal Opportunity and Human Rights Commission under the Charter would make ‘a significant contribution to the development of a culture of human rights in Victoria’. The theme of developing a human rights culture in Victoria was reiterated throughout debate on the Bill.

The idea behind this was that the best human rights outcomes will be achieved if people’s rights are taken into account in the everyday business of government and its interactions with the community. The Victorian Parliament wanted the community and every public servant to recognise that human rights are part of our values as a community.

The review will consider ways to enhance the effectiveness of the Charter in the development of a human rights culture in Victoria, including considering issues such as:

- what a good ‘human rights culture’ looks like
- awareness of human rights in the community and public sector
- human rights education, and
- public sector practices and processes that promote a human rights culture, including leadership, oversight and accountability.

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

The Charter sets out rights between people and government. It generally applies to a broad range of state and local government public sector bodies (see more detail under term of reference 2(a)). The Charter does not generally establish rights between individuals or between individuals and non-State companies.

However, when considering the creation of the Charter, the Human Rights Consultation Committee in 2005 recognised that modern governance is complex and often interacts with the private sector (including for-profit companies as well as not-for-profit community based organisations).

The Committee observed that:

People also feared that a too narrow definition could create an incentive to contract out services to avoid compliance... Where government relies upon private organisations to perform essential public functions, such as the running of prisons, it still retains responsibility for those functions.⁹

The decision was made by Parliament to apply the Charter to non-State entities in some specific circumstances, that is, when they are performing a function of a public nature.

⁹ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 55.

The review will consider whether the human rights obligations on non-State entities are clear, whether the possible avenues for complaint and remedy are appropriate and what mechanisms could improve the application of the law in this area.

More detail about what the law says and how the courts have applied it

Section 4(1) of the Charter says that a public authority includes:

(b) an entity established by a statutory provision that has functions of a public nature; or

(c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).

Entities that fall under category (c) are called ‘functional public authorities’ and attract the same obligations under section 38 of the Charter as State entities, when they are performing functions of a public nature. For example, this means that a private company is a public authority under the Charter when operating a Victorian prison, but not when it is conducting its other private business; or a religious or community organisation is a public authority under the Charter when contracted by the Department of Health & Human Services to deliver services, but not when it is undertaking the other roles of the organisation.

Section 4(2) of the Charter provides some guidance on factors that may be taken into account in determining if a function is of a public nature:

(a) that the function is conferred on the entity by or under a statutory provision;

(b) that the function is connected to or generally identified with functions of government;

(c) that the function is of a regulatory nature;

(d) that the entity is publicly funded to perform the function;

(e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.

This is not an exhaustive list.

The Victorian Civil and Administrative Tribunal (VCAT) considered the application of the Charter to non-State entities in *Metro West v Sudi*.¹⁰ In that case, Justice Bell found that a non-profit housing agency was a public authority under section 4(c) of the Charter. Although it was a private entity, the primary function of Metro West Housing Services Limited was the allocation and management of housing stocks under a service agreement with the Victorian Government. Metro West received government funding and exercised delegated statutory powers.

¹⁰ [2009] VCAT 2025 (9 October 2009).

In considering the definition of a ‘public authority’, Justice Bell stated that ‘s 4 must be given a wide and generous interpretation which is consistent with [the central purpose of the Charter to protect and promote human rights]’.¹¹ The application of section 4(1)(c) requires the answer to two questions:

1. Are the functions that are being exercised of a public nature?
2. Are the functions being exercised on behalf of the State or a public authority?

Justice Bell confirmed that relationships between entities and the government characterised by section 4(1)(c) do not need to be characterised or capable of being characterised in formal legal terms—it ‘covers relationships which may be looser than contract, agency and other legal categories... It covers arrangements under which the entity is acting as [the State’s] representative or for [the State’s] purposes in the practical sense’.¹²

The review will consider whether the application of the Charter to non-State entities is clear or could be more effective.

2. Any desirable amendments to improve the operation of the Charter

2(a) clarifying the provisions regarding public authorities, including the identification of public authorities and the content of their human rights obligations

As mentioned above, the Charter establishes rights between people and government. The Charter applies to state and local government. It does not apply to Commonwealth government agencies operating in Victoria. It applies to private sector bodies when they are performing functions of a public nature, such as a private prison operator or a community organisation running a disability service under contact with the Department of Health & Human Services.

Who is a public authority?

Section 4 of the Charter sets out who is a public authority for the purposes of this Act. It includes:

- (a) a public official within the meaning of the *Public Administration Act 2004*, for example a public servant employed in a department or agency, or a person appointed under statute like the Chief Commissioner of Police or the Commissioner of the Victorian Equal Opportunity and Human Rights Commission, among many others
- (b) Victoria Police

¹¹ [118].

¹² [164]. This decision was successfully appealed on grounds unrelated to the definition of public authority: see *Director of Housing v Sudi* (2011) 33 VR 559.

- (c) local councils, councillors and council staff as defined by the *Local Government Act 1989*
- (d) Ministers
- (e) courts and tribunals, and parliamentary committee members, when they are acting in an administrative capacity
- (f) a body established by a statutory provision that has functions of a public nature, for example VicHealth, VicRoads, WorkSafe and many others
- (g) a body whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority, eg a community organisation contracted by the Victorian Government to deliver disability services, or an organisation contracted to deliver public transport services
- (h) any entity declared by government regulations to be a public authority.

A public authority does not include Parliament or a body declared by regulations not to be a public authority. The *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* declare that the Adult Parole Board, the Youth Residential Board and the Youth Parole Board are not public authorities for the purposes of the Charter. These Regulations have effect until 23 October 2023.

In the 2011 review, SARC described section 4 of the Charter as ‘a lengthy and complex definition of “public authority”. In particular, it noted that the then Director of Public Prosecutions raised issues about whether the definition applied to his office and SARC noted separate questions about the meaning and scope of the concept of a ‘function of a public nature’.¹³ For example, it is well accepted that a private company running a state prison under contract is performing functions of a public nature. The situation is less clear regarding areas of work that can also be carried out purely in the private sector. An example of this is tertiary education and the role of universities, when there are also private institutions in the sector.

The majority of SARC recommended in 2011 that an exhaustive list of public authorities be included in the Charter.

What are the obligations of a public authority?

Under section 38(1) of the Charter, it is ‘unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right’. This includes both a ‘procedural’ requirement to give proper consideration and a ‘substantial’ requirement to not act incompatibility with human rights.

¹³ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 106-107.

The Supreme Court considered public authority obligations in *Castles v Secretary to the Department of Justice*.¹⁴ Justice Emerton said that:

The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfaced with by the decision that it made.

...

*While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.*¹⁵

There has been some debate about what it means to give proper consideration to human rights and not to act incompatibly with a human right in the Charter. For example:

- What does it mean to give 'proper consideration' in a particular context?
- What is meant by the difference between giving proper consideration to a relevant right when making a **decision**, but making it unlawful to **act** incompatibly with a human right—is this distinction between an 'act' and a 'decision' clear and useful?
- Is the question of incompatibility for public authorities based solely on the human rights themselves as set out in sections 8 to 27, or do public authorities also consider whether there are reasonable and proportionate limitations, applying the test in section 7(2)?
- What is meant by using the term 'incompatibility' here, but 'compatibility' elsewhere in the Charter?

¹⁴ (2010) 28 VR 141.

¹⁵ (2010) 28 VR 141 [185]-[186]

Justice Kyrou has questioned whether more consideration needs to be given to the difference between an ‘act’ and a ‘decision’ as described in section 38(1), noting that while the provision ‘prohibits acts which are incompatible with a human right, it does not prohibit decisions which are incompatible with a relevant human right. In the case of decisions, s 38(1) simply requires public authorities to give proper consideration to a relevant human right’.¹⁶

There is also question about the effectiveness of this obligation. For example, in the 2011 review, SARC noted that ‘there is evidence from a number of public authorities directed towards compliance with the Charter s. 38, but that the extent of compliance is variable and has been found to be lacking in some instances’.¹⁷

Note: The Charter is also part of the employment framework for Victorian Public Sector Employees. The values in the Charter are reflected in the *Public Administration Act 2004* and the *Code of Conduct for Victorian Public Sector Employees*. Under the Act and the Code, human rights are a public sector value and an employment principle.

Exceptions

The duty in section 38(1) does not apply if a public authority could not have reasonably acted differently or made a different decision, as a result of the operation of another law (section 38(2), Charter).

The public authority obligation under the Charter does not apply to an act or decision of a private nature (section 38(3)).

The public authority obligation does not require a public authority to act in way, or to make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates (section 38(4)).

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

This term of reference looks at clarifying the provisions that deal with what should happen if a person’s rights have been breached.

¹⁶ Justice Emilius Kyrou, ‘Obligations of Public Authorities under Section 38 of the Victorian Charter of Human Rights and Responsibilities’ (2014) 2 *Judicial College of Victoria Online Journal—Human Rights Under the Charter: The Development of Human Rights Law in Victoria* 1, 78.

¹⁷ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 106.

The Human Rights Consultation Committee in 2005 observed that:

*Community members stressed the need for a system that is simple to use and navigate. People were less interested in big court cases and the possibility of damages than in getting the problem fixed.*¹⁸

The law can provide many avenues for a remedy when someone's rights have been breached. For example, the ability to make a complaint to someone, to have someone decide whether there has been a breach of Charter rights and make a public statement about this (whether a statutory agency, or a court or tribunal through a declaration), an explanation or an apology, an injunction to stop a public authority from continuing the act that is breaching Charter rights, compensation for loss or injury caused, or systemic remedies like training and changes to policies.

Sections 38 and 39 of the Charter are relevant to this term of reference.

Section 38 of the Charter provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. As noted above, there are some exceptions to this obligation.

Section 39 of the Charter provides that if, otherwise than because of the Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of the Charter. The section also provides that a person is not entitled to be awarded monetary compensation because of a breach of the Charter.

The Explanatory Memorandum to the Charter explains that section 39 does not create a new or independent right to relief or a remedy. This means that if a public authority has acted incompatibly with a Charter right, or has failed to give proper consideration to a relevant Charter right in making a decision, the Charter does not allow a person to bring a legal action against the public authority on the basis of that Charter breach alone. If the person may seek relief or a remedy on the basis of a separate, non-Charter ground, they may also seek that relief or remedy on the basis of the Charter breach. This means that a Charter claim can be 'piggy-backed' onto an existing legal claim.

There is debate about the clarity of this provision and whether it meets community needs.

¹⁸ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 116.

More information about consideration of this provision by the courts

A number of court decisions have considered:

- what is meant by unlawfulness in section 39(1)
- whether the non-Charter claim must succeed in order for section 39(1) to have effect, and
- whether the Charter claim (that is, that a public authority has breached its obligations under section 38 of the Charter) and the non-Charter claim must relate to the same act or decision.

In *Goode v Common Equity Housing*, Justice Bell found that for the purposes of section 39(1), an act or decision can be described as unlawful because it is 'prohibited or proscribed by, or contrary to, a statutory provision or the common law' or 'inconsistent with a norm or standard prescribed in such a provision or law'.¹⁹

In *Bare v Small*, Justice Williams held that unlawfulness under section 38(1) does not amount *per se* to jurisdictional error and does not automatically invalidate an administrative act or decision.²⁰

In *Director of Public Prosecutions v Debono*, Justice Kyrou held that section 39 does not depend on *successful* exercise of a right to seek relief or remedy based on a non-Charter ground. However, there must be a right to seek relief or a remedy in respect of an act or decision of a public authority independently of the Charter.²¹ This approach was confirmed by Justice Bell in *Goode*²² and by Justice Macauley in *Burgess v Director of Housing*.²³

In *Director of Housing v Sudi*, the Court of Appeal held that section 39 did not enable VCAT to undertake a collateral review of the Director's decision to apply for a possession order.²⁴ The rights compatibility of the Director's application decision could only be considered in judicial review proceedings in the Supreme Court.

2(c) clarifying the role of human rights in statutory construction

Section 32(1) of the Charter requires that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'

This obligation is applied by the courts, but also anyone else reading and interpreting the law, including the public servants who administer laws and make decisions under them.

¹⁹ [2014] VSC 585 (21 November 2014) [26].

²⁰ [2013] VSC 129 (25 March 2013) [117]-[121]. The Court of Appeal has heard an appeal in this matter and its decision is reserved.

²¹ [2013] VSC 407 (1 February 2013) [82].

²² [2014] VSC 585 (21 November 2014) [25]-[39].

²³ [2014] VSC 648 (17 December 2014) [213]-[214].

²⁴ (2011) 33 VR 559.

An interpretive clause is a standard feature of human rights laws in the United Kingdom, New Zealand and the Australian Capital Territory. The basic principle is that of consistency: a law is consistent with human rights obligations if it meets the standard set by the Charter. If it is not, it should be interpreted where possible to be consistent.

This does not prevent the Parliament from passing laws that are inconsistent with human rights, but where the law is open to different interpretations, a human rights-consistent interpretation should be preferred.

In the 2011 review, SARC recommended that consideration be given to whether the interpretive obligation in the Charter is necessary.

More detail about what the law says and how the courts have applied it

In *Re an application under the Major Crimes (Investigative Powers) Act 2004*,²⁵ Chief Justice Warren applied section 32(1) of the Charter to find that a provision of the *Major Crimes (Investigative Powers) Act 2004*, which removes protections against self-incrimination, must be interpreted as extending derivative use immunity to a person, so as to be compatible with human rights. Derivative use immunity means that evidence obtained as a result of a person being compelled to answer a question will be inadmissible in proceedings against them.

Justice Nettle also applied section 32 in *RJE v The Secretary to the Department of Justice*. Justice Nettle determined that the term 'likely' in section 11 of the *Serious Sex Offenders Monitoring Act 2005*, which provides that a court may make an 'extended supervision order' in respect of an offender if satisfied to a high degree of probability that the offender is likely to reoffend, should be interpreted to mean 'at least more likely than not'.²⁶

The interpretive obligation in section 32(1) of the Charter was later considered by the High Court of Australia, including the question of whether it was a valid role for the judiciary. In *Momcilovic v The Queen*, Chief Justice French and Justices Gummow, Hayne, Crennan, Kiefel and Bell held that section 32(1) operated as a valid rule of statutory interpretation, which is a function that may be conferred upon courts.²⁷ They found that it does not confer on courts a function of a law-making character and did not permit the strong or remedial approach adopted by courts in the United Kingdom, such as in *Ghaidan*.²⁸ Each held that there is nothing in its text or context to suggest that the interpretation required by section 32(1) departs from the established understandings of the courts' role in construing legislation and that it must be understood as a process of construction understood and ordinarily applied by courts.

²⁵ (2009) 24 VR 415.

²⁶ (2008) 21 VR 526.

²⁷ *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*').

²⁸ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

Chief Justice French said that he understood section 32(1) as operating ‘in the same way as the principle of legality but with a wider field of application’.²⁹ The principle of legality says that where choices are available in reading statutory construction, a court should ‘avoid or minimise statutory encroachment upon rights and freedoms at common law’.³⁰ If rights are to be limited, it should be by ‘clear and unequivocal language for which Parliament may be accountable to the electorate’.³¹ If the words used in the statute are clear, then courts must give effect to those words, even if it limits rights. The Victorian Court of Appeal considered the High Court’s *Momcilovic* decision in *Slaveski v Smith*. In that case, Chief Justice Warren and Justices Nettle and Redlich observed that:

*French CJ, Crennan and Kiefel JJ and Gummow J, Hayne J and Bell J each held in separate judgements that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provisions in question in accordance with the ordinary techniques of statutory construction essayed in Project Blue Sky In v Australian Broadcasting Authority.*³²

In *Victorian Police Toll Enforcement v Taha*, Justice Tate of the Court of Appeal considered that the majority judgments in *Momcilovic*, other than Chief Justice French, viewed section 32(1) as ‘more stringently’ requiring ‘that words be read in a manner “that does not correspond with literal or grammatical meaning” than would be demanded or countenanced by the common law principle of legality’.³³

The differing views on whether section 32(1) goes beyond the principle of legality are, in part, connected to the role of the general limitations clause in section 7(2) of the Charter, which is discussed below.

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

The Charter allows for limitations on rights in some circumstances. This provides a mechanism to balance different rights and interests.

Many rights are not absolute under international human rights law or in other jurisdictions. However, different laws make provision for limitations in different ways.

²⁹ *Momcilovic*, [51] (French CJ).

³⁰ *Momcilovic*, [43] (French CJ).

³¹ *Momcilovic*, [43] (French CJ).

³² (2012) 34 VR 206, 215 [20] (citations omitted).

³³ [2013] VSCA 37 (4 March 2013) [190].

The Charter has a general limitations provision in section 7(2). This states that a human right may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including five key considerations. These are:

- (a) the nature of the right; and*
- (b) the importance of the purpose of the limitation; and*
- (c) the nature and extent of the limitation; and*
- (d) the relationship between the limitation and its purpose; and*
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

The Explanatory Memorandum to the Bill explains that:

This sub-clause reflects Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests. The operation of this clause envisages a balancing exercise between Parliament's desire to protect and promote human rights and the need to limit human rights in some circumstances.

The sub-clause lists a range of relevant factors to be taken into account when assessing whether a human right may be limited...

The general limitations clause, including the list of relevant factors, is modelled on section 5 of the New Zealand *Bill of Rights Act 1990* and, more particularly, on section 36 of the Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*.

Laws which are necessary to protect security, public order or public safety which limit human rights are examples of laws which may be demonstrably justified in a free and democratic society.

There is some debate about when and how the general limitations clause should be taken into account and whether it influences the decisions of courts or public authorities when they are considering whether something is 'compatible' or 'incompatible' with human rights. That is, do they consider compatibility with the rights as set out in sections 8 to 27 of the Charter only, or the rights as potentially limited considering the criteria in section 7(2). There is also debate about who should be placed in a position to consider the policy intent and objective of the proposed limitation on human rights.

More detail about what the law says and how the courts have applied it

The High Court in *Momcilovic* was split on the question of whether section 7(2) informs the statutory interpretation process or whether interpretation should only be with reference to compatibility with the human rights as set out in Part 2 of the Charter (that is, without considering whether they are subject to reasonable limitations). There is no binding decision on this point. The High Court considered a number of possibilities:

- Chief Justice French and Justices Crennan and Kiefel considered that the proportionality test in section 7(2) had no role to play in the application of the interpretative obligation in section 32(1)
- Justices Gummow, Hayne and Bell considered that section 7(2) is relevant to the application of section 32(1)
- Justice Heydon also considered that section 7(2) had a role to play, but considered that section 32 of the Charter was constitutionally invalid.

The implications of this are whether a person interpreting laws should:

1. look for compatibility with human rights as they are contained in sections 8 to 27 of the Charter, and not look to whether there are reasonable and proportionate limitations, justifiable in a free and democratic society, or
2. look for compatibility with human rights, considering the limitations clause set out in section 7(2) as part of the test of 'compatibility'.

The Supreme Court of New Zealand adopted a five step approach to human rights interpretation in *Hansen v The Queen* when applying similar sections of the *Bill of Rights Act 1990* (NZ) which incorporated the general limitations provision.³⁴ This has been described as follows when applied to the Charter:

Step 1: Ascertain the meaning of the legislative provision in accordance with the ordinary rules of statutory interpretation. This includes, of course, the principle of legality.

Step 2: Ascertain whether the meaning arrived at by the ordinary principles of statutory interpretation limits or restricts a relevant right or freedom. Importantly, this involves identifying the relevant rights and determining their scope. If a statutory provision construed in accordance with the ordinary rules does not limit any relevant human rights, that meaning can be adopted without further analysis. The meaning arrived at by the ordinary principles of statutory interpretation is compatible with human rights and there is no need for any further task of interpretation.

³⁴ [2007] 3 NZLR 1, 65.

Step 3: If step 2 reveals that the legislation restricts or limits a relevant right, ascertain whether the limitation is nevertheless justified by reference to s 7(2)...

Step 4: If the limit is justified, there is no incompatibility with a Charter right and the meaning ascertained by ordinary principles prevails.

Step 5: If the limit is not justified, once the balancing exercise under s 7(2) has been undertaken, the Court should examine the words in question again, to see if it possible for a meaning compatible with the relevant right or freedom, consistent with statutory purpose, to be found in them. If so, that meaning must be adopted...

Thus, importantly, an adverse result on the s 7(2) exercise triggers the obligation to re-examine the statutory words to find a human rights-compatible meaning.

Step 6: If it is not possible to find a compatible meaning, or that meaning is not consistent with statutory purpose, the meaning ascertained by the ordinary principles of statutory construction prevails.³⁵

The Court of Appeal has noted that there is no *ratio* on the point that the Victorian courts are bound to follow in relation to statutory interpretation.³⁶ The question remains open as a matter of precedent in the Victorian courts.

In the Victorian context, Justice Tate has noted that the application of section 7(2) is linked to the framework of the Charter as a whole; whether a law is 'compatible' with human rights when considered under section 32(1) as part of statutory interpretation, or whether an act is 'incompatible' with human rights when considered under the public authority obligations, should depend on whether the right is limited in a reasonable and demonstrably justified way.³⁷

On the other hand, in dissent to the approach in *Hansen* in the New Zealand context, Chief Justice Elias said that to include the proportionality justification in the interpretative exercise:

³⁵ Justice Pamela Tate, 'Statutory Interpretative Techniques under the *Charter*. Three Stages of the *Charter* – Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal—Human Rights Under the Charter: The Development of Human Rights Law in Victoria* 1, 55-56 (footnotes omitted).

³⁶ *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* (2012) 38 VR 569 [29]-[30] (Warren CJ and Cavanough J), cf *Nettle JA* at [142]; *WBM v Chief Commissioner of Police* [2012] VSCA 159 (30 July 2012) [122] (Warren CJ).

³⁷ Justice Pamela Tate, 'Statutory Interpretative Techniques under the *Charter*. Three Stages of the *Charter* – Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal—Human Rights Under the Charter: The Development of Human Rights Law in Victoria* 1, 50-51.

*distorts the interpretive obligation under s 6 from preference for a meaning consistent with the rights and freedoms in Part 2 to one of preference for consistency with the rights as limited by a s 5 justification. I do not think that approach conforms to the purpose, structure and meaning of the Bill of Rights Act as a whole. It risks erosion of fundamental rights through judicial modification of enacted rights according to highly contestable distinctions and values.*³⁸

Section 7(2) has been a more accepted part of the courts' consideration of the public authority obligations in section 38(1) of the Charter. For example, in *Sabet v Medical Practitioners Board of Victoria*, Justice Hollingworth considered whether the public authority had imposed any limitation on the relevant right and whether the limitation was reasonable and justified within the circumstances set out in section 7(2).³⁹ This approach was followed by Justice Bell in *PJB v Melbourne Health* (Patrick's case), where he found that judicially reviewing a decision of a public authority for unlawfulness under section 38(1) on grounds of incompatibility with human rights requires the court to consider and apply the proportionality test in section 7(2).⁴⁰

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

The Charter can apply to courts as public authorities when they are acting in an administrative, rather than a judicial, capacity (section 4(1)(j)). In its report on the 2011 review, SARC observed that 'the distinction between administrative and judicial power is an exceptionally difficult one to draw'.⁴¹

In its 2011 review, SARC recommended that courts be exempted from the public authority obligations of the Charter, but noted that the position of tribunals is different and suggested that an exhaustive list of tribunals to which the Charter should apply could be listed.

Section 6(2)(b) of the Charter also states that '[t]his Charter applies to - ... (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3'.

Part 2 sets out the human rights, including a number that directly relate to the role of courts and tribunals, such as the right to a fair hearing. Division 3 of Part 3 sets out the rule for interpreting statutory provisions.

³⁸ *Hansen v The Queen* [2007] 3 NZLR 1, 9.

³⁹ (2008) 20 VR 414 [108].

⁴⁰ [2011] VSC 327 (19 July 2011) [304], [309].

⁴¹ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 119

Section 6(2)(b) has been applied to make the role of the courts relevant where they must have a role in upholding a human right for it to be realised. For example, in *Victoria Police Toll Enforcement v Taha*, Justice Tate of the Court of Appeal described it as 'undeniable' that the right to a fair hearing 'relates to the core functions that courts perform'.⁴²

In *Momcilovic v The Queen*, Justices Crennan and Kiefel of the High Court commented that '[s]ome of the rights identified and described in Pt 2 may require courts or tribunals to ensure that processes are complied with, for example, to ensure a fair hearing [under s 24], and that the matters guaranteed by the Charter in respect to a criminal trial are provided [s 25]'.⁴³

2(f) the need for the provision for an override declaration by Parliament under section 31

Section 31(1) of the Charter makes provision for Parliament to expressly declare in an Act that the Act or a provision of it, or of another Act, has effect despite being incompatible with one or more of the human rights in the Charter or despite anything else set out in the Charter.

The override declaration allows the Parliament to declare that it is intentionally passing a law that is not compatible with human rights. The benefits of this kind of provision is that a declaration is a signal to courts and other people interpreting and applying a law that, once the Bill becomes law, its provisions do not need to be interpreted compatibly with human rights.

There is also a built in mechanism for Parliament to review these provisions regularly, signalling the importance of a decision to override the application of human rights.

However, some people have commented that the provision is confusing and unnecessary and that it has been applied in broader circumstances than the emergency situations originally envisaged. The requirement for regular review has also been overridden in practice.

Without this provision, Parliament still has supremacy in Victoria's model of human rights protection and constitutional structure. The Parliament can pass laws that are incompatible with human rights without the use of the override declaration.

More information about the law and how it has been applied

A member of Parliament who introduces a Bill containing an override declaration must make a statement explaining the exceptional circumstances that justify the inclusion of the override declaration (section 31(3)).

⁴² [2013] VSCA 37 (4 March 2013) [248].

⁴³ *Momcilovic*, [163].

Subsection (4) states that it 'is the intention of Parliament that an override declaration will only be made in exceptional circumstances'. Potential exceptional circumstances envisaged in the Explanatory Memorandum to the Charter were 'threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria.'⁴⁴

If an override declaration is made, then to the extent of the declaration, the Charter has no application to that provision (section 31(6)).

The declaration extends to any subordinate instrument made under the relevant Act or provision (section 31(2)).

The Charter states that a provision of an Act containing an override declaration expires on the fifth anniversary of the day on which the provision comes into operation or an earlier date specified in that Act (section 31(7)). Parliament may re-enact the override declaration and the provisions of the section.

Section 16 of the *Constitution Act 1975* (Vic) provides that '[t]he Parliament shall have power to make laws in and for Victoria in all cases whatsoever'. The Parliament's power to legislate is limited only by the federal and Victorian constitutions. The Charter is an ordinary statute and does not bind a future Parliament in its decisions about laws. Parliament can pass laws that are incompatible with the Charter. Parliament has done so on a number of occasions without issuing an override declaration.⁴⁵

Legal Profession Uniform Law Application Act 2014

In 2013, the first override declaration was made in relation to the Legal Profession Uniform Law Application Bill 2013. The *Legal Profession Uniform Law Application Act 2014* enacts a scheme for the consistent regulation of the Australian legal profession. Victoria is the host jurisdiction and other participating jurisdictions apply the law of Victoria as a law of their own jurisdiction. This means that the law as written in Victoria will apply in other states and territories.⁴⁶

The statement of compatibility said that:

The purpose of clause 6 [the override] is to guarantee uniformity in interpretation and application of the scheme across the participating jurisdictions. It is being implemented to avoid any risk of non-uniform application through other jurisdictions being required to interpret the uniform law consistently with the charter act. Its purpose is also to avoid the inconsistency that may arise if inter-jurisdictional bodies established under the uniform law, as well as regulatory bodies in other participating states or territories

⁴⁴ Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill, clauses 31, 22.

⁴⁵ *Summary Offences and Control of Weapons Amendment Act 2009* and *Control of Weapons Amendment Act 2010*, which were each accompanied by statements of compatibility stating that particular clauses were 'incompatible' with certain Charter rights.

⁴⁶ Currently, Victoria and New South Wales are participating in the national scheme.

*performing uniform law functions, are required to act compatibly with the charter act despite having no experience with its requirements.*⁴⁷

Excluding the Charter's application to the Uniform Law and to bodies acting under the Uniform Law was seen by Parliament as necessary to ensure interjurisdictional consistency in the application of the law and to prevent the extrajurisdictional application of the Charter.⁴⁸ This is the second time since the Charter's enactment that Victoria has hosted a national or uniform law.⁴⁹ Parliament did not enact an override declaration in relation to the previous national law.

SARC noted that the approach of this Bill was unique and that it prevented SARC from reporting to Parliament on whether or not the Legal Profession Uniform Regulations are incompatible with a human right.⁵⁰ SARC referred to Parliament the question of whether or not these provisions were reasonable limits on human rights.

Corrections Amendment (Parole) Act 2014

In November 1988, the Supreme Court sentenced Julian Knight to seven life sentences with a non-parole period of 27 years. He was eligible to apply for parole in May 2014.

The Corrections Amendment (Parole) Bill 2014 was introduced into Parliament in February 2014 to provide for additional conditions for the making of a parole order for the prisoner Julian Knight. The Bill introduced a new section 74AA into the *Corrections Act 1986*, which contained an override declaration.

The Explanatory Memorandum for the Bill stated that new section 74AA contained an override declaration for the purposes of section 31 of the Charter—that is, an express declaration that new section 74AA has effect despite being incompatible with one or more rights in the Charter. However, as the Explanatory Memorandum noted, the relevant provision 'also goes further to prevent the Charter Act from applying to section 74AA altogether'. Section 74AA also provided that the usual expiry of an override declaration under section 31(7) of the Charter did not apply.

The override statement in the second reading speech states:

Although the government considers that the Bill is compatible with the Charter Act, it is possible that a court may take a different view. In this exceptional case, the Charter Act is being overridden and its application excluded to ensure that the life sentence imposed by

⁴⁷ Victoria, *Parliamentary Debates*, Assembly, 12 December 2013, 4661 (Robert Clark).

⁴⁸ Legal Profession Uniform Law Application Bill 2013, Explanatory Memorandum.

⁴⁹ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 1 of 2014, 4 February 2014. The previous occasion was the Education and Care Services National Law, a schedule to the *Education and Care Services National Law Act 2010*.

⁵⁰ See Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 1 of 2014, 4 February 2014, 19-21.

the Supreme Court for these egregious crimes are fully or almost fully served and to protect the community from the ongoing risk of serious harm presented by Julian Knight. To provide legal certainty and to avoid a court giving the bill an interpretation based on Charter Act rights which does not achieve the government's intention, the Bill provides that the Charter Act does not apply to the new section 74AA which sets conditions for any parole order for Julian Knight.

SARC noted that '[w]hether the amendments sought to be made by the Bill constitute grounds for an 'exceptional circumstance' was a matter for Parliament to consider'.⁵¹

SARC went on to consider the human rights compatibility of the Bill and referred 'to Parliament for its consideration the question of whether or not extending Victoria's existing laws for the continued detention of serious sex offenders who are otherwise eligible for release to include high risk murderers would be less restrictive on Charter rights than clause 3 because of those laws' general terms, provision for regular court review and non-penal character'.⁵²

Section 31 of the Charter is similar to a provision in Canada's *Charter of Rights and Freedoms*.⁵³ As a constitutional document, Canada's Charter limits the sovereignty of all Canadian Parliaments by allowing the courts to declare that statutes are invalid because they are incompatible with human rights. The Canadian equivalent of the override declaration allows Parliament to declare that a statute is valid notwithstanding its incompatibility with human rights. Unlike in Canada, in Victoria an override declaration is not needed to ensure the validity of a Charter-incompatible law, but it makes Parliament's intention public and explicit.

2(g) the effectiveness of the declaration of inconsistent interpretation provision under section 36

Section 36 of the Charter allows the Supreme Court to issue a declaration of inconsistent interpretation if the Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right.

The Supreme Court must give a copy of any declaration under section 36 to the Attorney-General and the Attorney-General must give a copy to the responsible Minister. Within six months of receiving a declaration, the Minister must report to Parliament (section 37, Charter).

A declaration does not affect the validity of the law (section 36(5), Charter).

⁵¹ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 3 of 2014, 11 March 2014, 2.

⁵² Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 3 of 2014, 11 March 2014, 6-7.

⁵³ *Constitution Act 1982* (Can) s 33.

In its report on the 2011 review, SARC recommended that if section 36 is retained, consideration should be given to amending it to give an independent non-judicial body (such as the Victorian Equal Opportunity and Human Rights Commission) the functions of identifying statutory provisions that the Supreme Court has interpreted in a way that limits human rights and reporting to Parliament and the Minister about that.

More information about consideration of this provision by the courts

Only one declaration of inconsistent interpretation has been made to date—by the Victorian Court of Appeal in *R v Momcilovic*.⁵⁴ That decision was appealed to the High Court of Australia, and the High Court considered whether the power of the Supreme Court to make a declaration of inconsistent interpretation in section 36 of the Charter Act was valid.⁵⁵

The Australian Constitution places limits on the types of functions that can be performed by courts that are invested with federal judicial power, including the Supreme Court of Victoria. In particular, state Parliaments cannot confer on those courts non-judicial powers that are inconsistent with the exercise of federal judicial power and impair the courts' institutional integrity, impartiality and independence.⁵⁶ Functions that involve the exercise of judicial power, or that are incidental to the exercise of judicial power, can be conferred on these courts by state Parliaments.

In *Momcilovic*, Chief Justice French and Justices Bell, Crennan and Kiefel of the High Court held that section 36 was valid, while Justices Gummow, Hayne and Heydon held that section 36 was invalid for impermissibly impairing the institutional integrity of the Supreme Court.

In ruling that section 36 was valid, Chief Justice French considered that while section 36 did not involve the exercise of a judicial function and was not incidental to judicial power,⁵⁷ it did not infringe the constitutional limits on the Supreme Court's powers.⁵⁸ Chief Justice French held that section 36 'provides a mechanism ... by which the Court can direct the legislature to a disconformity between a State law and a human right set out in the Charter', while it remains Parliament's ultimate responsibility to determine whether the laws it enacts will be consistent or inconsistent with human rights.⁵⁹

Justices Crennan and Kiefel considered that section 36 was valid because, while it does not confer judicial power, it is incidental to judicial power.⁶⁰ This was supported by the discretionary nature of section 36(2) (the Court is not required to make a declaration) and that the function involves an ordinary

⁵⁴ *R v Momcilovic* (2010) 25 VR 436.

⁵⁵ *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*').

⁵⁶ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

⁵⁷ *Momcilovic*, [89]-[91].

⁵⁸ *Momcilovic*, [95]-[97].

⁵⁹ *Momcilovic*, [95]-[96].

⁶⁰ *Momcilovic*, [589], [597].

interpretive task that is not closely connected with the executive or the legislature.⁶¹

However, Justices Crennan and Kiefel considered that a declaration may be inappropriate in some circumstances—for example, it would rarely be appropriate in the context of a criminal trial proceeding because the identification of inconsistency with human rights might undermine a conviction.⁶²

While section 36 provides for the making of a declaration of **inconsistent** interpretation, the rest of the Charter is framed in terms of **compatibility** with human rights. The use in section 36 of the words ‘inconsistent’ and ‘consistently’, rather than ‘incompatible’ and ‘compatibly’, is not explained in the parliamentary materials and appears to be anomalous.⁶³

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

Under the Charter, the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission have a right to intervene in court or tribunal matters that raise Charter issues. As interveners, they do not represent one side or another in a dispute, but provide the court or tribunal with the benefit of their expert institutional perspectives on the interpretation and application of the law.

In superior courts, there is a requirement on the parties to notify the Attorney-General and the Commission that they intend to raise the Charter. This ensures that the Attorney-General and the Commission are aware of cases where decisions can be made that set precedent for the application of the law in the future.

There have been some questions raised about whether this notification requirement poses any barriers to the use of the Charter in legal proceedings.

Section 35 of the Charter requires a party to a court proceeding to give notice in the prescribed form⁶⁴ to the Attorney-General and the Commission if:

(a) in the case of a Supreme Court or County Court proceeding, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or

(b) in any case, a question is referred to the Supreme Court under section 33.⁶⁵

⁶¹ *Momcilovic*, [597], [600].

⁶² *Momcilovic*, [605].

⁶³ Notably the Human Rights Consultation Committee’s report and the draft Charter annexed to it referred to declaration of incompatibility rather than inconsistency.

⁶⁴ A copy of the template form is available on the Victorian Equal Opportunity and Human Rights Commission’s website <http://www.humanrightscommission.vic.gov.au/index.php/the-role-of-the-commission-under-the-charter/interventions/section-35-notice>

This notice provision does not apply in other courts or to tribunals.

There is no legislative timeframe to give notice or a requirement for proceedings to be stopped while the notification is issued. However, the Supreme Court has issued a practice note for Charter matters. *Practice Note No 3 of 2008* states that the Attorney-General and the Commission should generally be provided with 14 days notice of a Charter matter, noting that adjournments will be at the discretion of the judicial officer hearing the matter.

2(i) any other desirable amendments

It is open to the reviewer to make recommendations about any other desirable amendments to the Charter. Views on other issues are welcome during the public consultation.

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

The Charter originally set out a timetable for two statutory reviews, one after four years of operation (2011), and one after eight years of operation (2015) (sections 44 and 45).

These reviews were built into the legislation because the Charter was a new and developing law and the community conversation about the way the Charter should operate, and what it should cover, was ongoing. The intention was to ensure that the Charter remains flexible and effective in supporting community values and aspirations in Victoria. These built-in reviews ensured that the law was revisited.

The 2011 review was required to consider the first four years of operation of the Charter and to include consideration as to whether:

- additional rights should be included as human rights under the Charter, including rights under the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the right to self-determination
- regular auditing of public authorities to assess compliance with human rights should be made mandatory, and
- further provision should be made in the Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of the Charter.

⁶⁵ Section 33 of the Charter makes provision for a party or a court or tribunal to refer a question of law that relates to the application of the Charter or to the interpretation of a statutory provision in accordance with the Charter to the Supreme Court.

The 2015 review is required to consider the fifth to eighth years of operation of the Charter and to make a recommendation about whether any further review of the Charter is necessary.

Some people have suggested that further statutory reviews are useful to help maintain the development and refinement of the Charter. Others have suggested that these kinds of goals could be addressed through standard government reviews or a reference to the Victorian Law Reform Commission if a future government was interested in reviewing the legislation. There has also been some question about whether the regular statutory reviews have been a barrier to the implementation of the Charter as people wait to see if it will change.