THE VICTORIAN BAR COUNCIL

SUBMISSION TO THE REVIEW OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

4 JUNE 2015
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INTRODUCTION

1. The Victorian Bar welcomes the opportunity to provide this submission to the Review of the Charter of Human Rights and Responsibilities Act 2006 (Charter). The Victorian Bar’s submission focuses principally on those aspects of the Review’s terms of reference which raise questions of the practical operation of the Charter, matters of legal ambiguity, uncertainty or technical difficulty, or which reflect experience of members of the Bar in the conduct of cases and the provision of advice in connection with the Charter. This focus reflects the predominant experience and expertise of the Bar’s members as participants in litigation and as providers of legal advice; given the diversity of opinion of members of the Bar on many matters of political and legal philosophy which would influence policy choices, the Bar’s submission does not seek to address more policy-oriented questions.

2. In particular, the Bar’s submission is principally directed to the following paragraphs under question 2 of the terms of reference: (a), (b), (c) and (d), and (h). Because of their relationship with those questions, we also make comments on question 1 (b) and (e). Those terms of reference are:

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

   1. Ways to enhance the effectiveness of the Charter, including, but not limited to:
      (c) 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
      (e) the application of the Charter to non-State entities when they provide State-funded services

3. The Victorian Bar considers that it is well placed to inform the Review about the way the Charter is operating in courts and tribunals, and in other areas related to litigation such as legal advice work because its members see the Charter’s operation from many different perspectives, depending on the clients by whom they are briefed. Accordingly, these submissions reflect the experience of counsel who have appeared for public authorities, for the Attorney-General as intervener, for the Victorian Equal Opportunity and Human Rights Commission (VEOHRQ) and for applicants asserting rights or for citizens seeking advice. It draws on experience in diverse fields of practice, including administrative law, criminal law and discrimination law.
EXECUTIVE SUMMARY AND FOCUS OF SUBMISSION

4. In summary, the Bar makes the following recommendations, discussed in further detail below.

DESIABLE AMENDMENTS TO IMPROVE THE OPERATION OF THE CHARTER.

a) At present, the Charter offers a practical resolution in only limited cases. The principal means by which the effectiveness of the Charter can be enhanced would be to make breaches of human rights fully justiciable. Accordingly, the Charter, s 39(1), should be amended to include stand-alone cause of action and remedies for breaches of Charter rights. The comparable ACT Human Rights Act 2004 provides a ready model.

b) The provision for notification of the Attorney-General and the VEOHRC in any case in the County Court in which a relevant Charter issue is to be raised (s 35(1)(a)) should be reconsidered. Members of the Bar report that on occasion issues under the Charter are not raised because the process of notifying an issue may result in loss of a hearing date; where the applicant is in custody this delay may be considered too disadvantageous. On the other hand, the same considerations do not arise where a question is referred to the Supreme Court (s 35(1)(b)) or where the Court is considering making a declaration of inconsistent interpretation (s 36(4)). The Bar recommends no change to those latter provisions.

c) In relation to s 32 of the Charter (interpretation), the Charter should be amended to resolve the interaction of s 32 with s 7(2)(permissible limits). The law remains uncertain and open to debate, as noted in three decisions of the Court of Appeal since the High Court’s divided discussion of the question in Momcilovic v The Queen (2011) 245 CLR 1. The Bar recommends amendments to confirm the approach set down by the Court of Appeal in R v Momcilovic (2010) 25 VR 436 at 446 [35].

WAYS TO ENHANCE THE EFFECTIVENESS OF THE CHARTER

d) Consideration should be given to setting aside a pool of funds for applicants in order to ensure that properly-raised issues on the Charter can be articulated and presented by applicants fully funded and prepared. To date, applicants have relied heavily on pro bono counsel, but it is not appropriate that this be the principal way in which people are represented in litigation where there is a serious Charter issue to be heard and determined. Whilst the Bar expects pro bono representation by barristers to continue to play an important part in Charter litigation, as it does across the court system, to assume its continued availability at the present high level is unwise and undermines the efficacy of the Charter and the principle of equal access to justice.

e) The effectiveness of the intervention function will be materially compromised, and the fairness for parties also impacted, if adequate funding to VEOHRC is not made available so as to allow that role to continue.

f) Consideration ought to be given to giving the VEOHRC a power with respect to the voluntary conciliation or mediation of disputes about breaches of the Charter under Part 8 of the Equal Opportunity Act 2010.
g) The Government should continue to promote training and education of public authorities in the Charter. Training and education has and will continue to promote a greater understanding of the human rights of individuals with whom public authorities engage and interact. It will also encourage better decision making processes, and therefore enhance the protection of public authorities from successful challenges.

WHETHER ANY FURTHER REVIEW OF THE CHARTER IS NECESSARY

h) The Bar recommends that there should not be a further scheduled review of the Charter, for the reason that the jurisprudence on the Charter should be given time to develop in the normal course. Any further reviews should be left to be initiated, if it is considered desirable, through the ordinary parliamentary processes.
SUBMISSIONS OF THE VICTORIAN BAR

QUESTION 2(A)

Q 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

5. This question engages two parts of the Charter, being the definition of ‘public authority’ in s 4, and the provisions of Division 4 of Part 3 which identify the ‘obligations on public authorities’ (particularly, s 38 ‘conduct of public authorities’). The question of the Charter’s provisions regarding legal proceedings and remedies (s 39) and the extent to which courts and tribunals are ‘public authorities’ or have human rights obligations (s 6(2)(b)) are the subject of Qs 2(b) and (e). These are, discussed separately, below.

6. The Victorian Bar recommends that no amendment be made to the provisions of the Charter which define the concept of a public authority for the purposes of the Charter (s 4) and impose decision-making and conduct obligations upon public authorities (s 38).

Q 2(A) PART ONE: SECTION 4 - DEFINITION OF PUBLIC AUTHORITIES

7. ‘[T]he concept of a public authority is of fundamental importance to the achievement of the central purpose of the Charter’ to protect and promote human rights through the imposition of obligations upon public authorities to act in a way that is compatible with human rights and, in making a decision, to give proper consideration to relevant human rights (s 38).

8. The definition of ‘public authority’ in s 4 of the Charter adopts a category-based approach, expressly including various categories of entities within the definition and excluding others. The various categories of entities that are expressly included within the definition are, for the most part, clear and certain. Some other categories are expressed more conceptually but the jurisprudence dealing with these aspects of the definition of ‘public authority’ has developed in a generally satisfactory manner.

SEC 4(1)(A), (D), (E), (F), (H) – DESIGNATED OFFICES AND PERSONS

9. In the first group are officials and categories designated by name or office. There is little or no difficulty in identifying who is ‘a public official within the meaning of the Public Administration Act 2004’ (s 4(1)(a)), Victoria Police (s 4(1)(d)), ‘a council within the meaning of the Local Government Act 1989 and Councillors and members of Council staff within the meaning of that Act (s 4(1)(e)), a Minister (s 4(1)(f)), or an entity declared by the regulations to be a public authority for the purposes of the Charter (s 4(1)(h)), although none has so far been declared.

SEC 4(1)(G), (I), (J) - ’ACTING IN AN ADMINISTRATIVE CAPACITY’

10. A further class adopts a familiar, but nonetheless sometimes troublesome distinction, which turns on the classification of the function being performed: thus, a public authority includes a court or tribunal

1 Metro West Housing Services Ltd v Sudilovic [2009] VCAT 2025 per Bell P at [118] (Metro West).
‘when it is acting in an administrative capacity’ but not otherwise (s 4(1)(j))², and ‘members of a Parliamentary Committee when the Committee is acting in an administrative capacity’ (s 4(1)(g), but not ‘Parliament or a person exercising functions in connection with proceedings in Parliament’ (s 4(1)(i)).

11. Notwithstanding the difficulty that may occur from time to time in distinguishing on which side of the line a particular action may fall, the Bar does not recommend any change to paragraphs s 4(1)(g) and (j). Very soon after the commencement of the Charter, Hollingworth J decided in Sabet v Medical Practitioners Board of Victoria that the words ‘administrative capacity’ in s 4(1)(j) should be read as equivalent to the concept of ‘administrative power’ at common law. The principles applicable to the distinction between judicial and non-judicial power (most fully developed in federal law) therefore appear to provide a relevant guide to the application of those paragraphs.

**SEC 4(1)(B), (C) – ‘FUNCTIONS OF A PUBLIC NATURE’**

12. A greater potential for uncertainty arises in relation to the following two categories:

   a) ‘an entity established by a statutory provision that has functions of a public nature’ (s 4(1)(b)); and

   b) ‘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)’ (s 4(1)(c)).

13. Those two categories turn on classification of ‘functions of a public nature’. They have been the subject of limited judicial consideration. In Sabet v Medical Practitioners Board of Victoria, Hollingworth J held that that the Medical Board was a public authority under s 4(1)(b). In Metro West Housing Services Ltd v Sudi, a social housing provider which was an independent contractor to the Director of Housing was held to be a public authority under s 4(1)(c). In addressing the construction of s 4(1)(c), Bell P at [143] propounded a two-fold test:

   The first is whether the functions being exercised are of a public nature. That turns on the nature of the functions, and whether they are being exercised in the public interest, not on the nature of the entity. The second is whether the functions are being exercised on behalf of the State or a public authority. That turns on the relationship between them and the entity, and whether there is some arrangement under which, in exercising the functions, it is representing them or carrying out their purposes in the practical sense.

² A legislative note to s 4(1)(j) states that ‘comittal proceedings and the issuing of warrants … are examples of when a court or tribunal is acting in an administrative capacity’, reflecting Ammann v Wengener (1972) 129 CLR 415 at 435-436 and Ousley v The Queen (1997) 192 CLR 69 at 99-105, respectively. (The note forms part of the Charter: s 36(3A) Interpretation of Legislation Act 1984.) The note continues that ‘a court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures’. However, a court does not act in an administrative capacity when a judge hears an application for adjournment of a fixture: R v Williams (2007) 16 VR 168 per King J at 176 [50].


⁴ Sabet(2008) 20 VR 414 at 431-432 [112][118].

⁵ Metro West(2009) VCAT 2025 at [143]–[166].
14. The Charter continues to be invoked in cases involving social housing providers. The experience of practitioners at the Victorian Bar suggests that, notwithstanding the decision in Metro West, there is still some uncertainty as to whether registered housing agencies under the Housing Act 1983 and other social housing providers are public authorities for the purposes of the Charter. This manifests itself in preliminary issues raised by respondents which, so far, have not been run at trial or final hearing. This may demonstrate that knowledge of the Charter’s application is not sufficiently widespread in that sector, or may indicate reluctance to accept the characterisation propounded.

15. However, the Victorian Bar does not recommend any departure from s 4(1)(c) for the following reasons.

a) First, as the Attorney-General explained in the Second Reading Speech to the Charter Bill, s 4(1)(c) is intended to reflect ‘the reality that modern governments utilise diverse organisational arrangements to manage and deliver government services’. It is therefore essential that the definition of ‘public authority’ should include a category that focuses on the nature of the functions being performed and their substantive connection with the State, rather than the form in which those functions are delivered. The definition must also be sufficiently flexible to comprehend the diverse and continually evolving nature of arrangements for the delivery of public services. Section 4(1)(c) fulfils these requirements by adopting a formulation that is apt to ensure the proper reach of the obligations imposed on public authorities in s 38.

b) Secondly, the Charter itself provides some guidance as to the application of ss 4(1)(b) and (c). Section 4(2) sets out a list of factors that may be considered in determining what is a ‘function of a public nature’. The list is non-exhaustive: s 4(3). Subsections 4(4) and (5) provide further guidance in the application of s 4(1)(c).

c) Thirdly, additional guidance can be obtained from the detailed discussion of those subsections in the Explanatory Memorandum to the Charter Bill, the Second Reading Speech and the reasons of Bell J, in Metro West, in which his Honour also surveyed the comparative jurisprudence. We are still at a relatively early stage in the Charter’s development. The jurisprudence on s 4(1)(c) should be given time to develop on a case by case basis. The test propounded in Metro West is consonant with the terms of the statute and provides a workable basis for applying it in the varied circumstances of Government service provision.

d) Fourthly, any unexpected outcome in a particular context can be addressed by the exercise of the regulation-making power in s 46 of the Charter to declare an entity to be a public authority (s 4(1)(h)) or not to be a public authority (s 4(1)(k)). To date, those powers have been exercised sparingly. The Victorian Bar considers that to be appropriate. As suggested above, the proper reach of the definition of ‘public authority’, particularly ss 4(1)(b) and 4(1)(c), should be permitted to develop on a case by case basis. However, if there are areas where the lack of certainty is perceived to be detrimental to the proper application of the

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6 Victoria, Parliamentary Debates, Legislative Assembly, 4 May 206, p 1293; see also the Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006, p 4.

7 The Adult Parole Board, the Youth Parole Board and the Youth Residential Board have been declared not to be public authorities: Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013 (which continue the effect of earlier regulations).
Charter, those declaratory powers can and should be exercised to declare relevant entities to be public authorities.

SEC 4(1)(i), (j) – EXCLUSIONS

16. Certain entities are excluded from the definition of a ‘public authority’. These have already been noted: these are ‘Parliament or a person exercising functions in connection with proceedings in Parliament’ (s 4(1)(i)) and ‘a court of tribunal except when it is acting in an administrative capacity’ (s 4(1)(j)). Entities may also be declared by regulations not to be public authorities (s 4(1)(k)).

17. The experience of the Bar does not suggest that there has been any difficulty in the application of these definitions. An additional provision bearing upon courts and tribunals (s 6(2)(b)) is addressed at Q2 (e) below.

Q 2(A) PART TWO: SECTION 38 - OBLIGATIONS OF PUBLIC AUTHORITIES

18. The second part of question 2(a) of the Terms of Reference directs attention to the content of the obligations of public authorities. Relevantly, s 38(1) of the Charter imposes obligations upon public authorities to act in a way that is compatible with a human right and, in making a decision, to give proper consideration to relevant human rights.

19. It appears to be accepted that these obligations are either separate (albeit related) obligations or that the obligation to give ‘proper’ consideration has a substantive element, such that consideration of a human right by a decision-maker will not be ‘proper’, ‘however seriously and genuinely it was carried out, if the act or decision is incompatible with human rights in terms of s 7(2).’

20. It also appears to be accepted that the concept of incompatibility in s 38(1) is informed by application of the general limitations provision in s 7(2); that is, an act of a public authority will only be incompatible with a human right if it imposes a limitation on the right that cannot be justified as reasonable within the meaning of s 7(2).

21. There may be some benefit in inserting a textual note underneath s 7(2), to the effect that, in relation to those rights that are internally qualified (eg, ss 13(a), 15(3) and 21(2), reasonable limitations to those rights should be considered only once and by application of either the internal qualification or s 7(2).

22. The experience of the Bar is that the nature of these obligations are sufficiently well understood and have been applied in a consistent and common sense manner by courts and tribunals which have considered claims of a breach of s 38(1).

23. The Bar does not recommend any amendment of s 38. However, as discussed below in relation to term of reference 2(b), the Victorian Bar recommends amendment of s 39 of the Charter to clarify the consequences of a breach of s 38(1).

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9 PJB v Melbourne Health (Patrick’s Case) [2011] VSC 327 per Bell J at [312].
QUESTION 2(B)

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<td>clarifying the provisions regarding legal proceedings and remedies against public authorities</td>
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24. In respect of this paragraph of the Review’s Terms of Reference, three issues may be identified:

   a) Whether, under the Charter in its present form, an act or omission by a public authority, declared by s 38 to be ‘unlawful’, is or ought to be confirmed to be a ‘jurisdictional error’ for the purposes of common law judicial review proceedings under the Administrative Law Act 1978 or an application for judicial review under Order 56 of the Supreme Court Rules;

   b) Whether the effectiveness of the Charter would be enhanced and its operation improved if a stand-alone cause of action could be brought against a public authority to claim a remedy in respect of conduct which is unlawful under s 38 (s 39(1));

   c) Whether relief in the nature of damages ought to be available for a breach of the Charter (s 39(3)).

25. These issues are distinct, although all relate to the way in which the Charter operates and the extent to which it is effective. The first matter that arises is an area of uncertainty that has great significance for the Charter in its current form.

CONSEQUENCES OF A BREACH OF S 38(1) - JURISDICTIONAL ERROR?

26. Dealing with public authorities, the Charter sits beside the established body of administrative law potentially applicable to the same authorities. The question naturally arises as to the extent to which a breach of the Charter or an act or omission which is declared by s 38 to be ‘unlawful’ founds administrative law relief.

27. The answer is only partly provided by ss 39(1) and (2):

   a) Section 39(1) provides that if any relief or remedy may be claimed ‘on the ground that the act or decision was unlawful’, that relief or remedy may also be sought ‘on a ground of unlawfulness arising because of this Charter.’ In that respect, the Charter provides an additional ground of relief, without displacing other grounds. As put by Maxwell P in Sudi:

       Plainly enough, s 39(1) has an operation which is both conditional and supplementary. The condition to be satisfied is that a person be able to seek, independently of the Charter, ‘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’. If — but only if — that condition is satisfied, then s 39(1) enables that person to seek ‘that relief or remedy’ on a supplementary ground of unlawfulness, that is, unlawfulness arising because of the Charter.10

   b) Section 39(2) preserves any right that a person has to seek relief apart from the Charter, including expressly, a right to seek judicial review under the Administrative Law Act 1978 or Order 56.

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10 Sudi (2011) 33 VR 559, per Maxwell P at 580 [96].
c) However, neither the Charter nor the Administrative Law Act states expressly whether unlawfulness under the Charter is a species of jurisdictional error for administrative law purposes.

28. The issue as to whether a breach by a public authority of its obligations under s 38(1) of the Charter constitutes a jurisdictional error was left open by Warren CJ in Sudi.\textsuperscript{11} In the same case, Weinberg JA expressly regretted the failure to specify in the Charter the consequence of a public authority’s unlawful behaviour.\textsuperscript{12} Arguably, s 39(1) does specify the consequence of unlawful behaviour by a public authority. If the ground of unlawfulness arising otherwise than because of the Charter would amount to jurisdictional error and therefore entitle a person to a declaration, an injunction or an order in the nature of one of the prerogative writs, s 39(1) operates to entitle that person to ‘that relief or remedy’ for unlawfulness arising because of the Charter.

29. However, it has not been understood to operate in that manner. In Bare v Small\textsuperscript{3} Williams J held that a breach of s 38(1) does not amount to jurisdictional error. The decision has been appealed to the Court of Appeal and judgment is currently reserved. One of the reasons which led to the conclusion in Bare v Small that a breach of s 38(1) did not amount to jurisdictional error was that the obligations imposed by s 38(1) were said to ‘lack the ‘rule-like quality” indicative of a requirement of validity.\textsuperscript{14}

30. This is a matter which warrants careful assessment by the Review. The Bar recommends that if the conclusion in Bare v Small were to be endorsed by the Court of Appeal, the matter would warrant amendment in the manner adverted to by Weinberg JA. While the obligations in s 38(1) to act compatibly with and to give proper consideration to human rights are open and contextual, having regard to the fact that the rights are necessarily expressed at a certain level of generality and are subject to reasonable limitation consistent with s 7(2) of the Charter, nevertheless they are no different from many other rules of law, such as concepts of negligence or misleading and deceptive conduct under the Australian Consumer Law / Trade Practices Act.

31. Moreover, it would seem to be essential to the stated objects of the Charter, the promotion of a human rights culture within the public sector and to compliance by public authorities with human rights, that the obligations in s 38(1) be recognised, as a first step, as having the quality of rules of law. One of the usual ways in which rules of law are recognised as being such is that their breach gives rise to some relief or remedy enforceable by a court or tribunal.

32. Normally, where statute confers a power or states a limit which must be observed by a public authority, it is the function of the Courts to ensure that the public authority does not exceed the limits so prescribed. Section 38 of the Charter prescribes what appears to be a limit on all public authorities to which it applies. In the usual case, the Courts would have jurisdiction to ensure that the limit is observed. This was explained by Brennan J in Ainsworth v Criminal Justice Commission (1992) 175 CLR 564:

\begin{quote}
the principle that any person who purports to exercise an authority conferred by statute must act within
\end{quote}

\textsuperscript{11} (2011) 33 VR 559 at 569 [49].
\textsuperscript{12} (2011) 33 VR 559 at 596 [214].
\textsuperscript{13} [2013] VSC 129 per Williams J at [92] [122].
\textsuperscript{14} [2013] VSC 129 at [117].
the limits and in the manner which the statute prescribes and it is the duty of the court, so far as it can, to enforce the statutory prescription. I see no reason to confine the jurisdiction in judicial review more narrowly than this principle would acknowledge, though the armoury of remedies available to the court in particular cases may impose some limitations and judicial discretion in exercising the jurisdiction may further restrict the use of the available remedies …

conduct in which a person or body of persons engages in purported exercise of statutory authority must be amenable to judicial review if effect is to be given to the limits of the authority and the manner of its performance as prescribed by the statute.

33. To that end, it is open to the Review to conclude that it is critical to the effective operation of the Charter that an act or decision of a public authority which is incompatible with a human right be capable of amounting to jurisdictional error and entitling the person affected by the act or decision to the relief which would normally flow from that conclusion, subject to discretionary considerations common to all judicial review applications. That is the next issue which arises.

A STANDALONE CAUSE OF ACTION FOR BREACH OF THE CHARTER

34. As is well known, s 39 of the Charter does not of itself create an independent cause of action. As Hollingworth J held in Sabet [2008] VSC 346 at [104], the avenue for pursuing a relief or remedy pursuant to s 38 of the Charter, is through the ordinary administrative law avenues of merits review or judicial review of the relevant administrative decision.15

35. That was a deliberate decision of the government of the day, although the intended effect of s 3916 arguably was not fully expressed. The government’s stated intention when the Charter was introduced was ‘that any available remedies should focus on practical outcomes rather than monetary compensation.’17

36. However, the Charter at present offers only limited avenues that lead to a positive outcome for the aggrieved. The limitations are as to both scope and enforceability and this creates barriers to effective and appropriate redress.18 In particular:

   a) the absence of a direct, stand-alone remedy means that the complainant must seek indirect avenues for relief or encourage intervention by a third party, or abandon reliance on the Charter;

   b) the available scope for legal proceedings, the ‘piggyback provisions’ under s 39(1), have been heavily criticised as unnecessarily complex and unworkable;19

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15 See, for example, Director of Housing v IF (Residential Tenancies) [2008] VCAT 2413 at [51].

16 Indeed, the express attempts to confine the relief available were intended to avoid a possible implication of a right to remedies as has occurred in New Zealand. See Victoria, Department of Justice, ‘Human Rights in Victoria: Statement of Intent, May 2005’ reprinted as App B in Victoria, Human Rights Consultation Committee, Human Rights Consultation Committee: Rights, Responsibilities and Respect (2005), pp.144-146.


18 See Evans S, and Evans C, ‘Legal redress under the Victorian Charter of Human Rights and Responsibilities’ (2006) 17 Public Law Review 264 at 281 [Evans and Evans 2006]. Some of the difficulties that have been encountered in the public housing context are discussed in the Schedule to this submission.

c) further, despite the intention of the government when devising the Charter to focus on education and conciliation rather than litigation and damages, there is no complaints handling or conciliation function on the Human Rights Commissioner;20 and

d) finally, the concern to avoid a focus on monetary compensation has overlooked the range of other salutary remedies (from declaration21, to the prerogative writs (in the nature of mandamus, certiorari) and injunction).

37. While originally there may have been concern about a flood of litigation under the Charter which would be spurred by a standalone cause of action, such a concern would now seem to be allayed:

   a) there has been a period of eight years in which public authorities have had time to adjust to and comply with the Charter;

   b) in that period, fundamental aspects of Victorian jurisprudence about the application of the Charter have been established; and

   c) since 1 January 2009, the Australian Capital Territory has allowed a stand-alone cause of action with the right to all forms of relief except damages (s 40C, Human Rights Act 2004 (ACT)) without being overwhelmed by litigation. (There appears to have been some twenty cases in which the section has been judicially referred to).

38. In summary, s 39(1) has been the subject of judicial22 and academic23 criticism and has resulted in uncertainty as to its application and restrictions on the ability of litigants to raise a claim that a public authority has breached s 38(1) of the Charter. That uncertainty may be illustrated by an analysis of its application in relation to public housing (see Schedule).

39. The lack of a cause of action feeds into an unhelpful and erroneous perception of the Charter as something that must be treated differently to the ordinary law. As Emerton J said in Castles v Secretary to the Department of Justice:

   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’ variety activity for persons working in the public sector, both senior and junior.24

By the same token, consideration of whether a public authority has acted incompatibly with human rights or failed to give proper consideration to a relevant human right when making a decision should also become a ‘common or garden’ variety part of the ordinary processes of courts or tribunals in this State.

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20 Evans and Evans 2006 at p.274.
21 Ainsworth v Criminal Justice Commission (1992) 175 CLR 564
22 Director of Housing v Sudri (2011) 33 VR 559 at 596 [214] per Weinberg JA.
23 Gans; Evans and Evans 2006 at 281.
24 (2010) 28 VR 141 at 184 [185].
40. In that respect, the Bar re-affirms the principle advanced in its Submission in 2011 to the Parliamentary Committee on Review of the Charter.\textsuperscript{25}

The Bar sees the justiciability of public authorities’ compliance with human rights obligations as an important component of a legal system which takes human rights seriously. Section 38 should be retained, and strengthened by allowing for a free standing cause of action in relation to breaches of public authorities’ obligations.

41. Further, the ‘conditional and supplementary’\textsuperscript{26} operation of s 39(1) tends to feed into perceptions that Charter rights are considerations of a merely supplementary or secondary nature and unlikely to be of any real significance to the outcome of the case. It is relevant to note in this context that the experience of the Bar suggests that one of the reasons why available Charter arguments are sometimes not run or not pursued is that the arguments would not make any difference to the ultimate outcome due to the lack of an available remedy under the Charter.

BAR MEMBERS’ EXPERIENCE

42. The experience of the Bar confirms that the effectiveness of the Charter is presently restricted by the very limited extent to which the Charter can be invoked to obtain a practical remedy for an aggrieved citizen.

43. For the purposes of this Submission, the Bar surveyed its members’ experience with the Charter. All the respondents with practical experience of the Charter agreed that (a) the principal limitation on the effectiveness of the Charter was a lack of an effective remedy; and (b) the operation of the Charter would be enhanced by creation of a stand-alone remedy.

44. The Victorian Bar recommends that s 39 of the Charter be amended in a manner that clarifies the circumstances in which a person can rely on a breach of s 38(1) of the Charter in legal proceedings, that promotes the purposes of the Charter by broadening those circumstances and that, subject to the reserved judgment of the Court of Appeal in *Bare v Small*, clarifies the consequences of a breach of s 38(1).

45. In the absence of a cause of action or relevant ground of relief, there is a reluctance of many practitioners, especially but not exclusively in criminal law, to raise Charter issues. That is, in the experience of the Criminal Bar Association, echoed by the reluctance of some judicial officers to hear Charter arguments. Particularly in busy court lists such as the mention court of the Magistrates’ Court of Victoria, the Charter is seen as adding considerable complexity with very little - if any - impact. Practitioners know that, when raising the Charter, they can expect the riposte from the Bench, ‘yes, but what does it actually add?’

\textsuperscript{25} At [64].

\textsuperscript{26} Sudi (2011) 33 VR 559 at 580 [96] per Maxwell P.
46. The answer to that question may be that, in an appropriate case, the Charter can be very important, particularly when undertaking statutory interpretation and considering the conduct of public authorities. In some cases it may make the difference as to whether a person is found guilty or acquitted, granted his or her liberty, or remain in prison. However, more needs to be done to educate members of the Bar, and indeed judicial officers, about the Charter's potential. The most practical and important contribution to making the Charter effective is to provide an effective remedy for the appropriate case.

RECOMMENDATION

47. Accordingly, the Victorian Bar recommends that s 39 of the Charter be amended so as to enable a person who claims to have been affected by an act or a decision of a public authority in breach of s 38(1) of the Charter:

   i. to bring stand-alone proceedings in the Supreme Court seeking any of the remedies commonly available upon applications for judicial review, excluding (if so desired) damages; and

   ii. to rely on a breach of s 38(1) in any other legal proceedings brought by or against the person.

48. The amendment proposed in paragraph (a) above could, if the issue is not otherwise resolved by the Court of Appeal, make clear that a breach by a public authority of s 38(1) is capable of amounting to jurisdictional error.

49. The amendment could be achieved by amending s 39 of the Charter to reflect the terms of s 40C of the Human Rights Act 2004 (ACT). That section has been in force in the ACT since 1 January 2009. As noted above, the ACT provision has not caused difficulty.

50. It is submitted that amendment of s 39 along those lines would avoid the practical difficulties and normative problems identified above and aid the promotion of a human rights culture within the public sector by ensuring that the acts and decisions of public authorities can, where necessary, be subject to review for compatibility with human rights.

DAMAGES?

51. It is apparent from the foregoing that the Victorian Bar does not recommend that s 39(1) be amended at this time so to give rise to an entitlement to damages for a breach of s 38(1). Among its members there are some who advocate for a right to damages, whether subject to a threshold or limit, or left to the justice of the case. The Bar considers that this should be the subject of future consideration once there has been sufficient time for a body of jurisprudence in relation to s 39, amended in the manner proposed, to develop.
Q. 2  Any desirable amendments to improve the operation of the Charter, including, but not limited to:

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

52. In this section of its submission, the Bar addresses the interaction between s 32 and s 7(2) of the Charter.

53. The most controversial issue concerning the role of human rights in statutory construction is the extent to which a court in interpreting legislation to ensure its conformity with human rights might depart from the apparent intention of Parliament. That model is exemplified by the role of the courts in the United Kingdom under s 3 of the Human Rights Act 1998 (UK).  

54. In its 2011 submissions, the Bar supported the retention of each part of s 32 of the Charter, as orthodox and useful. It adopted that view against the background of the then recent decision of the Court of Appeal in R v Momcilovic. In that case, the Court of Appeal unanimously held that s 32 of the Charter did not direct or authorise the judicial re-writing of legislation as had occurred on occasion in the UK in order to ensure compatibility of legislation with human rights.

55. The Bar re-affirms its 2011 Submissions in that respect.

THE COMPLEXITY OF MOMCILOVIC HC

56. With regard to the interpretative provision (s 32 of the Charter), the judgment of the High Court in Momcilovic v The Queen, or perhaps more accurately the separate reasons for judgment in that case and the divergent approaches to the interpretation of s 32 have created significant complexity and uncertainty.

57. At the time of the last review of the Charter in 2011, the High Court’s decision in Momcilovic was then awaited. One of the issues ventilated in the appeal was the correctness of the unanimous decision of the Court of Appeal on the steps involved in interpretation of legislation under the Charter. Accordingly, in its 2011 Submissions, the Bar recommended that no action be taken to clarify the proper approach to the interaction of s 7(2) and s 32 until after the High Court’s decision.

58. However, in the result, the High Court’s consideration of that question was complex and without a clear ratio on that issue, so that the question of how the interpretation function is to be conducted was left unresolved by that Court.

59. The essential difficulty, as identified by Gummow J in Momcilovic HC at [168], is that when s 32 directs that ‘…all statutory provisions must be interpreted in a way that is compatible with human rights’, the definition of ‘human rights’ (‘the civil and political rights set out in Part 2’) takes one to Part 2, in which s 7(2) is located. Yet s 7(2) is qualitatively different to the rights articulated in Part 2

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28 (2010) 25 VR 436 (VSCA) (Momcilovic CA)
29 (2011) 245 CLR 1 (Momcilovic HC)
and is addressed to the extent to which human rights may be limited. Logically, s 7(2) would seem necessarily to be premised on the content of ‘human rights’ having been determined prior to the consideration of limits that may permissibly apply to the right; s 32 (consistently with the usual principles of statutory interpretation) directs how the content of ‘human rights’ is determined.

60. However, contrary views are open and are regularly put. The unresolved issue of the interplay between ss 32 and 7 of the Charter has created a situation where practitioners are not confident of the methodology to be applied. In busy courts, there is a significant reluctance to have judicial officers delve into the depths of that issue, especially when ‘ordinary’ principles of statutory construction, such as the principle of legality, can be seen to have the same or a very similar effect.30 The Court of Appeal has directed attention to the issue in three subsequent cases, without it being necessary to clarify whether any different methodology needs to be adopted than that of Momcilovic CA.31 More generally, it remains unclear whether and when the issue will be revisited by the Court of Appeal or may again come before the High Court.

61. For as long as Charter remains drafted as presently, the matter is finely balanced and is inherently uncertain. The Victorian Bar considers there would be benefit in an amendment that clarifies Parliament’s intention and provides certainty.

62. Accordingly, the Victorian Bar recommends that consideration be given to an amendment to the Charter to confirm whether s 32 directs that a Court interpret legislation compatibly with the rights set out in ss 8 – 27, without regard to the factors in s 7(2), or with regard to them.

63. In that respect, the Bar supports an approach consistent with the decision in Momcilovic CA, to the effect that s 7(2) does not inform the initial interpretative process which s 32(1) mandates but is engaged when and if the statutory provision under consideration is construed to impose a limit on the enjoyment of a human right (that is, when a declaration of inconsistency under s 36 or a claim under ss 38 and 39 is under consideration).32 Otherwise, s 32(1) would be weaker than the common law principle of legality, which does not require consideration of whether or not a limitation on a common law right is reasonable before it is capable of application. This would render s 32 a dead letter.

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30 As noted by French CJ in Momcilovic (2011) 245 CLR 1 at 50 [51], in a passage regularly cited by the Court of Appeal since (see cases in next footnote): s 32 of the Charter requires ‘statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) [thus] applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application...’


32 (2010) 25 VR 436 at 446 [35]. In commendably clear terms, the Court explained the methodology as involving three steps: ‘Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the Interpretation of Legislation Act 1984. Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter. Step 3: If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified’ A note in these terms could be inserted in the Charter.
QUESTION 2(E)

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

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

64. The interaction between the exclusion from the definition of ‘public authority’ of courts and tribunals when acting in a judicial capacity (s 4(1)(j)) and s 6(2)(b), which provides that the Charter applies to courts and tribunals ‘to the extent that they have functions under Part 2 or Division 3 of Part 3’, is capable of producing uncertainty, and appears to add little or nothing to the application of the Charter.

65. The subsection of which the paragraph is a part, s 6(2), appears primarily to be indicative of the general fields of operation of the Charter. It is of three paragraphs, corresponding in general terms to the three branches of government: it commences with s 6(2)(a) which states that the Charter applies to the Parliament in certain respects (essentially cross-referring to ss 28 – 31) and concludes with s 6(2)(c), stating that the Charter applies to public authorities, essentially cross-referring to ss 38 and 39. In this way, s 6(2) as a whole is a signpost, showing that each branch of government has a role to play in respect of the Charter. While this symbolism is unexceptionable as such, it is of concern if it produces confusion and uncertainty. The equivalent ACT legislation, the Human Rights Act 2004, which otherwise essentially mirrors the Charter, does not have a provision equivalent to s 6(2).

66. Whether s 6(2)(b) has any work to do as a substantive enactment is unclear. To the extent that a human right involves the exercise by a court or tribunal of a discretion or decision,33 and to the extent that a court interprets legislation in a way that is compatible with the Charter, it may be said that the court or tribunal has a function under Part 2 of the Charter, or Division 3 of Part 3 (interpretation of statutes under s 32), as the case may be. However, s 6(2)(b) is otiose: as a body that applies the law, the court or tribunal must apply the Charter in accordance with its terms as a statute of general application, without the direction in s 6(2)(b).

67. The Victorian Bar recommends that s 6(2)(b) (or all of s 6(2)) be deleted.

QUESTION 2(H)

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

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

68. There are three provisions of the Charter which require notification to be given to the Attorney-General and to VEOHRC:

a) in a case in the Supreme Court or County Court, if a question of law relates to the application of the Charter or with respect to interpretation of a statutory provision in accordance with the Charter (s 35(1)(a));

b) if a matter is referred under s 33 to the Supreme Court from another court or tribunal with

33 An obvious example is when the Court is the forum in which human rights connected with criminal trial and procedure—(ss 24, 25, 26 of the Charter) arise and come to be applied.
respect to the same matters (s 35(1)(b)); and

c) if the Supreme Court is considering making a declaration that a statutory provision cannot be interpreted consistently with a human right (s 36(3)).

69. In its 2011 Submission the Bar stated that its experience to that time had been that, after some initial problems caused by lack of awareness of the need to notify, the requirement then became generally understood and was taken into account as part of the Court timetable before matters were set down, with the result that notification was not then operating in practice to delay the progress of matters to a full hearing.

70. Ideally, as the Bar noted in 2011, in addition to facilitating the exercise of the intervention power, the notice requirement served a useful role in requiring parties to identify and elucidate Charter matters at an early stage in litigation.

71. In the Bar’s current experience, no difficulty arises with respect to notifications under ss 35(1)(b) or 36(3) and the Bar does not expect any difficulty to arise, as in each case, notification would add no delay and would be warranted by the significance of the proceedings.

72. However, the Criminal Bar has now identified concerns with the operation of notification in more everyday cases, under s 35(1)(a), to which we now turn.

**DIFFICULTIES WITH NOTIFICATION – CRIMINAL MATTERS**

73. The Criminal Bar Association reports that the notice provision in s 35 of the Charter has had a significant chilling effect, especially in criminal cases in the County Court of Victoria. In practical terms, the effect is created or compounded by funding and briefing practices that often result in criminal law barristers often being briefed late (very shortly before the hearing). In those circumstances there are obvious problems if Charter arguments are only identified a day or so before hearing. Notification of the Charter issue is likely to result in an adjournment, with consequent loss of the fixture. This creates concern, especially if the applicant is held in custody pending the hearing.

74. At a minimum, it is **recommended** that the notice provisions in s 35 of the Charter should be limited to cases in the Supreme Court of Victoria.

75. Additionally or in the alternative, the Bar **recommends** that s 35 could be amended to provide flexibility. Two forms of amendment might be considered:

a) A discretion in the Court to dispense with notification. This would be useful for cases in which the Charter arguments that were to be raised were established or well-understood.

b) A provision modelled on s 78B(2)(c) of the **Judiciary Act 1903 (Cth)** providing that the court or tribunal may continue to hear evidence and argument concerning matters severable from any matter arising under the Charter or involving the interpretation of a statutory provision in accordance with the Charter.

However, the Bar acknowledges that the latter option is not a panacea. It would not be workable, for example, in a case which turns largely on the interpretation of a statutory provision: it would not be appropriate to proceed with the interpretation of the provision under common law principles and leave the application of s 32 to a future date.
NEED FOR ADEQUATE FUNDING TO RAISE CHARTER MATTERS / CONCILIATION FUNCTION FOR VEOHRC

76. The difficulty just raised is in part attributable to briefing practices in legally-aided criminal law matters. The briefing practices are compounded by funding constraints. In complex criminal proceedings there are often a multitude of difficult legal issues, such as admissibility of evidence, severance of counts, uncharged acts, and tendency and coincidence evidence. The experience of criminal law practitioners has been that legal aid funding is limited and normally stretched to deal with these issues. It is often not practicable to engage in a further argument about human rights against a better resourced party and often no funding is available for a Charter argument, or separate application for such funding is needed.

77. In legally aided matters, legal practitioners have to apply for funding from Victoria Legal Aid which can be a difficult and slow process. Funding for Charter arguments is separate from standard criminal law funding. Further, in some cases where Charter points are properly raised, the matter may not meet the guidelines on the merits and/or means test. That includes, for example, where a person’s rights have been seriously breached but they are not at risk of immediate imprisonment. In those cases legal representatives must seek special funding, which is limited.

78. In private matters, the client obviously has to pay for any additional delay caused by running a Charter argument. There are no costs in criminal trials to be recovered after success and, in circumstances where the Charter is not perceived to have a real impact, it is understandable that private clients will be reluctant to rely upon the Charter. Understandably, legal practitioners must be accountable for their time and ensure the proper and efficient conduct of criminal proceedings.

79. As it did in 2011, the Victorian Bar recommends that Government establish a special funding pool to provide funds for applicants for important cases under the Charter. Models for such funding schemes exist in other areas of the law, including for example, income tax test cases and funding in respect of native title / traditional owner land justice. A policy of that kind would contribute meaningfully to the Charter’s objects through development of the jurisprudence under the Charter and consequent promotion of the understanding and observance of human rights.

80. The matters set out above lead to concerns about ‘inequality of arms’ if the Attorney-General intervenes. Further, in the experience of criminal practitioners, the VEOHRC often has not been adequately resourced in order to fulfil its role as an intervener, and in some circumstances, to provide a proper contradactor role in responding to the submissions of the Attorney-General.

81. The Bar acknowledges that in many cases the intervention of the VEOHRC in support of unrepresented parties seeking to raise a Charter argument has been essential in ensuring that the Charter argument has been put as well and as fully as it could be and in providing a proper contradictor to the public authority or the Attorney-General. For that reason, the Bar considers that the requirement to give notice to the VEOHRC should be maintained, subject to the power of the Court to dispense with notice in urgent cases.
82. Consideration ought to be given to giving the VEOHRC a power with respect to the voluntary conciliation or mediation of disputes about breaches of the Charter under Part 8 of the Equal Opportunity Act 2010.

83. The Bar affirms three further matters on which it commented in its 2011 Submissions, relating to several aspects of the operation of the intervention functions which could benefit from some improvement or modification. First, it is important that interveners give proper notice of the arguments they propose to make and the authorities on which they propose to rely (most of which are comparative and with which other counsel are not necessarily familiar). In the Bar’s experience, this does not always occur, particularly in the case of the Attorney General.

84. Secondly, there is a tension evident in proceedings where the State or an emanation of the State is a party, and the Attorney exercises his intervention function. The result is that there are then two sets of arguments being put essentially on behalf of the State, and those arguments are not always consistent. Generally, the Bar’s view is that the State should be capable of putting one view to the Court in any given case, including on Charter issues – and this may simply mean a revision of briefing practices to ensure the State is represented by counsel capable of putting both the Charter and non-Charter arguments in any given case.

85. Finally, in the absence of dedicated and sufficient funding for significant Charter cases, there has been heavy reliance on pro bono assistance from the Bar, particularly on behalf of applicants. The Bar is proud of its contribution to the Victorian justice system through the many hours of pro bono assistance which its members offer, but the fact that parties must turn to such assistance does concern the Bar Council. In most cases, the applicant is one with few resources, seeking access to and the vindication of the fundamental human rights to which the Charter gives effect. By contrast, a common respondent is a State agency, with intervention by the Attorney General, all of whom have access to resources, not only in the form of representation and funding, but by way of access to human rights information databases. Pro bono assistance, whilst of obvious assistance to applicants in the cases examined, cannot be assumed, let alone guaranteed. A clear imbalance in the distribution of resources in Charter litigation exists between applicants and respondents. This is likely to impact on both the frequency with which Charter cases are argued and the outcome in litigation in which Charter issues arise.

**QUESTION 3**

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

86. Section 45(2) of the Charter directs the Review to report on whether any further review of this Charter is necessary. The Bar **recommends** that there should not be a further scheduled review of the Charter, for the reason that the jurisprudence on the Charter should be given time to develop in the normal course. Any further reviews should be left to be initiated, if it is considered desirable, through the ordinary parliamentary processes.

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34 During the course of oral argument in the special leave application in Momcilovic, French CJ commented that it was ‘curious’ that the Crown and the Attorney were putting different arguments: [2010] HCA Trans. 227.
ACKNOWLEDGEMENTS

87. In formulating this response on behalf of the Victorian Bar, the Bar Council has been assisted by the Victorian Bar Human Rights Committee, the Criminal Bar Association, respondents to a survey of all members of the Bar and to participants in a practitioners’ forum. Contributors to the preparation of this Submission include: Peter Willis (chair), Andrew Hanak, Peter Hanks QC Malcolm Harding, Christopher Tran (Human Rights Committee); Stewart Bayles, Catherine Boston, Simon Moglia and Michael Stanton (Criminal Bar Association); Alistair Pound and Kylie Evans; and Susan Aufgang and Sarala Fitzgerald.
SCHEDULE – PARTICULAR EXAMPLES OF THE CHARTER IN OPERATION

SECTION 39 AND PUBLIC HOUSING

88. In Sudi, the Court of Appeal, reversing a decision of Bell J as President of VCAT, held that a public housing tenant could not raise a breach of the Charter by the Director of Housing as a defence to proceedings in VCAT for possession of rented premises on the ground that VCAT had no jurisdiction to engage in collateral review of the Director’s decisions and the Charter did not confer such jurisdiction upon VCAT.

89. However, in Sudi the Court of Appeal left open the question whether s 39(1) enables a person to rely on a ground of unlawfulness arising because of the Charter in support of a collateral challenge to the validity of an administrative act or decision where the court has jurisdiction to entertain a collateral challenge on a ground of unlawfulness arising otherwise than because of the Charter. Subsequent to Sudi, the Supreme Court held in Goode v Common Equity Housing that VCAT had misconstrued s 39(1) by declining to consider an applicant’s Charter claims on the ground that it was not satisfied that the applicant had established her non-Charter claims (various claims under the Equal Opportunity Act 2010). The fact that the same Tribunal member had, in an earlier case, correctly applied s 39(1), as was recognised in the judgment in Goode, illustrates the continuing difficulty of applying s 39(1) in different contexts.

90. Further, the judgment of the Court of Appeal in Sudi has the result that a public housing tenant who claims that his or her landlord (whether a tenant of the Director of Housing or a registered housing agency) has breached its obligations under s 38(1) of the Charter in the course of deciding whether to give a notice to vacate to the tenant and to act on that notice can only make that claim in separate proceedings in the Supreme Court.

91. In Burgess v Director of Housing, the Supreme Court held, applying Wingfoot Australia Partners Pty Ltd v Kocak, that an order in the nature of certiorari is not available to quash a public authority landlord’s decision to give a tenant a notice to vacate (whether on Charter grounds or any other grounds) once an order for possession is made by VCAT. At that point, the notice to vacate given to the tenant no longer has any continuing legal effect. If a warrant for possession has not yet been issued, the tenant may bring proceedings in the Supreme Court for judicial review of the landlord’s decision to apply for the warrant, but the grounds on which such proceedings might be brought may be limited to any new or changed circumstance arising since the landlord made the decision to issue

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35 (2011) 33 VR 559.
36 Director of Housing v Sudi [2010] VCAT 328.
40 [2014] VSC 585 at [41].
41 [2014] VSC 648. (Burgess)
the notice to vacate. But the opportunity to have the Court review the principal decision-making process – that which led to the decision to issue the notice – will have been lost.

92. The combined effect of s 39(1), Sudi and Burgess is that:

   a) a public housing tenant who seeks to challenge his or her landlord’s decision to issue a notice to vacate on Charter grounds must have a non-Charter ground of unlawfulness before the tenant can raise the Charter ground;

   b) the tenant has only a very limited window of opportunity to do so;

   c) the tenant must commence separate proceedings in the Supreme Court before an order for possession is made by VCAT; and

   d) if an application for a possession order has been made to VCAT, the tenant must obtain a stay of the proceeding from VCAT or, in an appropriate case, from the Supreme Court.

93. It was recognised in Sudi and Burgess that any inconvenience and expense generated by this situation is the necessary consequence of setting up a specialist forum of limited jurisdiction. However, that consequence has, in this context, resulted in unnecessary fragmentation of proceedings and an undesirable impediment to access to justice for people who, as public housing tenants, are unlikely to have the means or the wherewithal to seek prompt relief by way of judicial review proceedings in the Supreme Court.

THE CHARTER AND THE CRIMINAL BAR

94. This part of the submission has been prepared together with the Criminal Bar Association (‘CBA’).

95. In principle, it would be expected that the Charter should have significant application and effect in the daily practice of criminal law barristers at the Magistrates’ Court of Victoria and the County Court of Victoria – in bail applications, pleas, contested hearings and trials. That is especially so given that the Charter expressly protects the human rights of accused persons in criminal proceedings, as well as the right to a fair hearing.

96. However, it appears that there has been a general reluctance on the part of barristers to run Charter arguments in criminal proceedings. It is submitted that a combination of reasons contributes to this reluctance, including:

   a) the complexity of Momcilovic HC,

   b) the perceived limited impact of the Charter in criminal proceedings;

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43 [2014] VSC 648 at [225][228].
44 (2011) 33 VR 559 at 568 [39] per Warren CJ.
45 [2014] VSC 648 at [93].
46 Section 25.
47 Section 24.
c) the notice provision, inequality of arms and limited resourcing;

d) issues as to the scope of the obligations on public authorities; and

e) the reluctance of judicial officers to hear Charter arguments.

Certain of those matters are canvassed in the body of the Submission. As to the limited impact of the Charter in criminal proceedings, the CBA offers the following observations.

97. In early criminal cases after the Charter’s enactment, the Court of Appeal was of the view that the Charter did not have a significant impact on the legislative landscape. For example, in *Director of Public Prosecutions (Cth) v Barnes*, the Court of Appeal held that the Charter did not require any departure from the existing approach to the treatment of delay on bail applications. That exemplified the experience of practitioners in other courts – that judicial officers perceived that the Charter did not add anything to the rights protected under the common law.

98. Another example is the consideration by the Court of Appeal as to whether the Charter affected the interpretation of the *Surveillance Devices Act 1999 (Vic)* and the admissibility of ‘pretext’ conversations in *WK v The Queen*. The decisions in those cases were seen by practitioners as indicating that the Charter did not impact upon the status quo with regard to the admissibility of such evidence.

99. A further example would be the consideration by the Court of Appeal as to when Courts are acting in an ‘administrative capacity’, and thus when they are public authorities pursuant to s 4(1)(j) of the Charter with the obligations pursuant to s 38 of the Charter. In *Slaveski v The Queen (on the application of the Prothonotary of the Supreme Court of Victoria)*, the Court of Appeal held that courts do not act in an administrative capacity when granting adjournments. The Charter therefore has a limited role to play in such interlocutory decisions. On the other hand, s 21(5)(b) of the Charter (the right to be tried without unreasonable delay) has been relied upon successfully when resisting applications for repeated adjournments of prosecution made by members of Victoria Police (which is expressly defined as a public authority under s 4(1)(d) of the Charter).

100. Further, while the Court of Appeal in *Momcilovic CA* proposed to make a declaration of inconsistent interpretation pursuant to s 36 of the Charter, it must be remembered that the Court of Appeal held that the Charter did not result in a different interpretation of the reverse onus provision in s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), which was the main issue in the proceeding (and the issue that would have had the most practical impact on the appellant’s conviction). In circumstances where the Court of Appeal held that s 32 of the Charter did not alter the interpretation of the key statutory provision at issue, and then in circumstances where the High Court held that a declaration of inconsistent interpretation was an inappropriate remedy, it is hardly surprising that criminal practitioners doubted the value of raising Charter arguments.

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50 (2011) 33 VR 516.
52 Indeed, in *obiter*, Crennan and Kiefel JJ considered that, in the context of a criminal trial, it may well be that a declaration of incompatibility will rarely be appropriate (2011) 245 CLR 1 at 229 [605].
101. Having said that, more recently there have been two sets of proceedings which point to the utility and importance of the Charter.

102. The operation and effect of the Charter on the quasi-criminal Infringements Act 2006 (Vic) was considered in Taha v Broadmeadows Magistrates’ Court; Brookes v Magistrates’ Court of Victoria\(^{53}\), and then on appeal in Victorian Toll v Taha; Victoria v Brookes\(^{54}\) demonstrates that the Charter has value, particularly in ensuring that vulnerable persons receive fair hearings.

103. The relevance of the Charter in bail matters has now been squarely raised by Bell J in Woods v DPP\(^{55}\), which it is anticipated may reinvigorate reliance on the Charter in bail proceedings.

104. Finally, DPP v Kaba and the Magistrates’ Court of Victoria\(^{56}\) concerning the relevance of the Charter to the duties of police and the exclusion of evidence under s 138(1) of the Evidence Act 2008 (Vic), may encourage practitioners, in all courts, to place an increased reliance on the Charter in submissions regarding the exclusion of evidence.

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\(^{54}\)[2013] VSCA 37 (Nettle, Tate and Osborn JJA).


\(^{56}\)[2014] VSC 42.