



Victorian Equal Opportunity
& Human Rights Commission

Submission to the Eight-Year Review of the *Charter of Human Rights and Responsibilities Act 2006*

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1. Summary of Commission's Submission and Recommendations

Ways to enhance the effectiveness of the Charter

Terms of Reference 1(b) – Functions of the Victorian Equal Opportunity and Human Rights and the Victorian Ombudsman under the Charter, especially with respect to human rights complaints

Recommendation 1 – new dispute resolution function

In the interests of access to justice for complainants who allege human rights breaches, the Charter should provide for alternative dispute resolution and direct access to VCAT. The Commission should have the function and be resourced to offer dispute resolution services in relation to human rights complaints. The model should be based on the *Equal Opportunity Act 2010*, namely that dispute resolution should be provided as early as possible, be appropriate to the nature of the dispute and be fair and voluntary.

Recommendation 2 – new research function

The Commission should have the function of conducting research into any matter that would advance the objectives of protecting and promoting human rights under the Charter. Such a function would improve the capacity to reveal and address systemic human rights issues. The Commission has an equivalent function under the Equal Opportunity Act, which has enabled it to identify concerns of systemic discrimination, make informed recommendations and work with duty holders to raise awareness and effect change in policy and practice.

Recommendation 3 – new audit function

The Commission has a function under section 41(c) of the Charter to review the programs and practices of public authorities when requested, to determine their compatibility with human rights. This voluntary review function has been an important tool in encouraging and assisting public authorities to comply with the Charter. The benefit of working cooperatively is that there is a willingness on the part of public authorities to implement the recommendations of a review, and a genuine commitment to improve policies and practice. This valuable function should continue to be available to public authorities.

The Commission should also be able to initiate an audit of a public authority for compliance with the Charter if the Commission identifies significant compliance issues based on reliable information and the public authority is not willing to initiate a review of its programs and practices. The Commission would only exercise an audit function in appropriate circumstances in accordance with publicly available criteria.

An audit function would be part of a range of regulatory responses to facilitate and provide incentives for Charter compliance in the particular context. These responses range from education, reviews and audits to investigations and outcomes in court proceedings. In this way, an audit response would be additional to the role of the Ombudsman in investigating possible contraventions of the Charter or the role of IBAC in investigating police misconduct. The Commission would need to be adequately resourced to perform a new audit function.

Recommendation 4 – Investment in Education Function

The Commission has the function under section 41(d) of the Charter to provide education about human rights. Over the life of the Charter, the Commission has become the lead provider in human rights education and training. From this experience, the Commission recommends there should be a further investment in human rights education for both duty holders and rights holders in the following areas:

- For state government, there is a need to address what the Commission has observed as a decline in commitment to human rights education and to embedding the Charter since 2011, when the four-year review created uncertainty over the Charter's status. There is also a need for the targeted development of practical tools and resources, including online.
- For local government, there should be support for councils to continue to incorporate human rights into their service-delivery and organisational culture. In many respects, councils have 'led the way' in embedding the Charter. This needs to continue to occur and with consistency across the sector.
- For the community sector and advocates, there is a need for low or no-cost training to assist individuals to assert their rights. More generally, for the public, there is a need to address the low levels of awareness about the Charter, so that people understand the value of human rights and how the Charter works.

The Commission has proven expertise in:

- effective educational strategies to promote rights education within the Victorian community
- innovative learning strategies to engage public sector agencies in human rights education and training
- evidenced based educational content to support human rights practice and culture change within organisations
- cost effective education and training programs for public sector agencies, community sector organisations and individual rights holders.

The Commission believes that the reach of its education function to state government, local government, community sector organisations and advocates and to the general public needs to expand significantly, in order to effectively promote a human rights culture. The Commission requires further resources to undertake this work.

Recommendation 5 – no changes to intervention function

The Commission does not propose any changes to its intervention function under section 40 of the Charter. The rationale for this function is to enable the Commission to act as an independent and expert advocate in relation to the interpretation and application of the Charter and to contribute to the development of jurisprudence on the protection of human rights in the Charter. The Commission has received positive feedback from the heads of Victoria's courts and tribunals and other government and non-government stakeholders on the value of its intervention role. This consultation and feedback has been made available as part of the Eight-Year Review.

Recommendation 6 – no changes to reporting function

The Commission does not propose any changes to its annual reporting function on the operation of the Charter under section 41(a). The annual report is an important resource for government, Parliament and the community. It increases understanding of, and engagement with the Charter, highlights best practice initiatives by duty holders as well as areas for improvement.

Terms of Reference 1(c) – Role of Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee is a bipartisan parliamentary committee that provides independent scrutiny of Bills and statutory rules for compatibility with human rights. The powers of the Committee are adequate but underutilised. The Commission makes the following policy and practical recommendations to enhance the Committee's scrutiny role.

Recommendation 7

The Committee's capacity to identify Charter issues would be enhanced with better resourcing, including training for members and access to expert advice.

Recommendation 8

The Committee's effectiveness would be improved if it had sufficient time to hold public or private hearings on bills with significant human rights concerns. Such bills should remain before Parliament for longer periods to facilitate the scrutiny process. This would enable the public to participate in Committee processes and afford Parliament a greater opportunity to be aware of, and debate the human rights implications of bills.

Recommendation 9

The Committee's engagement with the public would be improved if the Committee encouraged public submissions and provided an analysis of those submissions in its reports to Parliament.

Recommendation 10

There should be greater transparency in the Committee's process for reviewing statutory rules that limit rights. To this end, the Committee should regularly report to Parliament on the compatibility of regulations and there should be a publicly accessible central repository of the human right certificates that are prepared by Ministers.

Terms of Reference 1(d) – Development of a human rights culture in Victoria, particularly within the Victorian public sector

In its submission, the Commission recommends a range of initiatives to enhance the development of a human rights culture in Victoria. The most important initiatives are:

- investing in human rights education (see Recommendation 4)
- providing a greater range of regulatory responses to identify systemic human rights issues and to increase compliance with the Charter (see Recommendations 2 and 3), and
- creating accessible and enforceable remedies when public authorities breach their human rights obligations (see Recommendations 1, 18 and 19).

These initiatives are set out in detail in the Commission's submission.

Terms of Reference 1(e) – Application of the Charter to non-State entities when they provide State-funded services

Recommendation 11

The Charter should continue to apply to non-State entities when they exercise functions of a public nature on behalf of the State or a public authority.

Recommendation 12

The existing flexible definition of public authority should be retained to avoid the risk of narrowing the application of the Charter.

Recommendation 13

The power to prescribe entities to be a public authority in section 4(1)(h) should be used more frequently to provide greater clarity in relation to the application of the Charter to non-State entities.

Recommendation 14

Public authorities should take steps to ensure that projects undertaken by non-State entities are designed and implemented in ways that protect and promote human rights, for example in tendering or procurement.

Desirable amendments to improve the operation of the Charter

Terms of Reference 2(a) – Clarifying the provision(s) regarding public authorities, including the identification of public authorities and the content of their human rights obligations

See Recommendations 11–14 above in relation to the identification of public authorities.

Recommendation 15

The Charter should retain the obligations on public authorities in section 38(1) to act compatibly with human rights and to give proper consideration to relevant rights in decision-making. This is an essential provision in the Charter for ensuring that human rights are embedded in the policies, programs and practices of public authorities.

Recommendation 16

The ability to declare an entity by regulations not to be a public authority in section 4(1)(k) and the corresponding power to make those regulations in section 46 should be removed from the Charter. This is because section 4(1)(k) has become an ‘exemption’ provision for entities that clearly fall within the definition of public authority. If the provision is retained, it should be used to prescribe entities not to be public authorities when they are exercising particular functions that fall outside the criteria of functions of a public nature.

Recommendation 17

The Adult Parole Board, Youth Parole Board and Youth Residential Board should no longer be exempted as public authorities under the Charter, given the significant human rights issues at stake when they exercise their functions, including the rights of victims of crime.

Terms of Reference 2(b) – Clarifying the provision(s) regarding legal proceedings and remedies against public authorities

The current remedies provision in section 39 of the Charter is inaccessible and inadequate. There is a need to ensure that the Charter achieves its purpose to protect and promote human rights and to create certainty for public authorities and the community in relation to the legal consequences of a breach of the Charter.

Having enforceable remedies would create that certainty and encourage a culture of valuing human rights in Victoria’s public sector by compelling public authorities to amend their practices to ensure acts and decisions respect the rights of people affected by their actions and decisions. This could have a significant impact on the lives of people in Victoria by preventing human rights infringements from occurring.

Recommendation 18

The Charter should be amended to provide a direct right of action in the Victorian Civil and Administrative Tribunal as an accessible, low cost jurisdiction, in respect of a complaint that a public authority has breached section 38 of the Charter. Where the Tribunal finds that a public authority has contravened section 38 of the Charter, it should be able to make a range of orders, including where appropriate, compensation for loss, damage or injury suffered in consequence of a contravention.

See also Recommendation 1 (above) – A person should have the option of bringing their dispute to the Commission for alternative dispute resolution prior to applying to the Tribunal.

Recommendation 19

The Charter should be amended to clarify that unlawfulness under section 38 of the Charter can be the sole ground upon which a person can seek judicial review of an administrative

decision in the Supreme Court. Administrative law remedies include injunctive relief, declaratory relief, mandamus and certiorari.

Terms of Reference 2(c) – Clarifying the role of human rights in statutory construction

Recommendation 20

The interpretive mandate is one of the primary vehicles for protecting and promoting human rights under the Charter. Following the High Court's decision in *Momcilovic v The Queen* (2011) 245 CLR 1, there has been considerable uncertainty about the approach and scope of section 32(1). The Commission maintains that section 32(1) was intended to be a stronger rule of interpretation than ordinary principles of interpretation or the common law principle of legality and proposes that section 32(1) be amended to clarify that intention.

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

Recommendation 21

It is currently unclear whether interpreting statutory provisions in a way that is 'compatible' with human rights is to be informed by section 7(2) of the Charter, which sets out the test for when human rights may be reasonably limited. The Commission's view is that section 7(2) does apply to the interpretative task.

In relation to the obligations of public authorities, the Commission submits that an act of a public authority will be 'incompatible' with a human right under section 38(1) of the Charter if it limits a human right and if the limitation is not reasonable and demonstrably justified under section 7(2) of the Charter. This view is supported by jurisprudence in Victoria, spanning the life of the Charter. The application of section 7(2) to statutory construction (section 32) should be consistent with its application to the obligations on public authorities (section 38). Accordingly, the Commission recommends amending the Charter to clarify that section 7(2) does apply to both sections 32 and 38.

Terms of Reference 2(e) – Clarifying the obligations of courts including under section 4(1)(j) and 6(2)(b)

In the Commission's view, the current approach in the case law to the obligations of courts and tribunals, including under section 4(1)(j) and 6(2)(b) of the Charter, is clear and appropriate. Accordingly, the Commission makes no recommendation for clarity in relation to this term of reference.

Terms of Reference 2(f) – The need for the provision of an override declaration by Parliament under section 31

Section 31 of the Charter enables Parliament in exceptional circumstances to declare that the Charter has no application to an Act or a provision of an Act. This means that the requirement in section 32 to interpret the provision in a way that is compatible with human rights does not apply and the Supreme Court cannot make a declaration of inconsistent interpretation in respect of that statutory provision. In the Commission's view, section 31 of the Charter is unnecessary. If courts are unable to interpret a statutory provision consistently with human rights, the Court may make a declaration of inconsistent interpretation. Importantly, a declaration of inconsistent interpretation does not affect in any way the validity, operation or enforcement of the statutory provision but triggers the requirement of a written response to Parliament from the relevant Minister. The impact of an override declaration is to undermine the 'dialogue' process established under the Charter between the courts and Parliament.

Recommendation 22

The override provision in section 31 of the Charter is unnecessary and should be repealed.

Recommendation 23

If the override provision is retained, further guidance is needed as to when an override declaration may be appropriate and how such a declaration should be drafted. The Scrutiny of Acts and Regulations Committee could prepare guidance of this nature.

Terms of Reference 2(g) – The effectiveness of the declaration of inconsistent interpretation provision under section 36

Recommendation 24

The section 36 declaration of inconsistent interpretation is an integral feature of the dialogue model of human rights protection, supports parliamentary sovereignty and should be retained.

Terms of Reference 2(h) – The usefulness of the notification provisions including under section 35

Recommendation 25

The notifications in section 35 and section 36 of the Charter are an important vehicle for the Commission to exercise its intervention function effectively. The Commission is open to modifications to the notification provisions and processes to address concerns that the current requirements may deter people from raising the Charter in proceedings.

Terms of Reference 2(i) – Any other desirable amendments

When the Charter was enacted, the definition of discrimination in the Charter was linked to the meaning of discrimination in the *Equal Opportunity Act 1995*, which at that time was direct or indirect discrimination on the basis of a protected attribute. Since that time, the meaning of discrimination in the *Equal Opportunity Act 2010* has expanded to include a range of other conduct, listed in section 7(1)(b) of the Act. It is not clear whether these new types of discrimination are included within the meaning of discrimination in the Charter and if so, whether that outcome would be workable or desirable given the multiple uses of the term discrimination throughout the Charter.

Recommendation 26

The Commission recommends clarifying the meaning of discrimination in the Charter. Options include:

- Aligning the Charter with the meaning of discrimination under the International Covenant on Civil and Political Rights, or
- Retaining consistency with the Equal Opportunity Act but limiting the meaning of discrimination to direct or indirect discrimination on the basis of the protected attributes.

Whether any further review of the Charter is necessary

Recommendation 27

The Commission does not consider that any further review of the Charter is necessary.

2. Submission to the four-year review

Terms of Reference 1 (a) – reviewing the submissions from the 2011 Scrutiny of Acts and Regulations Committee review and the Committee’s report

The Victorian Equal Opportunity and Human Rights Commission (the Commission) provided detailed submissions to the Scrutiny of Acts and Regulations Committee’s four-year review of the Charter in 2011. For most terms of reference for the current review, the Commission has prepared a new submission that builds on our position in the four-year review, taking into account relevant developments since 2011. These developments include:

- Jurisprudence on the operation of the Charter. In some respects, the jurisprudence since 2011 has clarified the operation of key Charter provisions. The Commission has considered the development of the law in making recommendations for change, and in many instances concluded that no change is needed to the current provisions because the law is developing in a clear and appropriate way. In some instances, the case law has led to greater confusion. Where this has occurred, the Commission makes recommendations for clarifying the operation of the Charter to remove this uncertainty.
- The experiences of public authorities, including government, local government and functional public authorities in working with the Charter on a day-to-day basis and the challenges they face in doing so. We have also considered the extent to which human rights have been embedded in their organisational culture and ways in which this could be enhanced. In the four years since the last review, we are better placed to offer observations on what factors enhance or hinder compliance and best practice.
- The views of the community regarding the pressing human rights problems in Victoria, and their experiences in using the Charter to hold government to account and advocate for their own, or their clients’ rights.

In making this submission we draw on our experiences gathered through the exercise of our statutory functions under the Charter, including the annual report on the operation of the Charter presented to the Attorney-General, providing education to rights holders and duty holders about the Charter, our compliance reviews and our intervention in court proceedings that raise human rights issues.

Where aspects of the Charter’s operation have been addressed in the Commission’s submissions to both the four-year and eight-year reviews, the Commission’s current position is represented in the following submission.

3. Creating a human rights culture

Terms of Reference 1(e) – Ways to enhance the effectiveness of the Charter, including the development of a human rights culture in Victoria, particularly within the Victorian public sector

In this submission, the Commission recommends a range of initiatives to enhance the development of a human rights culture in Victoria. The most important initiatives are:

- investing in human rights education (see Recommendation 4)
- providing a greater range of regulatory responses to identify systemic human rights issues and to increase compliance with the Charter (see Recommendations 2 and 3)
- creating accessible and enforceable remedies when public authorities breach their human rights obligations (see Recommendations 1, 18 and 19).

These initiatives are set out in detail in chapters 4 and 7.

Discussion

The Victorian Charter of Human Rights and Responsibilities (the Charter) was crafted to anchor human rights in the ordinary interactions between government and individuals. It is referred to as a 'dialogue model' of rights – that is, the emphasis is on identifying, considering and applying rights in everyday practice so as to make them a fundamental framework for government thinking that will prevent breaches of rights occurring in the first place.

The Charter set out three key mechanisms for achieving this:

- by creating obligations on public authorities to act compatibly with human rights and take human rights into account when making decisions
- by ensuring that all new laws are scrutinised for compatibility with human rights
- by ensuring courts interpret all existing laws compatibly with human rights.

The Commission, which has powers and functions under the *Equal Opportunity Act 2010* and the *Racial and Religious Tolerance Act 2001*, was given new statutory powers and functions under the Charter that were intended to help it contribute to developing a human rights culture in Victoria. These included providing human rights education, reporting on the operation of the Charter, interventions in court proceedings and conducting compliance reviews when requested by public authorities. The Commission's exercise of its functions is discussed in more detail below.

The Charter did not create or grant any new powers to enforce the obligations on public authorities:

- The Commission's compliance review function is by request – a public authority cannot be compelled to participate in a review.
- The Commission's reporting function monitors compliance by relying on self-reporting by agencies and their cooperation in doing so.
- An individual cannot directly take action in court to enforce their rights, but must tie their Charter claim to another cause of action.
- The *Ombudsman Act 1973*, which already empowered the Ombudsman to enquire into and investigate complaints about administrative action by authorities, was amended to clarify that the Ombudsman's power included the power to enquire into and investigate complaints about alleged breaches of the Charter.¹

¹ *Charter of Human Rights and Responsibilities Act 2006*, s47, sch item 2.

The regulatory structure that resulted created a 'soft' model of rights regulation that would facilitate voluntary compliance while vesting these functions in an appropriate existing body such as the Commission, the Ombudsman and SARC.

In exercising its functions under the Charter since 2007, the Commission is well placed to observe the effectiveness of the current model to date in creating a culture of human rights in Victoria. We have seen evidence that a cultural shift has begun. Advocates have used the Charter effectively to advocate for clients' rights. Human rights have become part of the language of government and awareness of Charter obligations among public servants is reasonably high. Local government has been particularly enthusiastic in embedding rights into their practice and procedures as a way to improve their interaction with their community. We have also seen, however, that when support for the Charter is waning, or where there was a possibility it might be repealed, that enthusiasm for meeting Charter obligations waned correspondingly.

Our experience is that there have been barriers to compliance and that the Charter could be more effective if the current regulatory model was reconsidered.

Barriers to compliance

The Commission has observed several key factors that have hindered the development of a human rights culture. We hold the view that the regulatory model proposed below would go a long way to addressing these barriers.

No clear breach outcomes

Not having clear, accessible and enforceable remedies attached to the Charter creates a disincentive for compliance as there are no obvious consequences of a breach. Many public authorities, particularly government departments, work from a strong risk-management framework that will prioritise organizational 'risks' that carry the heaviest sanctions (whether that be financial, reputational or other). From this perspective, human rights compliance is not a high priority.

If a breach of the Charter carries tangible consequences, then public authorities are more likely to ensure that they meet their obligations. Good will is important, but without a method of enforcement as a last resort, the rate of cultural change will remain slow.

We have seen through our training that the fact that a breach of a public authority's obligations under section 38 is 'unlawful' has led to a greater willingness to engage with the Charter. Nevertheless, the consequences of a breach are not significant (and are still largely unclear) and as a result we are observing the strongest interest in training from public authorities that see human rights as a 'best practice' opportunity rather than a legal requirement.

Varying government support

Over the past four years we have seen uncertainty around the Charter. The initial rollout of the Charter was accompanied by investment in training and infrastructure. Where gaps were identified, there was a movement towards addressing those; however this funding ceased.

The four-year review of the Charter recommended significantly reducing the Charter's scope. In the six months between the release of the report and the government's response, the Commission faced the lowest demand for Charter training since its inception.

Confusion about the impact of case law

Confusion about the impact of case law has had a dampening effect on the uptake of the Charter. Two cases in particular have negatively impacted on the willingness of advocates to raise the Charter in and outside of court and contributed to a view that the Charter is complex and difficult.

In *Director of Housing v Sudrić*², the Court of Appeal held that VCAT did not have jurisdiction to consider whether the Director of Housing had breached the Charter in making an application for a possession order. Although this finding specifically related to collateral review, it diminished the opportunities to raise human rights concerns in the context of housing matters in VCAT, and created a mistaken belief in some advocates and public authorities that VCAT had no jurisdiction at all to consider human rights.

The High Court decision in *R v Momcilovic*³ also contributed to confusion around the law, and in particular, the role and impact of the interpretive obligation in the Charter. The decision was complex, and produced six separate judgments with conflicting views as to how the Charter should be applied in practice. This created the impression that the Charter is a difficult piece of law and that there was no agreement around its application. This discouraged advocates from raising the Charter in court, and led ordinary people to feel that its meaning was impenetrable.

By contrast, case law can help clarify the meaning of the law and public authorities' obligations. Recent cases such as *DPP v Kaba*⁴ and *Slattery v Manningham CC*⁵ have opened up a clearer use of the Charter – not only in the Courts, but also as it is understood by those who look to the law for guidance in their work. We observed in 2009 that the decision in *Kracke v Mental Health Review Board*⁶ influenced not just the Mental Health Review Board, but also others who re-evaluated both their roles as public authorities and their obligations. These cases have offered accessible and valuable guidance around the application of human rights.

Proposed model of regulation

In his report into reforming equal opportunity law in Victoria, Mr Julian Gardner recommended getting the right regulatory mix, which provides for a graduated suite of measures to promote compliance and address breaches. He noted:

“[a] ‘regulatory mix’ is needed that takes into account variations in the reasons for non-compliance and the different motivations for compliance. Regulatory measures should facilitate and provide incentives for compliance, as well as sanctions that deter breaches and prompt better compliance.”⁷

In this respect, compliance has a positive dimension of encouraging, facilitating and rewarding compliance and best practice as well as a negative dimension of inspections for compliance and enforcing for non-compliance.⁸

An effective regulatory model for the Charter should also contain both encouraging and facilitation measures as well as inspecting and enforcement measures. It should enable the relevant bodies to be both proactive in preventing human rights breaches, and also provide the capacity to be reactive when breaches occur. The current model contains effective facilitation measures but should be enhanced by including more stringent enforcement measures. The Commission proposes an enhanced regulatory model as set out below in Diagram 1.

The Commission recommends a range of initiatives to enhance the development of a human rights culture in Victoria that include voluntary compliance as well as enforcement measures. The most important initiatives are:

- investing in human rights education (see Recommendation 4)

² [2011] VSCA 99.

³ [2011] HCA 34.

⁴ [2014] VSC 52.

⁵ [2014] VCAT 1442 and [2013] VCAT 1869.

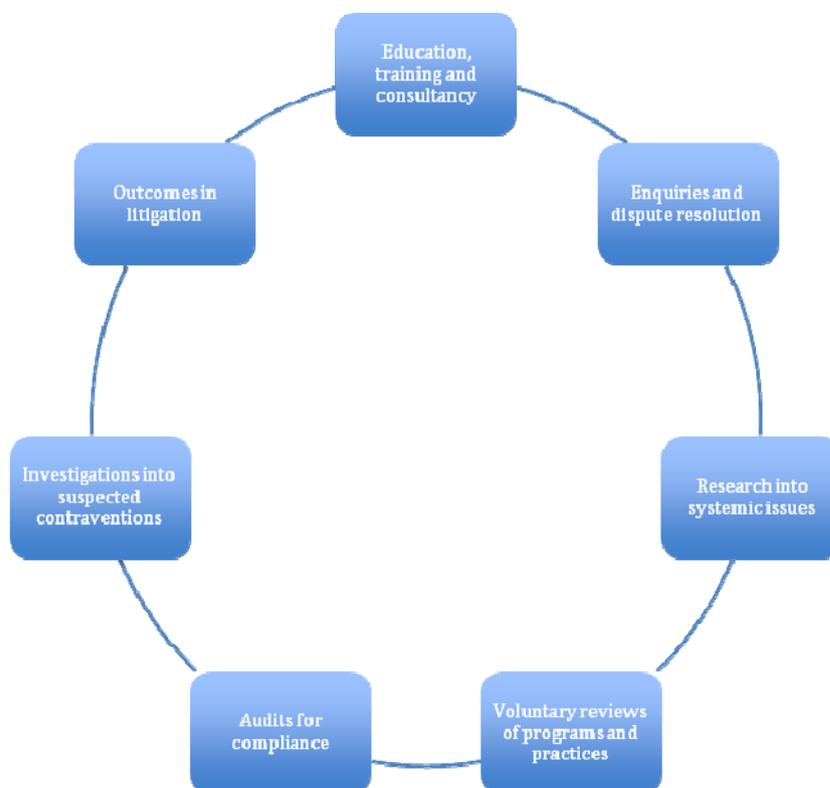
⁶ (2009) 29 VAR 1.

⁷ Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (State of Victoria, June 2008) (Gardner Report) 44.

⁸ *Ibid.*

- providing a greater range of regulatory responses to identify systemic human rights issues and to increase compliance with the Charter (see Recommendations 2 and 3)
- creating accessible and enforceable remedies when public authorities breach their human rights obligations (see Recommendations 1, 18 and 19).

Diagram 1: Regulatory model



Voluntary measures

Education and awareness

The government provided initial funding for the implementation of the Charter in the early years of the Charter's life. Education was integral to achieving this. The public needed to know they had rights protected by law, advocates needed to know their clients had rights when advocating on their behalf, and public authorities needed to understand the scope of their new legal obligations.

Over the past four years we have seen a reduction in dedicated funding to entrench human rights into state government workplace cultures. The education carried out by the Commission and others helps duty bearers to act compatibly with the Charter and helps to embed human rights practice into the daily work of duty holders and rights holders. A lack of investment and prioritising of this work in the last four years has seen decreased engagement, particularly in the state government sphere, around the Charter. Investment in education is critical to developing a human rights culture.

Processes and procedures must be in place in order to guarantee that human rights obligations are understood and followed by public authorities. Human rights education helps departments, agencies and local governments ensure that proper consideration is built into their project planning and that their service delivery is compatible with their obligations under the Charter. (See discussion on p31 on education and training)

Enquiries and dispute resolution

Rights holders and duty holders need access to an expert body for advice and information about their rights and obligations through free enquiry service. Further, alternative dispute resolution is needed to provide a quick, cheap, accessible, informal and easy-to-navigate method of redress outside the traditional court system. A dispute resolution service under the Charter that followed the model set out in the Equal Opportunity Act would provide an avenue for individuals who believed their rights had been breached, and encourage compliance by public authorities to resolve disputes and prevent them from escalating. (See discussion on p16 on alternative dispute resolution)

Research into systemic issues

Enabling the Commission to conduct research into any matter that would advance the objectives of protecting and promoting human rights under the Charter would improve the capacity to reveal and address systemic human rights issues. The Commission has an equivalent function under the Equal Opportunity Act, which has enabled it to identify concerns of systemic discrimination, and make informed recommendations to effect change. (See discussion p25 on research)

Voluntary Reviews

Under its existing review function, the Commission can be requested to look at a public authority's programs and practices to determine their compatibility with human rights. Reviews assist public authorities to understand the impact of their policies and procedures and improve them to prevent the likelihood of inadvertent breaches of their human rights obligations. (See discussion on p27 on reviews).

Enforcement measures

Audits for compliance

The Commission should also be able to initiate an audit of a public authority for compliance with the Charter if the Commission identifies significant compliance issues based on reliable information and the public authority is not willing to initiate a review of its programs and practices. The Commission would only exercise an audit function in appropriate circumstances in accordance with publicly available criteria. (See discussion on p27 on audits)

Outcomes in litigation

The 'dialogue model' envisaged by the Charter was intended to avoid a litigious, breach-focused model of human rights protection, and instead to create a culture of respect for human rights, where human rights were considered at each stage of planning, developing and delivering services to the public. In essence, it was intended to prevent human rights breaches occurring rather than to remedy them once they had occurred.

For this reason, a direct cause of action was not included in the Charter framework, and instead, mechanisms were put in place to ensure that laws were developed and interpreted consistently with human rights, and that public authorities were obliged to act and make decisions consistently with human rights. However, when breaches do occur, it is important that a person can seek an appropriate remedy. An effective remedy provision would also greatly enhance public authorities' commitment to meeting their Charter obligations. And, as noted above, case law can provide clarity around the scope of a public authority's obligations and encourage proactive compliance. (See discussion p16 on complaints and p61 on remedies)

Investigations

For the most serious and systemic human rights issues, the Ombudsman should retain her power to investigate breaches, drawing on the extensive powers available to her to do so. Similarly, the Charter should retain the role of the Independent Broad-based Anti-corruption

Commission (IBAC) in investigating police misconduct to ensure that police officers have regard to human rights.

4. The Commission's functions

Terms of Reference 1(b) – Ways to enhance the effectiveness of the Charter, including the functions of the Victorian Equal Opportunity and Human Rights Commission under the Charter

As the statutory human rights body in Victoria, the Charter gives the 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 rights⁹ and report to the Attorney-General in writing (section 41(b))
- 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))
- to advise the Attorney-General on anything relevant to the operation of the Charter (section 41(f)).

The Commission has been actively fulfilling these functions since 2007 and has developed significant expertise in human rights and the Charter in that time. Most, but not all, of these functions align with our functions under the Equal Opportunity Act.

Complaints and dispute resolution

Recommendation 1 – New Dispute Resolution Function

In the interests of access to justice for complainants who allege human rights breaches, the Charter should provide for alternative dispute resolution and direct access to VCAT. The Commission should have the function and be resourced to offer dispute resolution services in relation to human rights complaints. The model should be based on the Equal Opportunity Act, namely that dispute resolution should be provided as early as possible, be appropriate to the nature of the dispute and be fair and voluntary.

Current model

The Charter provides a patchwork of options for dealing with complaints in relation to potential human rights breaches, with very little opportunity for a complainant to access independent dispute resolution services or to enforce his or her rights ultimately in a tribunal or court. A complainant may:

- make a complaint directly to a public authority through internal complaints mechanisms (although these may not be specifically for Charter complaints)¹⁰

⁹ 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.

- make a complaint to the Ombudsman in relation to administrative action
- make a complaint to IBAC in relation to police personnel conduct
- attach a Charter claim to an existing cause of action in legal proceedings under section 39 of the Charter. (see p 61 on remedies)

The Charter does not contain an integrated complaints handling or dispute resolution framework for allegations by members of the public that their human rights have been breached. Instead, a number of bodies have functions which relate to dealing with complaints about the Charter after a member of the public has attempted to resolve the matter directly with the public authority.

Internal complaints mechanisms

Where a person feels their rights have been breached, their first option is often to complain directly to the agency responsible. While some agencies incorporate human rights into their complaints processes, there is no consistent internal complaint handling processes. The Department of Justice and Regulation is preparing guidelines to assist public authorities to deal with internal human rights complaints, and the Commission supports a consistent approach to dealing with human rights complaints in government. However, there still remains a need for external independent avenues of complaint.

The Ombudsman

The Ombudsman may enquire into and investigate complaints about administrative action by authorities. The Charter amended the Ombudsman Act to clarify that the Ombudsman's power included the power to enquire into and investigate complaints about alleged breaches of the Charter.¹¹ The Ombudsman does not have jurisdiction to investigate police misconduct.¹² The Ombudsman has the power under section 16I of the Ombudsman Act to refer complaints to a specified person or body if the subject matter is relevant to that person or body's duties and functions and it would be more appropriate for them to deal with the complaint. The Commission is one such body to whom the Ombudsman may refer complaints, for example in relation to equal opportunity or racial and religious tolerance matters.¹³

Independent Broad-based Anti-corruption Commission

IBAC is responsible for identifying, exposing and investigating serious corrupt conduct and police misconduct. The *Independent Broad-based Anti-corruption Commission Act 2011* confers on IBAC the power to ensure Victoria Police officers have regard to human rights as set out in the Charter, and to receive complaints about police personnel conduct.¹⁴ IBAC may attempt to resolve a police personnel conduct complaint by conciliation.¹⁵ IBAC has broad discretion to determine that a complaint does not warrant investigation.¹⁶ IBAC may refer a complaint to a more appropriate body for investigation, such as the Chief Commissioner of Police, and review that investigation.¹⁷

The Victorian Equal Opportunity and Human Rights Commission

The Commission is Victoria's independent statutory human rights authority with expertise in the operation of the Charter through the exercise of its statutory functions, but the Commission cannot take complaints about human rights breaches. Last financial year, the

¹⁰ The Department of Justice and Regulation are currently formulating guidelines for public authorities on how to deal with Charter complaints internally, in response to the Scrutiny of Acts and Regulations Committee Charter report in 2011. However, these are still at consultation stage.

¹¹ *Charter of Human Rights and Responsibilities Act 2006*, s47, sch item 2.

¹² *Ombudsman Act 1973*, s 15(1).

¹³ See Schedule 3 of the *Ombudsman Act 1973*.

¹⁴ *Independent Broad-based Anti-corruption Commission Act 2011*, s15(3)(iii), 51-52.

¹⁵ *Independent Broad-based Anti-corruption Commission Act 2011*, s 64(2).

¹⁶ *Independent Broad-based Anti-corruption Commission Act 2011*, s 67.

¹⁷ *Independent Broad-based Anti-corruption Commission Act 2011*, s73. See also IBAC Annual Report for 2013-2014, where IBAC reported conducting 79 reviews of Victoria Police matters.

Commission received approximately 670 enquiries from individuals raising allegations of a breach of human rights. The Commission has a secrecy obligation that limits referrals or information sharing, even when it might assist a complainant to progress their issue.¹⁸ The Commission refers a number of complaints to the Ombudsman annually, but this is through providing the enquirer with the contact details of the Ombudsman and the enquirer must then contact the Ombudsman of their own accord. The Commission also follows this process in relation to IBAC and Victoria Police for enquiries that relate to alleged police misconduct. In other cases, depending on the subject matter and the situation of the complainant, the Commission may refer the person directly to the relevant public authority or to other services to obtain legal advice.

There is no single body that can receive complaints about allegations of a human rights breach against all public authorities as defined in the Charter.

Recommended model

Alternative dispute resolution should be included in the Charter as the first level of redress in any remedies provision. Alternative dispute resolution provides a quick, cheap, accessible, informal and easy-to-navigate method of redress outside the traditional court system. Parties can negotiate an outcome that is mutually acceptable and which can provide a personal remedy for the complainant, such as compensation or an apology, or systemic change such as changes to customer practices and procedures, changes to internal or staff practices and procedures, modification of facilities and/or premises and the introduction or review of policies and provision of training.

Dispute resolution provided under the Charter should follow the model set out in the Equal Opportunity Act, which currently exists for complaints of discrimination, sexual harassment, victimisation and vilification.

The principles of dispute resolution offered by the Commission under the Equal Opportunity Act are that dispute resolution:

- should be provided as early as possible
- should be appropriate to the nature of the dispute
- is fair to all parties
- is voluntary
- should be consistent with the objectives of the Act.¹⁹

The Commission has relevant experience in providing dispute resolution involving rights based complaints, including where complainants are in closed environments. With legislative changes and additional resources, the Commission could incorporate Charter disputes into the existing dispute resolution framework. This would provide a speedy and accessible way for people to resolve individual disputes about their human rights. Moreover, as Victoria's independent statutory human rights authority, the Commission has the expertise in human rights to provide a high quality service that complements its other statutory functions under the Charter.

Under the Equal Opportunity Act model, a complainant can take their claim to VCAT following unsuccessful dispute resolution with the Commission, or alternatively they can go directly to VCAT. This is also part of the proposed framework for dealing with Charter disputes. It is important for complainants to have access to VCAT because it provides a cheap, efficient, expeditious and simplified forum for the resolution of civil disputes. VCAT is accustomed to dealing with human rights-related complaints and unrepresented complainants. Access to VCAT would require amendments to the Charter, including the right to bring a claim without attaching it to another cause of action and the ability to seek remedies for Charter breaches (discussed in Remedies on p61).

¹⁸ *Equal Opportunity Act 2010*, s176.

¹⁹ *Equal Opportunity Act 2010*, s112.

Why dispute resolution?

Alternative dispute resolution is provided through a free, impartial and independent service. It is a crucial alternative for complainants to going to court. This is because parties can resolve complaints quickly, at a low level and without the need for lawyers, and can negotiate an outcome that suits both parties and which can provide a personal remedy for the complainant, to acknowledge any loss or hurt experienced by them. It is possible to achieve both individual and systemic outcomes through a dispute resolution framework.

This kind of framework already exists under the Equal Opportunity Act for complaints of discrimination, victimisation, sexual harassment and racial and religious vilification.²⁰ The move from a complaints handling model to a dispute resolution model was a deliberate step in the Equal Opportunity Act after the Gardiner Review in 2008 recommended that it was more appropriate. The former complaints handling process was complex and involved the Commission investigating the complaint and seeking information from parties before engaging in conciliation.

Importantly, the Gardiner review wanted equal opportunity dispute resolution to involve “early and active intervention by the Commission to facilitate both compliance with the Act and dispute resolution”, and the use of flexible ADR options including negotiation, mediation, conciliation, telephone call discussions, letters and provision of specialist advice about equal opportunity law to encourage compliance.²¹

As a result, the dispute resolution framework in the Equal Opportunity Act is a “streamlined process” for individuals to seek a remedy for discrimination, sexual harassment and victimisation but also to “identify and resolve the underlying causes and effects of discrimination and to achieve the progressive realisation of substantive equality, as far as reasonably practicable”.²²

Moreover, the terminology change from “complaint” to “dispute” was deliberate, aimed at reflecting the less formal processes that can take place under the dispute resolution model and the discretion that the Commission has in resolving disputes.²³

Dispute resolution in practice at the Commission

The Commission has seen firsthand how well this model can work. It has a dedicated dispute resolution unit with trained conciliators and enquiry line staff and with appropriate additional funding would have the capacity to provide dispute resolution under the Charter. The Commission, through dispute resolution, provides a means for parties to discuss and attempt to resolve a dispute confidentially with the assistance of a conciliator. The Commission’s dispute resolution service is timely, flexible and responsive to the issues raised by the parties.

Dispute resolution at the Commission may be the only opportunity for a person to seek redress of their Equal Opportunity Act or Racial and Religious Tolerance Act complaint as a higher threshold of claim is often required if the matter was before the Victorian Civil and Administrative Tribunal – Human Rights List for decision and a higher financial cost may be incurred. Both complainants and respondents voluntarily agree to participate in dispute resolution and can withdraw at any time during the process.

Our dispute resolution work is central to our role in protecting and promoting human rights and complements our policy and education work. The number and type of complaints we receive highlight systemic discrimination and is used to help in our research, education and investigation functions.

The Commission’s current dispute resolution process is as follows:

²⁰ *Equal Opportunity Act 2010* Part 8.

²¹ Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (State of Victoria, June 2008) (Gardner Report) 60.

²² Explanatory Memorandum to the Equal Opportunity Bill 2010 (10 March 2010) 2.

²³ Explanatory Memorandum to the Equal Opportunity Bill 2010 (10 March 2010) 52.

- The Commission receives enquiries by telephone, email, letter, instant chat or in person and provides language and Auslan interpreters where required.²⁴ Complaint information officers assist enquirers with information about the operation of the Equal Opportunity Act and the Racial and Religious Tolerance Act and the complaints process. They answer questions about what is required to make a complaint for dispute resolution.
- Information is also provided to those seeking information about obligations under the Equal Opportunity Act, Racial and Religious Tolerance Act and Charter. Potential respondents to a complaint including public authorities seek advice on their responsibilities and interpretation of the law.
- For a complaint to be accepted for dispute resolution a person must be able to identify a possible contravention of the Equal Opportunity Act or Racial and Religious Tolerance Act. If a matter raises a possible breach of the law, dispute resolution is offered to parties.²⁵
- Dispute resolution commences when the person bringing a dispute advises the Commission that they wish to proceed.²⁶ This usually involves completing a complaint form and complaint information officers assist people to complete the form where English is their second language or they have a disability.
- The Commission does not require the production of statement of complaint and response, nor can it compel parties to provide documents for the purpose of the conciliation. This encourages early resolution of complaints as well as streamlining the dispute resolution process so that parties can discuss their issues directly before entrenching themselves into positional arguments. This has promoted more open and honest communication between the parties and the conciliator. The increased flexibility of the format of the process means that the conciliator can tailor the format of the conciliation process to the particular complaint.
- The primary method of dispute resolution under the Equal Opportunity Act is conciliation. This is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation, whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms and may actively encourage the parties to reach agreement.
- In many cases conciliation involves the conciliator facilitating a face-to-face meeting of the parties. Conciliation may also be conducted in other formats such as by telephone conference, and can take place in both metropolitan and regional Victoria.
- If the parties reach a negotiated outcome, they usually enter into an agreement with each other setting out the terms of their settlement. This can be certified by the conciliator and lodged with VCAT by way of registration.²⁷
- If the parties are unable to reach a negotiated outcome, they are free to walk away from the conciliation.²⁸ The complainant can then make an application to VCAT to have their complaint heard and adjudicated by a Tribunal Member (without the Commission referring the matter on).²⁹

Snapshot of the Commission's dispute resolution function 2013/2014

Enquiries

²⁴ The Commission has been certified by Scope as Communication Accessible.

²⁵ *Equal Opportunity Act 2010*, s113(1)(a)

²⁶ *Equal Opportunity Act 2010*, s115

²⁷ *Equal Opportunity Act 2010*, ss119-120

²⁸ *Equal Opportunity Act 2010*, s118

²⁹ *Equal Opportunity Act 2010*, s122

The Commission received 9157 enquiries from the public which raised 13,101 issues.

There were 672 enquires that raised human rights issues. In counting these enquiries, we have not included enquiries under the Equal Opportunity Act and Racial and Religious Tolerance Act that may also be classified as a breach of the equality right in the Charter because the respondent is a public authority. Of the 672 enquiries, 158 enquiries received were specifically in relation to the Charter. Other issues raised that may be a breach of a person's rights under the Charter were:

Child Protection	18
Courts	68
Criminal Record	61
Local Government	35
State Government	25
Homelessness	14
Involuntary Patient	48
Police	61
Prisons	44
Tenancy	140

Complaints

The Commission received 1053 complaints under the Equal Opportunity Act and Racial and Religious Tolerance Act. This is consistent with the number received in the previous two years. Complaints under the Equal Opportunity Act and Racial and Religious Tolerance Act may also be classified as a breach of the equality right in the Charter where the respondent is also a public authority.

In this respect, there were 187 complaints made against public authorities as defined in section 4 of the Charter in relation to Equal Opportunity Act and Racial and Religious Tolerance Act matters.

Over 4,000 people participated in dispute resolution at the Commission (complainants, respondents, representatives and support people). All were informed about the laws administered by the Commission and its functions.

In 2013/2014, 1130 complaints were finalised at the Commission. Currently, the Commission finalises 90% of matters within 6 months of receipt and resolves 42% of all matters finalised. Of the matters where conciliation is attempted 69% resolved.

Unlike the *Equal Opportunity Act 1995*, the 2010 Act permits complainants to make an application to VCAT for a determination on the matter, without having to go through the Commission's dispute resolution process first. The effect of this is that complainants who bring their complaint to the Commission are doing so because they are seeking a conciliation-based process and are not looking in the first instance for a formal hearing.

Other benefits to the Commission's current dispute resolution system are:

- A respondent's participation in the Commission's process is voluntary and the role of conciliator has become focused on equipping parties with a fuller understanding of their options, the process, and the law so that they can make an active and informed decision throughout the process. In 2013/2014, of the 1130 complaints that were finalised at the Commission, only 124 respondents withdrew from dispute resolution.
- The Equal Opportunity Act does not require dispute resolution steps to be taken within specific legislated time frames and does not expect or require comprehensive investigation of the substance of the complaint prior to conciliation. The Commission

considers that this promotes more open and frank communication between the parties and the Conciliator.

- The increased flexibility of the format of the process means that the Conciliator can tailor the format of the conciliation process to the particular complaint.

In this way, the Commission does not handle or process complaints, but provides a forum for the parties to work through their disputes with the assistance of a trained alternative dispute resolution professional. It is considered to be a quicker, more flexible and more approachable method for resolving issues. The Commission would recommend that any “complaints mechanism” under the Charter include a dispute resolution service in the same vein as that provided under the Equal Opportunity Act and Racial and Religious Tolerance Act. The Commission would be ideally placed to provide this service due to its expertise in human rights and dispute resolution handling.

Dispute resolution outcomes

Dispute resolution at the Commission can be a tool to achieve social change. The confidential nature of conciliated outcomes does not restrict the social reformative potential of human rights and discrimination laws. Conciliation outcomes have the capacity to extend beyond privatised individual remedies and include measures that contribute to furthering the objectives of the law to eliminate discrimination and promote equality.

During dispute resolution, conciliators focus on positive, constructive communication and on ‘needs’ and ‘interests’ rather than ‘rights’ and ‘demands’. Parties are encouraged to understand each other’s views and develop creative resolution options to address mutual needs and interests. This can facilitate consideration of outcomes that have systemic impact, in addition to outcomes that address individual remedies. Conciliators foster systems change by encouraging parties to see the broader societal or structural terms of the dispute beyond individualised self-interest.

It is therefore possible, in dispute resolution, for the parties to negotiate outcomes which provide a personal remedy to the complainant, such as compensation or an apology, as well as remedies which result in systemic outcomes. This could include changes to customer practices and procedures, changes to internal or staff practices and procedures, modification of facilities and/or premises and the introduction or review of Equal Opportunity Act policies and provision of training.

A resolution may consist of many different outcomes agreed to by the parties of the dispute, such as:

- Financial compensation;
- Changes to practice, policies and procedures;
- Modification of facilities/or premises;
- Statement of Service/Reference;
- Apology/letter of regret;
- Development and implementation of an equal opportunity/anti-discrimination policy;
- Equal Opportunity/anti-discrimination training.

Examples of systemic outcomes negotiated at the Commission that extend beyond the personal or individual are those linked with policies, practices or systems are:

- An organisation agreed to install new ramps at the entry of its building to replace steep steps, in order to allow access to customers in wheelchairs; this also provided improved access to the elderly and parents with prams.
- An organisation ceased compulsory weekend shifts to provide flexibility to staff that have parental or carer status responsibilities. Changing the company policy also assisted those who cannot work weekends due to religious beliefs/activities.
- A school agreed to confirm its disability and anti-discrimination policies with staff and provide specific training in relation to a child’s disabilities for the integration aid. The child

had an intellectual disability and epilepsy which is managed with medication, but had been segregated from other students and excluded from sport, school excursions and after school activities due to her disability. The outcome not only benefitted the child but also benefitted the broader student population who have disabilities.

Regardless of the negotiated outcome of the complaint, involvement in the dispute resolution process can often stimulate organisations to review and make changes to their practices, policies and service delivery that support the objectives of the law. In other words, the organisational change may not be included in the negotiated settlement agreement, but the fact of having an issue and legal framework brought to the organisation’s attention can often be the impetus for the organisation to undertake a broader review of their policies and procedures for compliance.

Relationship with Ombudsman’s and IBAC’s investigative functions

The Commission considers that the proposed dispute resolution framework would sit alongside and coexist with the Ombudsman’s and IBAC’s investigation functions.

The Commission would expect that if it were given the function to undertake dispute resolution under the Charter, the Ombudsman would refer complaints to it for resolution, where appropriate.³⁰ Access to VCAT would affect and potentially limit the matters that the Ombudsman could investigate, either via a complaint or own motion power. This is because a complainant or person aggrieved would have the right to bring the complaint or matter to a Tribunal, and the Ombudsman must refuse to deal with a complaint if the complainant has the right to access a legal remedy (sections 15(5) and 16A(5) of the *Ombudsman Act 1973*). However, importantly, the Ombudsman would retain her broad discretion to investigation these complaints where she is satisfied that “it would not be reasonable to expect or have expected the complainant to exercise that right”; or “the matter merits investigation to avoid injustice.”³¹

In relation to police personnel conduct complaints, IBAC may commence or continue to investigate a matter despite the fact that any civil proceedings are on foot, or are commenced, in any court or tribunal that relate to, or are otherwise connected with, the subject matter of the investigation.³²

Relationship with other complaints handling bodies

There are other statutory agencies in Victoria that can receive and conciliate complaints which may involve a narrow range of human rights issues. For example, the Privacy and Data Protection Commissioner, the Health Services Commissioner, and the Disability Services Commissioner. The Commission should be able to refer complaints to these agencies where appropriate, for example if a complainant alleges breach of the right to privacy that involves information privacy or his or her health records, or where a complainant alleges they have been mistreated by a staff member in the provision of a disability service provided by the Department of Human Services. This referral process is set out further below.

	Privacy and Data Protection Commissioner (PDPC) – Privacy and Data Protection Act 2014	Health Services Commissioner (HSC) – Health Records Act 2001	Disability Services Commissioner – Disability Act 2006
Complaint handling	Yes – s57 (Part 3, Division 8)	Yes – s45 (Part 6)	Yes – s109-111 (Part 6, Division 6)

³⁰ *Ombudsman Act 1973*, s161

³¹ *Ombudsman Act 1973*, s15(5)-(6) and s 16A(5)-(6).

³² *Independent Broad-based Anti-corruption Commission Act 2011*, s 70.

Conciliation	Yes – s67	Yes – s59	Yes – s116
Certification and registration of conciliation Agreements	Yes – s69	Yes – s61	Certification – s116(6)
Power to obtain documents	Yes for conciliation – s68	Yes for conciliation – s60 Health Records Act	Yes – s113, 122 and power to apply for warrants s124
Other ADR process	n/a	n/a	May resolve informally if appropriate s113(3)
Access to VCAT following conciliation	By referral from the PDPC on request by complainant – if conciliation not appropriate under s66(3), or if conciliation fails under s71(3)	By referral from the HSC on request by complainant – if conciliation fails under s63(3) [note if conciliation or ruling not appropriate, no further action can be taken by complainant – s57]	No – Investigation follows a failed conciliation s118(1) if Commissioner is of the view that further action is required
Referral of complaints to other agencies	Yes – s63 to the Federal Privacy Commissioner, the Disability Services Commissioner, the Freedom of Information (FOI) Commissioner or the Ombudsman, the HSC, the Commissioner for Children and Young People, or the Mental Health Complaint Commissioner	Yes – s51(3) to the PDPC, Federal Privacy Commissioner, the Disability Services Commissioner, FOI Commissioner or the Ombudsman	Yes – s114(2) (2) Referral of complaint and any relevant information to the person, court, board or tribunal which the Disability Services Commissioner considers has power to resolve or deal with the matter.
Can receive referred complaints	Yes – s58 – from the Ombudsman and FOI Commissioner	Yes – s46 – from the Ombudsman, FOI Commissioner, PDP Commissioner	Not specified in legislation
Investigations, Rulings and compliance notices	Investigations only in relation to issuing of compliance notices under s78	Investigations and rulings – s64 – where not reasonably possible to conciliate or conciliation is not likely to resolve the complaint Compliance notices under s66	Investigations – s118 Notice of decisions – s119

Streamlining Complaint Handling and Referral

In order to improve accessibility and clarity for complainants, the Commission supports the Ombudsman’s pilot project of developing a complaints handling portal for the Victorian public sector. This would enable complainants to go to a central place to lodge their complaint with the most appropriate body.

The ability for the Commission and the Ombudsman to refer Charter complaints should also be improved. For example, the current notification requirements on the Ombudsman when she refers a complaint to a person or body could be streamlined (see section 16J of the Ombudsman Act).

Further, the Commission should be able to refer a complaint to the Ombudsman for investigation where it raises systemic issues in matters of public administration and it is not reasonable to expect or have expected the complainant to make an application to VCAT. The secrecy provisions in the Equal Opportunity Act should be clarified to facilitate such referrals.

The Commission should also be able to refer complaints to other agencies that have the power to resolve or deal with the matter.

Research

Recommendation 2 – New Research Function

The Commission should have the function of conducting research into any matter that would advance the objectives of protecting and promoting human rights under the Charter. Such a function would improve the capacity to reveal and address systemic human rights issues. The Commission has an equivalent function under the Equal Opportunity Act, which has enabled it to identify concerns of systemic discrimination, make informed recommendations and work with duty holders to raise awareness and effect change in policy and practice.

Research Function – revealing and addressing systemic human rights issues

The Commission has a research function under section 157 of the Equal Opportunity Act. This allows the Commission to undertake research into any matter arising from, or incidental to, the operation of the Equal Opportunity Act that it considers would advance the objectives of the Act. It also enables the Commission to collect and analyse information and data relevant to the operation and objectives of the Equal Opportunity Act. Section 158 of the Equal Opportunity Act enables the Commission to report on any matter arising from its research function.

The Equal Opportunity Act research function has allowed the Commission to proactively identify and address key areas of systemic discrimination, accompanied by recommendations seeking to influence policy across Victorian Government departments. Research reports also have secondary benefits, such as media attention and raising awareness of human rights issues in the community. Research reports can function as advocacy tools for effecting change.

Some examples of our research work into systemic equality issues are as follows:³³

- *Beyond Doubt: the experience of people with disabilities reporting crime to police*
- *Held Back: the experience of students with disabilities in Victorian schools*
- *Desperate Measures: the relinquishment of children with disability into state care*
- *Research into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police*

Beyond Doubt

The report documented the experiences of people with disabilities reporting crime and looked at both police practice and the factors that affect reporting. Victoria Police has committed to implementing all recommendations in the report. The recommendations have been reflected in a recently finalised Accessibility Action Plan for the organisation. Both the findings and

³³ All research reports are available on the VEOHRC website at <<http://www.humanrightscommission.vic.gov.au/resources>>

recommendations from *Beyond Doubt* are informing a broad agenda of cultural change at Victoria Police. Specific areas include:

- Providing information in accessible formats. The Commission has worked closely with Victoria Police and people with disabilities to develop a resource in Easy English about reporting crime to police. The resource will greatly assist individuals requiring information in an Easy English format to report crime to police and will form part of a suite of other materials Victoria Police are developing, including information in Easy English on complaints and sexual assault.
- training for Victoria Police to improve services for people with disabilities and
- better coordination with other areas of government – such as the Independent Third Person program at the Office of the Public Advocate – to improve support and responses to people with disabilities.

The Department of Health and Human Services has also established a Disability Worker Exclusion Scheme to exclude workers who have been found to have abused, assaulted or neglected clients in disability and other services from working with people with disabilities.

Held Back

Held Back examined the experiences of students with disabilities in Victorian Schools to learn how schools are meeting students' needs, as well as understanding where practice might be improved. Key initiatives at the Department of Education and Training that have resulted from the research include:

- Establishing a Special Provision Review at the Victorian Curriculum and Assessment Authority (VCAA) arising from recommendations and findings about adjustments for students with disabilities during exams and assessment
- Creating an online professional learning resource for school leaders and all school staff on discrimination law and the Disability Standards for Education
- revising policies on managing violent and aggressive to extreme behaviour, arising from findings about the use of restraint and seclusion in Victorian schools

The Commission also notes that the Government's special needs plan for Victorian schools includes a commitment to independent oversight by the Principal Practitioner – Disability of the use of restraint and seclusion, which was one of the recommendations in *Held Back*.

Desperate Measures

This report examined the issues faced by families relinquishing children with a disability into state care, and exposed an area of systemic discrimination that was not previously well understood. Relinquishment of children with disability by their families was not routinely measured by any Department or agency, and there was little academic research into the issue. The research function gave the Commission the power to examine something that was essentially a hidden problem, and to work with the Department to start to quantify the prevalence of relinquishment. It allowed the Commission to listen to families of children with disabilities to start to understand the systemic problems that might lead a family to that crisis point. The Government has committed to addressing the key findings of the Commission's report. The Commission is working with the Department of Health and Human Services in relation to an action plan to prevent and respond to relinquishment.

Sex discrimination and sexual harassment in Victoria Police

An example of a current research project is the independent work the Commission has been commissioned to perform for Victoria Police into sex discrimination and sexual harassment, including predatory behaviour, amongst police personnel.

Led by an Expert Panel, the Commission will gather information and report on the nature and extent of sex discrimination and sexual harassment in Victoria Police, including the drivers and impact of these behaviours as well as initiatives to drive cultural, practice and

organisational change. The aim of the project is to promote safety and equality amongst police personnel. The information will be used to develop an action plan for Victoria Police, which the Commission will then independently monitor and report on publicly over three years.

Based on our experience under the Equal Opportunity Act, we see the following benefits of having a research function under the Charter:

- allowing for evidence-based research and analysis into systemic human rights issues
- drawing attention to human rights problems but also recommending informed solutions
- facilitating advocacy around human rights issues by producing quality research reports
- effecting real change by working with affected community members, advocacy groups, Departments and agencies to formulate and implement the recommendations in our report.

Audit function

Recommendation 3 – New Audit Function

The Commission has a function under section 41(c) of the Charter to review the programs and practices of public authorities when requested, to determine their compatibility with human rights. This voluntary review function has been an important tool in encouraging and assisting public authorities to comply with the Charter. The benefit of working cooperatively is that there is a willingness on the part of public authorities to implement the recommendations of a review, and a genuine commitment to improve policies and practice. This valuable function should continue to be available to public authorities.

The Commission should also be able to initiate an audit of a public authority for compliance with the Charter if the Commission identifies significant compliance issues based on reliable information and the public authority is not willing to initiate a review of its programs and practices. The Commission would only exercise an audit function in appropriate circumstances in accordance with publicly available criteria.

An audit function would be part of a range of regulatory responses to facilitate and provide incentives for Charter compliance in the particular context. These responses range from education, reviews and audits to investigations and outcomes in court proceedings. In this way, an audit response would be additional to the role of the Ombudsman in investigating possible contraventions of the Charter or the role of IBAC in investigating police misconduct. The Commission would need to be adequately resourced to perform a new audit function.

Audit Function – incentives for compliance with the Charter

Under s41(c) of the Charter, the Commission may be requested by a public authority to review that authority's programs and practices to determine their compatibility with human rights. The Commission has an equivalent function to conduct a review of compliance when requested under section 151 of the Equal Opportunity Act. The Commission also has investigative functions under Part 9 of the Equal Opportunity Act to address suspected contraventions of the Equal Opportunity Act that are serious and systemic and not amendable to dispute resolution or application to VCAT.

How effective are voluntary reviews in facilitating Charter compliance?

Since the commencement of obligations on public authorities under the Charter in 2008, the Commission has conducted six formal human rights reviews and responded to a number of informal requests. These review processes have been constructive and effective in supporting human rights compliance. The Commission's review reports are generally not public. Although section 41(c) does not require reviews to be confidential, the terms of the review are negotiated between the Commission and the public authority. The Commission will generally accede to a request that the review remain confidential unless it is of the view that it is not in the public interest to do so.

Some examples of the Commission's review work are set out below.

Examples of the Commission's Review Function

Case study – transfer of children into adult prison

In July and August 2012, five children were transferred from youth justice centres to adult prison, including a 16-year-old Aboriginal boy who was held in solitary confinement at Port Phillip Prison for a number of months.³⁴

These events prompted the Department of Human Services (the Department) to begin work to minimise the number of young people, particularly children, transferred from youth justice centres to prison. As part of this work, the Department requested that the Commission review key policy documents relating to the transfer of youth justice clients to adult prisons.

Corrections Victoria also requested that the Commission review sections of their Sentence Management Manual relating to the transfer of young people and their consequent placement in the prison system. This allowed the Commission to conduct a holistic review of youth justice transfers to prison.

The Commission and the agencies took a collaborative approach to the review, with opportunities to seek clarification and solve problems together.

The agencies' transparency and openness in providing materials allowed the Commission to undertake a full analysis to determine the policies' compatibility with human rights. The Commission provided an overview of the legal framework and guidance on how human rights are engaged when a young person is transferred to prison, specific advice on current and proposed policy documents, and developed a practical guide to the 'Key questions to ask when thinking about the human rights implications of a transfer to adult prison.'

The agencies accepted a significant proportion of these recommendations.

Importantly, the collaborative approach also led to the agencies accepting the Commission's offer of human rights training for staff. The Commission delivered training to Youth Justice Centre unit managers, focussing on strengthening their human rights practice and developing a human rights-based framework for decision-making. Through these sessions, unit managers identified the value of future training to embed human rights practice for frontline staff.

Corrections Victoria and the Commission developed training designed specifically for Sentence Management Branch (SMB) staff responsible for conducting prisoner classification, including decisions about prison placement and a prisoner's security rating. The core content of the training included the Charter, proper consideration of human rights at each step of the placement process, and when limits on rights are justified. The training was structured around promoting best practice and the practical issues facing Corrections Victoria staff. The Education Consultant that delivered the training reflected that "any potential reticence was addressed by the way we focussed on their work environment and embedded the human rights scenarios into their practice. By the time the training was over, workers from the SMB were talking about the Charter as something that supported their work as a transparent tool for the decisions they face every day."

Following the Ombudsman's investigation and the Commission's review, there have been no further transfers of children to adult prison.

The Commission's recommendations have been well received and many implemented. The Commission has also found that following a review, the Commission is often asked to provide education to support implementation of the recommendations. These synergies between the Commission functions offer public bodies comprehensive assistance not only to identify compliance issues but also the support to implement real and lasting change.

³⁴ Victorian Ombudsman, *Investigation into children transferred from the youth justice system to the adult prison system* (2013) <<https://www.ombudsman.vic.gov.au/getattachment/6a579e49-212e-42b0-9d3c-791e2d60e102/reports-publications/parliamentary-reports/investigation-into-children-transferred-from-the-y.aspx>>

Case study – same gender health care

In 2014/15, the Commission conducted a compliance review under both the Equal Opportunity Act and the Charter. Monash Health requested that the Commission conduct a compliance review of its policy relating to the provision of same-gender healthcare as contained in the Monash Women's maternity services' patient information. The Commission considered how the policy applied to patients who would request same-gender care due to their cultural and religious backgrounds, such as Muslim, Jewish and Aboriginal patients, or where they had experienced trauma. The review involved reviewing the written policy of Monash Women's, as well as consulting with key staff and members of the community about the policy and its implementation. The Commission also considered the policy in light of Monash Health's existing patient centred care and diversity framework to ensure any recommendations would be practical and workable within the existing Monash Health policy and practice framework.

The Commission completed the review in early March 2015, and provided a confidential report to Monash Health. In May 2015, Monash Health publicly committed to implementing all of the Commission's recommendations, including amending their policy to state that staff will try to accommodate requests for same gender care whenever possible, although could not guarantee a carer of a particular gender for every appointment, examination or procedure. For example, if there is an emergency and a patient needs urgent medical attention, they will be treated by the available doctors who could be male or female. Patients could also ask to have another person, such as a relative or friend, attend the consultation, examination or procedure with them and reasonable endeavors to accommodate their request would be undertaken where practicable. Monash Women's director Professor Euan Wallace said Monash Health was privileged to provide health care to a culturally diverse population that had changed significantly in recent years.

It was important that this policy review was conducted under both the Equal Opportunity Act and the Charter, as cultural practices and religious belief are protected under both laws. A person accessing health services provided by a public authority has the right to receive them free from racial or religious discrimination, and for that public health service provider to take their human rights into consideration and not unreasonably limit them when they make decisions about the services provided. Most relevant to culturally appropriate health care services are a patient's rights to equality, freedom of thought, conscience and religion, and cultural rights. In these circumstances, compliance with the Charter would assist with compliance with the Equal Opportunity Act and vice versa.

The Commission has also worked with Victoria Police to revise its field contact policy to ensure compliance with the Charter and the Equal Opportunity Act. The background to this work was action taken by Victoria Police following the settlement of litigation alleging racial profiling within the police and in light of strong community perceptions of racial profiling.³⁵

Despite the effectiveness of the reviews conducted so far, there has not been a high demand from public authorities for assistance. There are a variety of obstacles that prevent public authorities requesting reviews, including:

- a lack of awareness
- resistance to change
- concern for negative exposure, and
- the cost of compliance.

In a number of circumstances, reviews have been prompted by an Ombudsman investigation or the settlement of litigation. In the Commission's view, compliance issues ought to be identified earlier and more proactively.

³⁵ See Victoria Police, *Equality is Not The Same* (2013) and progress reports, <http://www.police.vic.gov.au/content.asp?Document_ID=39350>

The preferred regulatory model for the Charter

The preferred regulatory model for the Charter should include a suite of measures that can be used to respond appropriately to ensure compliance in the particular context.³⁶ The preferred model should continue to include roles for a range of bodies, including the Commission, Ombudsman and IBAC.

In order to provide greater incentives to comply with the Charter and deter breaches at an earlier stage, the Commission's review function should be extended to also enable the Commission to initiate audits of public authorities. At present, the Commission's review function is limited to providing voluntary services.

It is the Commission's experience that voluntary processes, in the form of research into systemic issues and reviews of practices and procedures, have been constructive and effective tools in supporting human rights compliance. One of the significant benefits of voluntary compliance is the willingness of public authorities to cooperate in the process, implement the recommendations of a review, and be genuinely committed to improve their practice. Engagement in the review process has served to clarify the human rights obligations of public authorities as duty bearers under the Charter supporting public authorities to close knowledge gaps regarding their general and specific human rights obligations. The Commission has been able to provide technical assistance through this process to analyse the effectiveness of existing actions and offer tailored corrective action. In particular, the review process has brought to the forefront issues confronting the most vulnerable in our community and how public authorities respond to such groups.

However, the voluntary nature of the review function naturally directs the function toward public authorities that are willing to address their Charter responsibilities and seek assistance. While a voluntary review will generally be the preference, this will not always be an appropriate or feasible way to ensure compliance. To fully embed a culture of human rights in Victoria, it will be important on occasions for the Commission to be able to initiate an audit of a public authority for compliance with the Charter if the Commission identifies significant compliance issues based on reliable information and the public authority is not willing to initiate a review of its programs and practices. The Commission would only exercise an audit function in appropriate circumstances in accordance with publicly available criteria. There are numerous examples of the value of auditing in the human rights context.³⁷

The Commission has the technical expertise and experience to initiate audits for compliance. Through its various legislative functions under the Charter, including if the Commission obtained a research function, the Commission is ideally placed to identify human rights issues in Victoria. These functions provide a wealth of current data to the Commission on Victoria's human rights performance, priorities and corresponding issues confronting public authorities as duty bearers complying with responsibilities under the Charter. The Commission would need to be adequately resourced to perform a new audit function.

To effectively carry out an audit function, the Commission would need to be empowered to obtain documents or information and publish reports and recommendations in the public interest.³⁸ Access to reliable, complete and sometimes sensitive information is critical to an effective audit and requires appropriate levels of scrutiny and verification. Where a public authority did not request a Charter compliance audit, the Commission must be able to access all relevant information.

The audit function for the Commission would be different from, and additional to the role of the Ombudsman in investigating possible contraventions of the Charter or the role of IBAC in investigating police misconduct, including for a failure to have regard to human rights. Whereas those bodies have a full range of investigative powers in responding to serious

³⁶ See Gardner, *An Equality Act for a Fairer Victoria* (June 2008), at page 44.

³⁷ See for example, the role of the ACT Human Rights Commission in conducting audits and reporting under the *Human Rights Act 2004*, s 41(1). See also the role of the Privacy Commissioner in conducting audits and reporting under the *Privacy and Data Protection Act 2014*, s 103 and 111.

³⁸ See the Commission's powers in this respect under Part 9 of the Equal Opportunity Act.

contraventions of the Charter, the audit function would be geared toward providing incentives and corrective action for compliance.

The Commission may also wish to share information with the Ombudsman about systemic Charter breaches or human rights issues warranting investigation. The secrecy provisions in the Equal Opportunity Act should be clarified to facilitate this, whilst also protecting the confidentiality of the dispute resolution process.

An overview of the proposed regulatory model for the Charter is set out in chapter 3. The Commission believes this model will not only encourage compliance but also assist in building a culture of human rights in Victoria.

Education

Recommendation 4 – Investment in Education Function

The Commission has the function under section 41(d) of the Charter to provide education about human rights. Over the life of the Charter, the Commission has become the lead provider in human rights education and training. From this experience, the Commission recommends there should be a further investment in human rights education for both duty holders and rights holders in the following areas:

- For state government, there is a need to address what the Commission has observed as a decline in commitment to human rights education and to embedding the Charter since 2011, when the four-year review created uncertainty over the Charter's status. There is also a need for the targeted development of practical tools and resources, including online.
- For local government, there should be support for councils to continue to incorporate human rights into their service-delivery and organisational culture. In many respects, councils have 'led the way' in embedding the Charter. This needs to continue to occur and with consistency across the sector.
- For the community sector and advocates, there is a need for low or no-cost training to assist individuals to assert their rights. More generally, for the public, there is a need to address the low levels of awareness about the Charter, so that people understand the value of human rights and how the Charter works.

The Commission has proven expertise in:

- effective educational strategies to promote rights education within the Victorian community
- innovative learning strategies to engage public sector agencies in human rights education and training
- evidenced based educational content to support human rights practice and culture change within organisations
- cost effective education and training programs for public sector agencies, community sector organisations and individual rights holders.

The Commission believes that the reach of its education function to state government, local government, community sector organisations and advocates and to the general public needs to expand significantly, in order to effectively promote a human rights culture. The Commission requires further resources to undertake this work.

The first four years of the Charter

The Human Rights Consultation Committee Report that recommended enacting the Charter identified various strategies for building a human rights culture in Victoria, including education across the entire community, an expanded role for the Commission, a specialised human rights unit within government and specific human rights action plans within

government.³⁹ Education was a critical component of the Committee's recommendations on building a human rights culture. It recommended:⁴⁰

For the Charter to make a difference to people's lives, it must be backed by an effective package of education for the community, the legal profession, the courts, parliamentarians and government. This will help to build a human rights culture – a culture that creates an understanding of and respect for our basic rights and responsibilities across the entire Victorian community. Such a culture could contribute to a greater understanding of the protection of human rights where it matters most: at the individual level where people interact with each other, with government and in their communities.

In the first four years of the Charter, the government allocated \$6.5 million for implementation initiatives, focussing on human rights training for key departments and agencies and community education.⁴¹ The Department of Justice established a Human Rights Unit, which was responsible for developing and implementing communication and education programs across the whole-of government. Primarily with the assistance of Victoria University, the Department ran three major training programs: the first was directed at legal and legislation policy officers; the second was a 'train-the-trainer' course focussed on human rights implementation; and the third was for government prosecutors and criminal law practitioners. The Department also provided some training for parliamentarians on the Charter. The Department of Human Services, Victoria Police and Corrections Victoria were also allocated funding because of the impact of the Charter in their areas of work.⁴² The Commission was funded to undertake community education.⁴³ Other groups that received initial funding included the Judicial College of Victoria for judicial education in human rights and the Charter. Notably, local government was not specifically resourced to implement the Charter, which significantly hampered their initial preparations and readiness.⁴⁴

The focus of the Commission's education function during the first four years of the Charter was on training for community organisations, education initiatives for local councils, and promoting an understanding of the Charter to the broader community. The Commission's promotion of the Charter included for example, a Youth Ambassador program, a human rights community arts project, a community grants program, human rights forums and the provision of information on-line.

The next four years of the Charter

Once the initial four-year funding of the implementation of the Charter ceased, there was no longer a whole-of-government investment in, or coordinated approach to, human rights education and training. The support from government to specialised units such as the Human Rights Unit decreased, as did funding for the Commission's education role, and Departments and agencies and other key players were left to self-fund education initiatives if and when required. At the same time, the four-year review of the Charter arguably created some uncertainty within the public sector over the status of the Charter, including the Government's response that it would seek legal advice rather than reject SARC's recommendation to remove courts and tribunals from the Charter as well as repeal the obligations on public

³⁹ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), 92-112.

⁴⁰ Ibid, p 92.

⁴¹ Department of Justice, Victoria, 2006-07 Victorian Budget Fact Sheet: Victoria Leads the Way on Human Rights (2006).

⁴² See generally, Victorian Equal Opportunity and Human Rights Commission, *First Steps Forward: The 2007 Summary Report on the Operation of the Charter of Human Rights and Responsibilities*, p 11.

⁴³ The Commission's funding for its education function was as follows: 2006/07 \$500,000, 2007/08 \$500,000, 2008/09 \$339,000, 2009/10 \$203,000 recurrent linked to CPI.

⁴⁴ Victorian Equal Opportunity and Human Rights Commission, *First Steps Forward: The 2007 Summary Report on the Operation of the Charter of Human Rights and Responsibilities*, p 20-21.

authorities.⁴⁵ The Commission considers that a combination of these developments and other factors, such as a lack of enforcement mechanisms and remedies in relation to non-compliance with the Charter, have contributed to a decline in engagement with human rights education and to embedding the Charter over the last four years as compared to the first four years of the Charter's operation.

The reduction in funding for human rights training for state government has created the context in which the Commission has become the primary provider of human rights education across the community, local government and state government sectors. The Commission's approach to human rights training has evolved in the last four years, in response to emerging knowledge around human rights. The Commission brings to its education and training programs specialised knowledge of human rights legislation, case law and the particular obligations placed on public authorities under the Charter. The Commission also brings specialised knowledge of workplace and organisational culture change and of the specific mechanisms required to move public sector agencies beyond legislative compliance to human rights best practice. In more recent times, the Commission has taken innovative steps to move our education, training and consultancy services to a 'high impact' model of service delivery, where we prioritise work that will result in greater levels of positive change within an organisation's culture, behaviour, attitudes, processes, policies, practice or systems.

In this submission, we describe the Commission's education and training programs as well as the community awareness campaigns undertaken over the last four years to demonstrate the Commission's initiatives and to explain the rationale for why there should be further investment from government in human rights education.

Education and training for state government

From 2011 to 2014, the Commission provided 37 education and training sessions to state government departments. This figure is indicative of state government's limited engagement with the human rights education and training provided by the Commission. Whilst limited, human rights education and training to state government has had a positive impact on a range of department's compliance with their obligations under the Charter, and their capacity to apply a human rights approach to their practice and operations.

The human rights education and training provided thus far to state government departments, has been designed to support their capacity to:

- Understand their obligations under the Charter
- Comply with their obligations across all elements of service delivery
- Build a human rights culture across departments and across government as a whole.

The Commission has worked in partnership with key state government departments to develop and design human rights education and training to produce sustainable human rights best practice outcomes. For example, the Commission partnered with the Department of Justice and Regulation, Human Rights Unit to design and deliver a human rights training and education program for the Victoria Public Service Graduates. Conducted in the past three years, this program aims to provide those with graduate positions across all government departments, an understanding of their obligations under the Charter and of the ways that the Charter is relevant to their future role as public servants. The Human Rights Unit reports that this training has had a significant impact on graduates' commitment to and practice in a human rights approach to their work.

Our training has focused on two categories of public authorities, namely those who deliver services often to the most vulnerable parts of the community and those who have specific functions to manage complaints and monitor parts of the public service.

⁴⁵ Parliament of Victoria, Scrutiny of Acts and Regulations Committee, Review of the Charter of Human Rights and Responsibilities Act 2006, Victorian Government Response, 14 March 2012, [1.12]- [1.14] and [2.93]-[2.101].

Examples of training for public authorities who deliver services to vulnerable clients and/or in complex environments

- The Commission provided human rights training and education to the Department of Health and Human Services, Youth Justice Unit as well as to Corrections Victoria, Sentence Management Branch following an Ombudsman's investigation and a Commission review into the transfer of children into adult prisons. This work is detailed in a case study on p28 in relation to the Commission's review function.
- The Commission provided human rights training and education to the Department of Health and Human Services Housing Unit to improve their operational and practice approaches to the allocation and management of public housing.
- The Commission provided human rights training and education to the Department of Education to training to support the Department's practice with students with disability.

Examples of training for public authorities with complaint handling and/or monitoring functions

- In consultation with Victoria Police, the Commission designed and delivered a human rights train-the-trainer program to members of Professional Standards Command. The aim of this program was to enable Professional Standards Command to implement human rights training as a mechanism to equip members to apply a human rights approach to their complaints and investigations functions. Professional Standards Command reports that it now integrates human rights considerations across all areas of its complaints processes and collects data to monitor trends and patterns of human rights complaints relating to policing.
- The Commission has also provided training and education to Office of Correctional Services Review, which sits within the Department of Justice and Regulation and monitors and reviews the performance of prisons and other correctional services. The focus of the training was how to apply the Charter to the review function performed by the Office.
- Other examples include training and education for the Victorian Ombudsman and the Office of the Disability Services Commissioner.

The Commission has also produced a range of resources for public authorities that contain practical information, case studies and tools to help public servants consider relevant human rights in their work. Some of our major guidance material includes:

- *The Charter of Human Rights and Responsibilities - a guide for Victorian public sector workers*
- *Rights and Risks: how human rights can influence and support risk management for public authorities in Victoria.*

The Commission's work with departments and agencies thus far reveals some progress together with an unmet need for human rights education and training across most sections of state government. The Commission is of the view that many government departments have not yet recognised their core obligations under the Charter, and the requirement placed on them to adopt a human rights approach to all areas of their practice and service delivery.

The Commission requires further resourcing to extend its reach in state government departments in order to enhance the uptake of human rights education and training to

promote a human rights culture across government. This could be achieved by:

- Provision of consultancy services to assist and facilitate organisational behavioural change
- Provision of train the trainer programs to equip departments to undertake their own human rights education and training
- Implementation of human rights awareness raising campaigns across government using existing and new human rights stakeholder networks
- Provision of tools and resources including online education and training packages

Education and training for local government

From 2011-2014, the Commission has conducted 159 education and training sessions for local government. This work was done in collaboration with a large number of councils across metropolitan and regional Victoria.

The nature and frequency of these sessions indicate that local government has demonstrated an interest in understanding their obligations under the Charter and implementing a human rights approach to service delivery. It is the Commission's views that this interest is driven by the close relationships local government agencies have with their residents, and a genuine commitment to adopt human rights principles in the provision of services to diverse communities.

The commitment demonstrated by local government has been maintained by the range of initiatives undertaken by the Commission and augmented by resources designed for local government, including

- Everyday People Everyday Rights toolkit
- The Charter – individual rights
- The Charter of Human Rights and Responsibilities: What is it all about
- The Charter and public authorities

The Commission has remained responsive to the needs of local government and has engaged in a range of human rights education and training approaches. We have conducted whole of council training, human rights induction sessions, briefings for councillors and community awareness sessions. The Commission has also conducted human rights forums and symposiums for local government.

As large organisations, some local government agencies require a multifaceted approach to their human rights education and training. The Commission has worked with a number of local councils to identify the most effective way to influence and shape human rights practice across their organisation. More recently, the Commission has begun work with a metropolitan council to implement a high impact training intervention with its senior executives and management teams to equip them to build a sustainable inclusive workplace culture as the context for human rights best practice. Work with this council also includes the development of its organisational human rights strategy.

The Commission has enjoyed ongoing and productive relationships with local government. We have in the review period, been engaged for 'repeat business' with:

- City of Stonnington
- City of Maryibynong
- City of Port Philip
- Brimbank City Council
- Hepburn Shire Council
- City of Whittlesea
- Macedon Ranges Shire Council

- City of Greater Geelong
- Southern Grampians Shire Council
- Corangamite Shire
- City of Mt. Alexander Shire

The Commission is keen to continue to expand support to local governments and strengthen their capacity to comply with their obligations under the Charter and enact human rights best practice. The Commission requires further resourcing to extend its education and training initiatives for local government by the:

- Development of a human rights assessment tool and template for councils
- Revitalising of local government stakeholder networks
- Provision of consultancy services to assist and facilitate organisational behavioural change
- Provision of train the trainer programs to equip councils to undertake their own human rights education and training
- Provision of tools and resources including online education and training packages

Education and training for community sector and advocates

From 2011 to 2014, the Commission had conducted 148 human rights education and training sessions for community advocates who come from a range of community based settings. The focus of these sessions has been on raising awareness of human rights and how the Charter may be used as a tool in client based advocacy. Given the diverse representation at these sessions, the Commission has utilised a range of education and training methodologies to cater for language, literacy and broader communication needs.

The Commission has established effective and sustainable partnerships with a number of community organisations to provide education and training in diverse community settings. For example, the Commission partnered with Victoria Legal Aid and the Muslim Legal Network to conduct 13 'Mosque Connect' human rights information sessions across metropolitan and regional Victoria. These sessions provided a mechanism to raise awareness of human rights and of the legal protections relating to discrimination and racial vilification. Similarly, the Commission partnered with Women's Health West to develop and implement a human rights education initiative for women from new and emerging communities. This has provided an opportunity to reach a particularly vulnerable community group (South Sudanese refugee women), unlikely to access the Commission's broader education and training programs. Further, the Commission has partnered with numerous agencies in the disability sector in delivering human rights training, with the focus being on using the Charter as a tool for advocacy and change.

The Commission continues to maintain productive collaborative relationships with a range of community organisations in order to ensure it meets the education and training needs of their client groups including disability service providers, housing and legal services.

The Commission requires further resources to maintain and strengthen its human rights education and training to the community sector and advocates. The Commission is working toward establishing enduring partnership with Aboriginal community organisations and as such, will extend its human rights education and training to the diverse Victorian Aboriginal communities.

The Commission is undertaking a project to increase the awareness, understanding and use of Aboriginal cultural rights protected in the Charter. Arising from this project will be a range of education and awareness raising initiatives to assist Aboriginal people to assert their cultural rights with public authorities. The Commission will require further resources to undertake the ongoing and culturally appropriate human rights education and training for Aboriginal communities.

The Commission is keen to extend its education and training methodologies for the community and advocacy sector to:

- Digital photo stories
- Human rights video series
- Visual case studies
- Plain English education and training resources.

Community Awareness Campaigns

From 2011–2014, the Commission has complemented its targeted education and training programs with information and resources for the general public. Public education is an important component for creating behavioural change. For many whose only access to the Commission is through our web presence, the information and campaign materials online are vital for all Victorians to understand their human rights and how to claim them.

In 2012, the Commission launched the Protecting Us All website. The site, humanrights.vic.gov.au, uses case studies to outline the 20 fundamental rights protected by the Charter and explains how these rights are relevant to all Victorians. Additional case studies and materials have been added to the site since its launch.

The website led to the creation of a suite of fact sheets that explain how the Charter operates, outlining the 20 rights protected in the Charter, as well as topics such as the role of the Charter in the Parliamentary process, in the courts and in the work of government and the community. These are available at humanrightscommission.vic.gov.au/charterfactsheets.

The Commission has produced a range of public education materials, from information sheets (“Z-cards”) to rock posters to Frisbees promoting human rights messages for all Victorians. The Commissioner regularly appears in public talks and across the media. Her talks and clips of her work are also available on the website of the Commission.

For the Charter to be more effective the level of awareness about the existence of the Charter needs to be raised amongst the public, so that Victorians understand the value of human rights and how the Charter works in practice.

Interventions

Recommendation 5 – No Changes to Intervention Function

The Commission does not propose any changes to its intervention function under section 40 of the Charter. The rationale for this function is to enable the Commission to act as an independent and expert advocate in relation to the interpretation and application of the Charter and to contribute to the development of jurisprudence on the protection of human rights in the Charter. The Commission has received positive feedback from the heads of Victoria’s courts and tribunals and other government and non-government stakeholders on the value of its intervention role. This consultation and feedback has been made available as part of the Eight Year Review.

Current model

Both the Attorney-General and the Commission have a discretionary power to intervene in proceedings before courts and tribunals where a question of law arises regarding the application of the Charter, or the interpretation of a statutory provision in accordance with the Charter.

The intervention function is distinct from an enforcement mechanism such as an independent cause of action – it does not vindicate individuals rights, per se, rather it is directed to assisting in the development of the law.

The Commission and the Attorney-General do not require the court’s permission to intervene in a proceeding. The Commission and the Attorney-General do not require notification to be

given before they can exercise their right to intervene, although notification is mandatory in the County Court, Supreme Court and Court of Appeal.

Discussion

Since the Charter came into force the Commission has received 258 notifications and has intervened in 47 proceedings. The Attorney-General has intervened in approximately 33 proceedings, in 18 of which the Commission was also an intervener.

The Commission believes that there remains a public interest in retaining the intervention role. As an intervener, the Commission has made a valuable contribution to the development of Victorian human rights jurisprudence. Although there is more case law on the Charter's application since the previous Charter Review, development of human rights jurisprudence is still in a relatively early phase. Further, the intervention role will be particularly important to retain if there are legislative changes to the Charter, especially to the remedies provision.

The Commission is aware of some concerns that the intervention roles in the Charter may deter some parties from raising the Charter because this may lead to intervention by the Commission or Attorney-General, which it is feared may result in prolonging proceedings, extra time and cost, and delay to the hearing and determination of a matter.

These are important considerations. However – taking into account the broad support and positive views expressed by heads of Victoria's courts and tribunals and other government and non-government stakeholders for the Commission's interventions⁴⁶ – the Commission considers that the public interest and value in its intervention role at this point in time outweighs the value that could be gained by removing the function.

The Commission's experience is that where it intervenes in relation to a Charter question, parties will often rely in whole or in part on the Commission's submissions on the application of the Charter and the scope of relevant human rights, which may result in saving parties' time and cost that would otherwise had been required to address the Charter question in the absence of an intervener's submissions.

In this way, in some cases interventions may relieve the parties from preparing submissions addressing relevant international law and judgments of domestic, foreign and international courts relevant to the human right raised, especially where parties may not have expertise or the time to do so.

Commission's right to intervene

The rationale for the Commission's intervention power under the Charter is to enable the Commission to act as an independent and expert advocate in relation to the interpretation and application of the Charter and to contribute to the development of jurisprudence on the protection of human rights in the Charter.

The Commission's right to intervene is important as it:

1. reflects the Commission's expert role as the regulatory body with responsibility for administering and promoting the Charter;
2. recognises the importance of an expert body such as the Commission in developing the jurisprudence related to a new law;
3. is derived from its independence, autonomy and expertise, which is particularly important when raising human rights issues of high public interest;
4. promotes the objectives of the legislation;
5. validates the importance of the Charter's human rights protections.

⁴⁶ See the Commission's Report to Stakeholders, available on the Commission's website at: <http://www.humanrightscommission.vic.gov.au/index.php/component/k2/item/1240-commission-review-of-intervention-functions-under-the-charter-and-equal-opportunity-act>.

In the Commission's review of its intervention functions in 2014/15,⁴⁷ the Commission received feedback that its intervention role is strongly welcomed by the judiciary and tribunal members, and assists practitioners both directly in the proceeding and also beyond the proceeding.

The Commission has found that its submissions in interventions:

- have been frequently applied by VCAT, and decisions in that jurisdiction have been more robust as a result.
- even in proceedings where the submissions were not accepted, have been of assistance in Victoria's superior courts and helped to achieve the Commission's key purpose of clarifying the law and what it requires in practice.
- made a beneficial contribution to the development of Victorian jurisprudence in the protection of rights.
- through testing the scope of rights and operational provisions have contributed to decisions that help to clarify the application and operation of the Charter.

An overview of the Commission's Charter Interventions from July 2011-2015 can be found in the Appendix.⁴⁸

Attorney-General's right to intervene

In contrast to the Commission's interventions, which are independent from government, the Attorney-General's interventions on the Charter are on behalf of government.

As first Law Officer of the State of Victoria, the Attorney-General has general responsibility for Victorian laws and the legal system. The rationale for the Attorney-General's intervention power is to put submissions on the application of the Charter on behalf of government.⁴⁹ When the Charter was introduced, the provision that the Attorney-General be notified and have the power to intervene was said to "ensure that the government and relevant statutory bodies are not caught unawares by possible developments in the interpretation of the charter and that the government has the opportunity to make representations on these important issues."⁵⁰

During the Commission's review of its intervention functions in 2014/15,⁵¹ some stakeholders raised the point that parties may be reluctant to rely on the Charter in a claim against a government party because the Attorney-General may intervene to make submissions that would further support the state party's arguments on the Charter questions. The Commission observes that notification to the Attorney-General is not required if the state is a party, however in practice the Attorney-General is generally notified even when the state is a party: the Supreme Court's practice note recommends doing so. The Commission considers that this is not necessary and the Supreme Court's practice note on notifications could be amended consistently with this.

Some stakeholders also asked whether the Attorney-General had guidelines in relation to the exercise of the intervention function. The Commission takes no position on the Attorney-General's right to intervene under the Charter. However the Commission considers it would be useful for the Attorney-General to publish accessible guidelines on the exercise of the Attorney-General's role to intervene under section 34 of the Charter.

⁴⁷ The Commission's Report to Stakeholders is available on the Commission's website at: <<http://www.humanrightscommission.vic.gov.au/index.php/component/k2/item/1240-commission-review-of-intervention-functions-under-the-charter-and-equal-opportunity-act>>.

⁴⁸ An overview of the Commission's Charter Interventions 2008-2011 was included in Appendix N to the Commission's Submission to the Four Year Review of the Charter.

⁴⁹ Consultation Committee report, page iv.

⁵⁰ Second Reading Speech on clauses 34 and 35, p 1293

⁵¹ The Commission's Report to Stakeholders is available on the Commission's website at: <<http://www.humanrightscommission.vic.gov.au/index.php/component/k2/item/1240-commission-review-of-intervention-functions-under-the-charter-and-equal-opportunity-act>>.

Reporting

Recommendation 6 – No Changes to Reporting Function

The Commission does not propose any changes to its annual reporting function on the operation of the Charter under section 41(a). The annual report is an important resource for government, Parliament and the community. It increases understanding of, and engagement with the Charter, highlights best practice initiatives by duty holders as well as areas for improvement.

Discussion

Under section 41(a) of the Charter, the Commission prepares an annual report for the Attorney-General that examines

- the operation of the Charter, including its interaction with other statutory provisions and the common law,
- all declarations of inconsistent interpretation made during the relevant year; and
- all override declarations made during the relevant year.

The Commission's annual Charter report is an important resource for government, parliament and the community. Each year, it examines the operation of the Charter in parliament and courts and tribunals. It also considers the use of the Charter by duty holders (public authorities) and rights-holders (the community). For example, the report considers:

- the use of the Charter in public decision-making and services, including the steps that government is taking to comply with its obligations to protect human rights, as well as examples of best practice;
- the current human rights concerns raised by community organisations and statutory agencies, as well as the important work that the government is doing to address those concerns;
- the role of the Charter in the Victorian Parliament, including as a key consideration in developing new laws; and
- the role of the Charter in Victorian courts and tribunals, including the key cases that have raised and considered the technical operation of the Charter and the scope of the rights contained in the Charter.

The Commission has tabled seven annual reports on the operation of the Charter and a number of accompanying thematic reports.⁵² In 2012, the Commission tabled its first stand-alone report on local government and the Charter to heighten the visibility of the Charter in local government. These reports have been well received by government and the community.

After eight years of operation, the Commission's Charter reports provide evidence that the use of the Charter by government and the community has matured. In some areas of government, the Charter is not only part of 'everyday business', but drives significant human rights initiatives to address systemic issues and to promote the protection of rights. Public authorities are also increasingly using the Charter in more sophisticated ways to review, develop and implement policies and practices that are compatible with, and promote, human rights.

The Commission's statutory reporting mechanism has a number of significant benefits for public authorities, parliament and the community. As noted in the explanatory memorandum for the Charter, it was expected that the Commission's annual Charter report would 'focus on key aspects of the Charter's operation as a conduit for institutional dialogue'.

⁵² The Commission's annual Charter reports are available at: <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/charter-reports>.

Human rights education is one of the key outcomes of the annual Charter report. In particular, the yearly report increases understanding of and engagement with the Charter by government, parliament and the community. It does this by providing a comprehensive picture of the use of the Charter in practice, as well as explaining how the Charter's key provisions work. This includes current case law on the interpretation of the key operative provisions of the Charter and the scope of the rights contained in the Charter.

Recent feedback from government departments was that the Charter report provides them with useful feedback on the operation of the Charter and government activity, and is a good way to remind staff about their human rights obligations and to keep them engaged with the Charter.

The Charter report is also one of the key mechanisms for keeping government and parliament accountable. It outlines the steps that the government is taking to comply with its obligations under the Charter, as well as areas where there could be improvement. In this way, it is an important resource to track government compliance with and best practice under the Charter. It also includes a detailed overview of the use of the Charter in law-making – including where the Charter has led to positive law reform, and where the analysis and scrutiny of human rights impacts could be improved.

The Charter report is also a public platform to share examples of human rights best practice and initiatives by duty holders. Each year, the Commission profiles many examples of how public authorities (including state government departments and agencies, courts and tribunals, and local government) implement human rights in practice. This includes using the Charter to inform the development, revision or implementation of policies, procedures and practices. It also includes notable examples of human rights initiatives that move beyond compliance to addressing systemic rights issues. For example, the Commission's 2014 report on the operation of the Charter highlighted the work that Victoria Police has done to address concerns of racial profiling within Victoria Police. Following Victoria Police's report *Equality is Not the Same*, Victoria Police initiated a three-year action plan to develop, implement and evaluate improvements to frontline policing. Victoria Police's genuine commitment to community engagement in developing the report, as well as its ongoing efforts to implement the resulting action plan, reflect a strong commitment to human rights consistent policing.

Finally, the Charter report often leads to ongoing engagement with public authorities and community organisations about the Charter, which helps to promote a human rights culture. In preparing the Charter report, the Commission consults with state government departments, a number of statutory agencies, local councils, courts and tribunals, and community organisations. A number of these are complaint-handling bodies that receive information directly from the public about the human rights performance of other public authorities. Although there is no statutory requirement for organisations to report to the Commission, public authorities actively participate in the reporting process each year – to showcase the work they are doing to actively promote and protect human rights, as well as to let the Commission know how we can help them to better understand their obligations under the Charter. As a result, the reporting process often leads to ongoing engagement with public authorities and community organisations, including targeted training and education on the Charter and human rights. For example, as part of the reporting process for the 2014 Charter report, 16 organisations – including government departments and agencies, courts and community organisations – requested information on human rights training and education.

5. Scrutiny of Acts and Regulations Committee

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

The Scrutiny of Acts and Regulations Committee (SARC) is a bipartisan parliamentary committee that provides independent scrutiny of Bills and statutory rules for compatibility with human rights. The powers of the Committee are adequate but underutilised. The Commission makes the following policy and practical recommendations to enhance the Committee's scrutiny role.

Recommendation 7

The Committee's capacity to identify Charter issues would be enhanced with better resourcing, including training for members and access to expert advice.

Recommendation 8

The Committee's effectiveness would be improved if it had sufficient time to hold public or private hearings on bills with significant human rights concerns. Such bills should remain before Parliament for longer periods to facilitate the scrutiny process. This would enable the public to participate in Committee processes and afford Parliament a greater opportunity to be aware of, and debate the human rights implications of bills.

Recommendation 9

The Committee's engagement with the public would be improved if the Committee encouraged public submissions and provided an analysis of those submissions in its reports to Parliament.

Recommendation 10

There should be greater transparency in the Committee's process for reviewing statutory rules that limit rights. To this end, the Committee should regularly report to Parliament on the compatibility of regulations and there should be a publicly accessible central repository of the human right certificates that are prepared by Ministers.

Scrutiny of human rights impacts in Bills

SARC is required under s 30 of the Charter to consider any Bill introduced into Parliament and report to Parliament as to whether the Bill is compatible with human rights.

In its submission to the Human Rights Consultation Committee in 2005, SARC 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.⁵³

SARC scrutiny process

After a Bill is read a second time, debate is generally adjourned for 2-3 weeks for detailed consideration of the Bill. SARC prepares comments on all Bills for tabling in an Alert Digest at the commencement of a parliamentary sitting week when the resumption of debate may occur. These comments include a 'Charter report' for each Bill that sets out a discussion of any relevant Charter issues. If the Bill raises issues of incompatibility, SARC corresponds with the relevant Minister and includes the Minister's response in the Alert Digest.

Until April 2013, SARC only prepared comments under a heading 'Charter report' if it considered Charter issues were raised. Since April 2013,⁵⁴ SARC prepares comments for

⁵³ Cited in Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (2005), 76.

⁵⁴ SARC, *Alert Digest No 5 of 2013*.

every Bill under the heading 'Charter report'. If it considers no Charter issues arise, it states that 'The [xxx] Bill is compatible with the rights set out in the Charter of Human Rights and Responsibilities'.

SARC states that '[w]ithin the relevant terms of reference the Committee welcomes public submissions concerning Bills currently before the Parliament'.⁵⁵ SARC notes these submissions in the Alert Digests and posts public submissions on its website.⁵⁶ SARC reserves the right to invite evidence to be given before it at a private or public hearing in relation to a Bill.⁵⁷

SARC's identification of Charter issues

SARC has developed significant Charter expertise, as evidenced in a number of Charter reports which provide a detailed and thorough analysis of Charter issues raised. For example:

- For the *Criminal Organisations Control Bill 2012*, SARC provided an extensive analysis that alerted Parliament to various rights relevant to the Bill. Specifically, it was concerned that the definition of a 'declared organisation' that has connections to serious criminal activity may permit declarations to be made about groups of people who associate together due to personal or communal attributes that are protected by the Charter, and may catch individuals in the definition. SARC sought further explanation on these issues from the Attorney-General, which was provided in subsequent correspondence.⁵⁸

However, in the Commission's view, a number of Bills which clearly impact on Charter rights are not accompanied by a discussion of that impact in the SARC Charter report. For example:

- The Children, Youth and Families Amendment (Permanent Care and other Matters) Bill 2014 introduced amendments to the *Children Youth & Families Act 2005 (Vic)*. Concerns were raised by the Law Institute of Victoria that the Bill as drafted created unreasonable and unjustifiable limitations to the fundamental human right to a fair hearing and the protection of the family as the fundamental group unit as set out in sections 24 and 17 of the Charter.⁵⁹ However, SARC's Charter report simply stated that 'The Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities'.

SARC recently issued a consolidated practice note dated 26 May 2014. This states that the Committee will 'characterise a Statement of Compatibility ... as a form of explanatory memoranda'.⁶⁰ It states that amendments unrelated to a Bill's purpose as introduced should be accompanied by supplementary information as to the compatibility of those amendments with Charter rights. The Commission strongly supports this recommendation. The note states that where there is insufficient or inadequate information regarding the Statement of Compatibility, the Committee may report the matter to Parliament and/or write to the relevant Minister.

SARC's practice note provides useful direction for the preparation of Statements of Compatibility. However, further guidance could be given by SARC to ensure the quality and consistency of Statements of Compatibility. SARC should expand its directions to consider other Charter rights (beyond traditional common law rights) and provide technical guidance on matters such as how Statements of Compatibility address the limitation provision (s 7(2)). SARC could identify specific areas where Statements can be improved.

⁵⁵ SARC, *Annual Review 2013*, 7.

⁵⁶ SARC, *Annual Review 2013*, 7.

⁵⁷ Ibid.

⁵⁸ Attorney-General Robert Clark, *Minister's Response*, reported in the Parliament of Victoria Scrutiny of Acts and Regulations Committee *Alert Digest No 18 of 2012* (11 December 2012).

⁵⁹ Law Institute of Victoria, *Submission: Children, Youth and Families Amendment (Permanent Care and Other matters) Bill 2014* (11 September 2014).

⁶⁰ SARC, Practice Note (26 May 2014).

SARC has tended to focus on traditional common law rights. This is evident in the emphasis in its practice note on Bills dealing with arrest, detention, deprivation of liberty, search and seizure, strict and absolute liability, reversal of onus of proof, the right to silence and privilege against self-incrimination.⁶¹ In earlier Alert Digests, SARC at times identified common law rights issues arising in a Bill, but did not identify any Charter issues.⁶² More recent Alert Digests provide useful cross-references between the analysis of common law rights and Charter rights.⁶³

In the Commission's view, for SARC's scrutiny of Bills to be more effective, SARC needs to be adequately resourced to ensure that all human rights issues raised in Bills are robustly addressed in Charter reports. Additional resources that could assist SARC include extra staff and further access to expert advice. Members of SARC and their staff should be provided with regular training to assist in the identification of human rights issues in Bills.

SARC's engagement with Parliament

Initially, SARC Annual Reviews referred to the number of Bills that had been amended by Parliament in response to human rights issues raised by SARC.⁶⁴ These numbers were very low. They do not appear to be reported in the most recent SARC Annual Reviews.

	Bills before Parliament	Substantive Charter Reports by SARC	Bills for which submissions received ⁶⁵	Correspondence with Minister	Bills amended in response to SARC
2014	102	22	6	15	[not recorded]
2013	89	19	3	14	0 ⁶⁶
2012	98	18	0	19	[not recorded]
2011	92	14	2	10	2 ⁶⁷
2010	98 ⁶⁸	10	[not clear]	30	2 ⁶⁹

⁶¹ Note that SARC has also identified some non-traditional rights requiring explanation, including freedom of communication, assembly, movement, association, religion or conscience; infringement of the right to vote; property acquisition; and privacy: Practice Note 2.

⁶² For example, in relation to the Corrections Further Amendment Bill 2013, SARC identified issues of retrospectivity under its obligation to consider issues of 'rights and freedoms', but did not identify these as Charter issues: SARC, *Alert Digest No 5* (16 April 2013), 1.

⁶³ See, eg, SARC's analysis of the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 in SARC, *Alert Digest No 11* (2 September 2014), 3ff.

⁶⁴ See, eg, SARC, *Annual Review 2007*; SARC, *Annual Review 2008*; SARC, *Annual Review 2009*; SARC, *Annual Review 2010*, 5; SARC, *Annual Review 2011*, 5-6.

⁶⁵ Note that the statistics provided in SARC Annual Reviews and Alert Digests do not match up exactly with the statistics in VEOHRC *Charter Reports*; it seems this is because of the distinction between when a Bill is introduced and when the relevant Alert Digest is published.

⁶⁶ See VEOHRC, *2013 Report on the Operation of the Charter of Human Rights and Responsibilities* (2014), 59.

⁶⁷ A bill amending the Equal Opportunity Act 2010 responded to some aspects of the previous Committee's Charter Report on the Bill for that Act; and the Charter Report on the Criminal Procedure Amendment (Double Jeopardy and Other Matters) Bill 2011 prompted a house amendment to allow persons acquitted of child homicide to be retried where there is fresh and compelling evidence of their guilt: SARC, *Annual Review 2011*, 5-6.

⁶⁸ Note that SARC, *Annual Review 2010* refers to 2008 in this context, which appears to be an error (at 4).

⁶⁹ Parliament reversed rules making same-sex partners of long-term pensioners ineligible for reversionary pensions, which the Committee had reported in 2008 may be incompatible with the Charter's equality right; and permitting finally dealt with charges to be considered in 'working with children' assessments, which the Committee had reported in 2007 may be incompatible with the Charter's right to the presumption of innocence: SARC, *Annual Review 2010*, 5.

Consideration should be given to ways in which the issues raised by SARC could be better brought to the attention of Parliament. For example, SARC tables its regular Alert Digests, which include copies of Ministerial correspondence on Bills, in both Houses. Having the responsible Minister refer to the SARC correspondence at the resumption of debate on a Bill would draw attention to any Charter issues at the time the Bill is actually debated, and at the instigation of the Minister who is responsible for the Bill.

Generally, SARC has around two weeks to prepare a Charter report for a Bill. This represents a very short time for SARC to consider the human rights implications of a Bill, review submissions and potentially hold public or private hearings. For complex Bills and those with significant human rights impacts, consideration should be given to the provision of exposure drafts and having such Bills remain before Parliament for longer periods of time to enable greater discussion and debate in Parliament on Charter implications. This would facilitate greater scrutiny by Parliament, SARC and community groups.

SARC should consider holding public or private hearings on Bills with substantial human rights implications. This would provide community groups and experts with an opportunity to put evidence on the record in a public forum. SARC could notify the Parliament of its intention to do so, giving Parliament an opportunity to delay consideration of a Bill until SARC has reported on the hearings.

SARC reserves the right to invite evidence to be given before it at a public or private hearing.⁷⁰ Unlike the Federal Joint Committee with a similar function,⁷¹ SARC has not held public hearings in respect of any of the Bills it has considered since 2009.⁷² In 2008, SARC held a public hearing in relation to its inquiry into the Police Integrity Bill 2008.⁷³ That Bill had been referred to SARC by the Legislative Council for public inquiry, consideration and report within one month of the resolution.

Also in 2008, SARC heard evidence in relation to the Public Health and Wellbeing Bill 2008. In 2009, SARC was requested by Governor in Council Order to inquire into, consider and report to Parliament on whether any amendments should be made to the exceptions and exemptions in the *Equal Opportunity Act 1995*. SARC held a public hearing to determine whether such amendments were needed.⁷⁴ These early examples show that there is scope for SARC to receive evidence on the human rights implications of Bills by way of hearing. They also demonstrate that Parliament can make use of SARC's expertise by expressly referring Bills for consideration. The Federal Joint Committee has stated that it 'has found it helpful to seek private briefings to assist it in developing its understanding of legislation and human rights principles'.⁷⁵ In the Commission's view, SARC should consider the benefits of holding public or private hearings on Bills with human rights implications.

Parliament should consider whether to refer certain Bills to SARC for special consideration including public hearings (in addition to the usual practice of SARC considering all Bills).

While the primary analysis of Bills should continue to be done on the papers, in the Commission's view, hearings would provide a useful opportunity for invited or interested community organisations and individuals to provide views to SARC on Bills with significant human rights implications. Hearings would allow for a more focused engagement on issues of interest to SARC and an opportunity for community organisations to provide input in a less formal manner. In some circumstances, a public hearing may allow SARC to place evidence on the public record in the shortest possible timeframe before a Bill is passed.

⁷⁰ SARC, *Annual Review 2013*, 7.

⁷¹ Parliamentary Joint Committee on Human Rights, *Annual Report 2012-13* (2013), 5.

⁷² SARC, *Annual Review 2010*, 6; SARC, *Annual Review 2011*, 7; SARC, *Annual Review 2012*, 7; SARC, *Annual Review 2013*, 7.

⁷³ SARC, *Annual Review 2008*.

⁷⁴ SARC, *Annual Review 2009*.

⁷⁵ Parliamentary Joint Committee on Human Rights, *Annual Report 2012-13* (2013), 5.

SARC's engagement with community

A number of community organisations have expressed to the Commission that although the SARC process should be a mechanism for human rights accountability and challenge, they have concerns about its effectiveness and utility.⁷⁶ While SARC accepts submissions on any Bill,⁷⁷ it generally does not comment directly on the content of submissions, even when they relate to vital reforms and raise significant human rights issues. Some examples are set out below:

- Summary Offences and Sentencing Amendment Bill 2013. This Bill expanded the grounds on which police members and protective services officers could direct a person to move on from a public place in certain circumstances. The Bill was the subject of significant public debate, which voiced concerns about the erosion of fundamental rights of freedom of assembly and speech and movement. Ten organisations made submissions to SARC, raising concerns about the human rights implications of the Bill. The SARC Charter report noted the receipt of submissions. It referred briefly to its comments on the predecessor to this Bill, introduced in 2009, before concluding that '[t]he Summary Offences and Sentencing Amendment Bill 2013 is, therefore, compatible with the rights set out in the Charter of Human Rights and Responsibilities'. No reference was made by SARC to the content of any of the submissions made to it.
- The Children, Youth and Families Amendment (Permanent Care and other Matters) Bill 2014: This Bill introduced amendments to the *Children Youth & Families Act 2005 (Vic)*. The Law Institute of Victoria prepared a detailed submission on the impact of the Bill on the fundamental human right to a fair hearing and the protection of the family as the fundamental group unit. In its Alert Digest, the Committee noted that it had 'received a written submission from the Law Institute of Victoria and [would] consider the submission at a future meeting'.⁷⁸ To the Commission's knowledge, there is no indication of whether the submission was considered at a future meeting.

On one occasion, SARC referred a question to Parliament on the Children, Youth and Families Amendment (Security Measures) Bill 2013 as a consequence of a submission by the Commission, and the issues raised were taken up in Parliament and were part of the extensive debate on the Bill.⁷⁹ SARC assessed the Bill as compatible with human rights. Nevertheless, it referred to Parliament for its consideration the alternative, less restrictive arrangements for unclothed searches, use of force and seclusion in the *Children and Young Persons Act 2008 (ACT)* and the *Disability Act 2006 (Vic)* referred to in the submission from the VEOHRC.

While SARC receives submissions from the public on Bills, community organisations note that it is difficult to find out information about Bills that raise human rights issues without actively monitoring Parliament. Further, SARC's timetable for preparing a Charter report on a Bill is not publicly accessible. The short timeframe for consideration of Bills by SARC noted above means that community organisations often do not have the time or resources to prepare a submission to SARC on issues of genuine concern.

In the Commission's view, it is appropriate that SARC should receive and consider submissions from the public as part of its commentary when reviewing Bills for compatibility with Charter rights. The current practice, where SARC receives submissions but does not regularly or consistently indicate having considered them, is unsatisfactory. In the Commission's view, it would be useful for SARC actively to consider community submissions on Bills in its Alert Digests. This would enhance SARC's human rights analysis of Bills and the accountability of Parliament.

⁷⁶ 2013 Report on the Operation of the Charter of Human Rights and Responsibilities, 30.

⁷⁷ In contrast, the Federal Parliamentary Joint Committee on Human Rights invites submissions for particular Bills, and otherwise welcomes correspondence which it publishes on its website: Parliamentary Joint Committee on Human Rights, *Annual Report 2012-13*, 5.

⁷⁸ SARC, *Alert Digest No 10* (19 August 2014), 2.

⁷⁹ Victoria, *Parliamentary Debates*, Legislative Council (1 April 2014).

SARC's engagement with the community could also be improved by notices being placed on its website and an electronic mailing list open to the public established to encourage submissions by interested groups with clear timelines for engagement. SARC should consider how it could use social media to improve accessibility for community organisations and individuals.

- SARC may also want to consider having a basic database of its Charter Reports, searchable by Bill. SARC could also establish an electronic mailing list open to the public to alert interested parties to new material on its website, and consider how social media might improve accessibility for community organisations and individuals to contribute their views.

Exposure drafts of complex Bills and those with significant human rights impacts (together with an accompanying draft statement of compatibility⁸⁰) would provide not only SARC and Parliament but also the public with a better opportunity to offer views.

Scrutiny of human rights impacts in Regulations

The Commission recommends greater transparency and accessibility around the scrutiny of human rights certificates.

Regulations form part of the law in Victoria. Acts of Parliament are broad in scope, with regulations providing finer detail about how the law will operate. Although these details may raise significant human rights issues, regulations are rarely subject to the rigorous public scrutiny given to bills.

Scrutiny of human rights impacts of regulations presently occurs in the form of a human rights certificate. SARC considers whether it agrees with the certificate's assessment. Many human rights certificates are not publicly available. There is no central repository for public access. This means that it may not be possible to review the content of regulations regarding limitations on human rights and determine how thoroughly a Minister has considered human rights.

There is currently a discrepancy between Section 21(ha) of the *Subordinate Legislation Act 1994* (SLA) and the Note in section 30 of the Charter. Section 21(ha) was inserted by a consequential amendment in the Charter. Under the SLA, SARC may report to each House of the Parliament if SARC considers that any statutory rule laid before Parliament is incompatible with Charter rights, whereas the Note in section 30 of the Charter states that SARC must review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights.

In the Commission's view, SARC should be required to report to Parliament on statutory rules it considers are incompatible with human rights, and as we set out below, this should be done in a regular and timely way. The current discrepancies could be clarified by simply changing the wording of the legislation in section 21(ha) of the SLA to mirror the wording of the Note in section 30 of the Charter setting out that SARC must report to Parliament if it considers the statutory rule to be incompatible.

SARC should regularly report to Parliament on the compatibility of regulations with human rights.

SARC should regularly report to Parliament on the compatibility of regulations with human rights and publicly report on human rights in Alert Digests in a similar way as Bills tabled in Parliament. Unless exempted, a Member of Parliament must ensure that a human rights certificate is prepared for a statutory rule or legislative instrument.⁸¹ The Member must certify

⁸⁰ SARC noted that the exposure draft Water Bill was not accompanied by a draft statement addressing the compatibility of the exposure draft with human rights: SARC, *Alert Digest No 9* (5 August 2014), 37-38.

⁸¹ Subordinate legislation scrutinised by the Committee is comprised of both regulations and legislative instruments. 'Regulations' encompass instruments such as statutory rules and court rules. 'Legislative

whether the proposal limits any Charter right. If a human right is limited, the certificate must set out the nature of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve the purpose sought by the limitation.⁸²

SARC considers whether it agrees with the certificate's assessment. If regulations are inconsistent with the Charter, the Committee has discretion to table a report in Parliament.⁸³ In practice, if the Committee has had concerns, it generally writes a letter to the Minister to seek a written response. The Committee publishes such correspondence annually next to the human rights certificate in its *Annual Review of the Regulations Report*. This lacks the timely public scrutiny given to Bills. SARC reports on all Bills tabled in Parliament in Alert Digests prepared before the following sitting period, (generally two weeks).⁸⁴ This system of scrutiny also stands in contrast to the federal system, described below, which provides for robust scrutiny of regulations.

Reporting regularly on regulations (rather than annually) is likely to entail extra work for SARC, and therefore SARC should be adequately resourced to meet this requirement.

Human rights certificates should be publicly accessible in a central repository.

There should be a central repository for human rights certificates, and this should be publicly accessible. Unlike Bills under Parliamentary consideration, most human rights certificates are not publicly available, and currently there is no central repository for access by the public. This means that it may be extremely difficult to review the content of certificates regarding limitations on human rights and determine the balance struck by the Minister in considering compatibility issues. Significant human rights implications may arise from a lack of scrutiny of regulations. Some examples are set out below:

- In December 2013, new regulations were made under the Charter to continue the exemption of the Adult Parole Board, Youth Residential Board and Youth Parole Board as public authorities under the Charter.⁸⁵ Boards are therefore not required to consider and comply with the Charter, for example, to take the right of children to protection in their best interests (section 17) into account. In 2013, human rights issues were raised about the role of the parole boards in transferring young people to the adult corrections system. This exemption has meant that young people in the corrections system have faced substantial limitations on their rights without the accountability framework of the Charter.⁸⁶
- A research report into the experience of students with disability in Victorian schools allowed parents and teachers to report incidents where children with disability were physically restrained at school. The Commission sought a copy of the human rights certificate accompanying the *Education and Training Reform Regulations 2007*, which authorises such restraint. The human rights certificate acknowledges that the regulation may involve the removal of a student from the classroom, which would limit their freedom of movement, and discusses whether this limitation is reasonable. However, it does not consider whether physical restraint of children impinges on other compelling rights, for example, protection from cruel, inhuman or degrading treatment, protection of children's

instruments' may include orders-in-council, proclamations, notices and codes of practice. Local laws are not included in this process. <http://www.parliament.vic.gov.au/images/stories/committees/sarc/review_regulations/Annual_Review_Regulations_2013.pdf>

⁸² *Subordinate Legislation Act 1994*, Section 12A.

⁸³ *Subordinate Legislation Act 1994*, Section 21(ha).

⁸⁴ *Scrutiny of Regulations under the Charter of Human Rights and Responsibilities*, (Adrian Bates) (2011) pp7-8

⁸⁵ *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013*

⁸⁶ See a fuller discussion of this research on p28. 15 out of 24 cases of children being transferred involved decisions made by the Youth Parole Board.

best interests and the right to liberty and security. If this had been a clause in a Bill, the human rights issues would have received a much greater degree of public scrutiny.⁸⁷

- The Committee noted that the *Health (Commonwealth State Funding Arrangements) Bill 2012* included a power to modify primary legislation by means of subordinate legislation (commonly referred to as “Henry VIII” clauses). It sought an explanation from the Minister justifying the inclusion of such a provision and whether it was an inappropriate delegation of legislative power.⁸⁸ The consequence of such a clause is that an Act can be amended through subordinate legislation without the human rights scrutiny that would ordinarily be required by an amendment Bill that passes through Parliament.

The Federal scheme – a contrasting model

In contrast to Victoria, the Federal scrutiny system offers a much more transparent mechanism for Parliamentary scrutiny of regulations.

Since January 2012, a Parliamentary Joint Committee on Human Rights has examined Bills and legislative instruments for compatibility with human rights.⁸⁹ The Charter should make similar provision for scrutiny and reporting on regulations in Victoria.

The Joint Committee has set out its expectations for statements of compatibility in a Guidance Note. Statements of compatibility are essential to the examination of human rights in the legislative process. The Joint Committee relies on the statement as the primary document setting out the analysis of the compatibility of the Bill or instrument with Australia's international human rights obligations.

The statement of compatibility should identify the rights substantially engaged by the legislation. Where a Bill or instrument limits a human right, the Joint Committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in its guidance note. Statements should provide analysis of the impact of the Bill or instrument on vulnerable groups.⁹⁰

A recent example of a regulation subject to scrutiny by the Joint Committee was the *Migration Amendment (Partner Visas) Regulation 2014*, increasing certain visa application charges by 50 per cent. The Joint Committee observed that the fee increases could limit the right to protection of the family of Australian citizens and residents who wish to live permanently in Australia with their partner. It noted that an important element of protection of the family, arising from the prohibition under article 17 of the ICCPR against unlawful or arbitrary interference with family, is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, or impose long periods of separation will limit this right. The Committee considered that the statement of compatibility did not sufficiently justify the limitation and sought the advice of the Minister whether the fee increase was aimed at a legitimate objective and a reasonable and proportionate means of achieving this.⁹¹

The Federal Government allows for Parliamentary scrutiny of regulations during their passage through Parliament, at a time when public accountability is most crucial. The Charter should also provide for scrutiny of regulations, to promote transparent development of regulations in Victoria.

⁸⁷ VEOHRC, *Rights in focus: 2011 report on the operation of the Charter of Human Rights and Responsibilities*, pp28 – 30. See a fuller discussion of this research on p26.

⁸⁸ Ibid.

⁸⁹ *Human Rights (Parliamentary Scrutiny) Act 2011*, s 7.

⁹⁰ Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, Twenty-first report of the 44th Parliament, Guidance Note 1, (Dec 2014)

<http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/reports/2015/21_44/21st%20report.pdf>

⁹¹ Parliamentary Joint Committee on Human Rights Human rights scrutiny report, Eighteenth report of the 44th Parliament (10 February 2015), pp86-87:

<http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/reports/2015/18_44/18th%20report.pdf>

Comparative table detailing treatment of primary legislation and regulations

Victorian Primary Legislation	Victorian Regulations	Federal Regulations
<p><i>Charter of Human Rights</i>, section 28: A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill (and) must cause the statement of compatibility to be laid before the House of Parliament into which the Bill is introduced before giving [their] second reading speech</p> <p>Charter section 30: The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.</p>	<p><i>Subordinate Legislation Act 1994</i>, Section 12A(1): The responsible Minister must ensure that a human rights certificate is prepared in respect of a proposed statutory rule, unless the proposed statutory rule is exempted under sub-section (3). 12A(2) A human rights certificate must certify whether the proposed statutory rule does or does not limit any human right set out in the Charter.</p> <p>Section 21 Review of statutory rules by the Scrutiny Committee: section 21(ha) The Scrutiny Committee <u>may</u> report to each House of the Parliament if the Scrutiny Committee considers that any statutory rule laid before Parliament — is incompatible with the human rights set out in the Charter</p> <p>Charter of Human Rights section 30 (Note): The Scrutiny of Acts and Regulations Committee <u>must</u> also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights</p>	<p><i>Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)</i>, section 9: A rule-maker (eg Minister) must cause a statement of compatibility to be prepared in respect of that legislative instrument – The statement of compatibility must be included in the explanatory statement relating to the legislative instrument. A statement of compatibility must include an assessment of whether the legislative instrument is compatible with human rights</p> <p>Section 7: Parliamentary Joint Committee on Human Rights – The Committee has the following functions: (a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue</p>

6. Public authorities

Terms of Reference 1(e) – Application of the Charter to non-State entities when they provide State-funded services

Terms of Reference 2(a) – Clarifying the provisions regarding public authorities, including the identification of public authorities and the content of their human rights obligations

Terms of Reference 1(e)

Recommendation 11

The Charter should continue to apply to non-State entities when they exercise functions of a public nature on behalf of the State or a public authority.

Recommendation 12

The existing flexible definition of public authority should be retained to avoid the risk of narrowing the application of the Charter.

Recommendation 13

The power to prescribe entities to be a public authority in section 4(1)(h) should be used more frequently to provide greater clarity in relation to the application of the Charter to non-State entities.

Recommendation 14

Public authorities should take steps to ensure that projects undertaken by non-State entities are designed and implemented in ways that protect and promote human rights, for example in tendering or procurement.

Terms of Reference 2(a)

Recommendation 15

The Charter should retain the obligations on public authorities in section 38(1) to act compatibly with human rights and to give proper consideration to relevant rights in decision-making. This is an essential provision in the Charter for ensuring that human rights are embedded in the policies, programs and practices of public authorities.

Recommendation 16

The ability to declare an entity by regulations not to be a public authority in section 4(1)(k) and the corresponding power to make those regulations in section 46 should be removed from the Charter. This is because section 4(1)(k) has become an 'exemption' provision for entities that clearly fall within the definition of public authority. If the provision is retained, it should be used to prescribe entities not to be public authorities when they are exercising particular functions that fall outside the criteria of functions of a public nature.

Recommendation 17

The Adult Parole Board, Youth Parole Board and Youth Residential Board should no longer be exempted as public authorities under the Charter, given the significant human rights issues at stake when they exercise their functions, including the rights of victims of crime.

Non-State entities, or ‘functional public authorities’

A number of public authorities are expressly identified as being bound by the Charter and include public officials, entities established by statute with public functions, Victoria Police, local Councils, Ministers, courts and tribunals, and members of Parliamentary Committees when acting in an administrative capacity. These are generally referred to as ‘core’ public authorities.

Section 4 also recognises that private and other not-for-profit entities are increasingly providing Victorian Government services and exercising public functions. The definition of public authority therefore encompasses what is known as a ‘functional’ public authority. Section 4(1)(c) provides that a public authority includes 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’. Guidance on these criteria is found in section 4(2)-(5).

The Commission continues to receive feedback through its education and training function that the definition of ‘public authority’ under the Charter is unclear. There is scant case law on ‘functional’ public authorities that provides these entities with guidance on what would amount to a function of a “public nature” and “on behalf of the state”. This uncertainty is significant for the entities themselves, their employees, and those individuals and communities in Victoria who receive services from them.

The only Victorian case to give a proper analysis to section 4(1)(c) remains *Metro West Housing Services Ltd v Sudi (Sudi)*.⁹² This case states that, because of the diversity of the types of arrangements that might be captured, there can be no universal test and the task of identifying the nature of the function must depend on the facts and context.⁹³

In one further case, *Homeground Services v Mohamed (Residential Tenancies)* [2009] VCAT 1131, a private welfare agency that had contracted with the Director of Housing to provide transitional housing to indigent tenants was held to be a functional public authority, although VCAT did not examine the Charter’s provisions in the same detail as *Sudi*.

If it is unclear as to whether an entity is a public authority, there is a risk it may assume it is not bound by the Charter. Currently, individuals who consider a non-State entity has infringed human rights or failed to give proper consideration to human rights in the exercise of a public function on behalf of the State or a public authority would likely seek to complain to the entity in the first instance. In such circumstances, the entity may deny that it is bound by the Charter. The risk that this would be challenged remains relatively low given the absence of a direct right of action for Charter breaches or a clear complaints and dispute resolution mechanism.

Case study: Social housing providers

A significant area where the Commission has seen dispute as to whether non-State entities are covered by the Charter’s public authority definition is in relation to not-for-profit entities providing housing services. Non-State entities are increasingly responsible for providing housing services to vulnerable and disadvantaged Victorians as Victoria’s housing services continue to be privatised and are increasingly provided by housing associations.

In Victoria, registered housing agencies provide affordable rental housing for low-income households and are registered either as housing associations or housing providers under the *Housing Act 1983*.⁹⁴ There are currently eight registered housing associations and 34 registered housing providers in Victoria. When the regulatory framework for registered housing agencies was introduced into the *Housing Act* in 2004, its purpose was to implement the government’s affordable housing policy by ‘modernising the delivery and administration

⁹² [2009] VCAT 2025 at [143].

⁹³ [129].

⁹⁴ <<http://www.housingregistrar.vic.gov.au/Registered-Housing-Sector>>. Housing associations expand new housing through construction, purchase or acquisition, using a mix of government funds and private sector investment. They also manage housing portfolios – properties owned by themselves or leased from other parties, such as the Director of Housing.

of social housing by growing the role and size of the not-for-profit community housing sector and giving low-income people greater variety and choice in their access to affordable housing.⁹⁵

While registered agencies must comply with certain performance standards under the Housing Act, registered agencies do not necessarily consider they are bound by the Charter.⁹⁶

Although there are instances of individuals challenging the decisions of social housing providers (through judicial review) on grounds they failed to act compatibly with or give proper consideration to human rights, all disputes have resolved prior to hearing and there remains no case law to provide guidance on how the Charter's public authority definition applies to these entities.

The Commission is aware of one current VCAT proceeding in which a registered housing association has submitted that it is not a public authority in certain interactions with a tenant.⁹⁷ The Commission has intervened in the proceeding under section 40 of the Charter to make submissions on the application of section 4(1)(c) of the Charter to the entity.

Another recent example in which a registered agency disputed it was bound by the Charter was in the Supreme Court proceeding of *Andrew Forbath v Social Housing Victoria* ('*Forbath*'). Social Housing Victoria is a registered housing agency that provides affordable long-term rental housing and accommodation to people on low income. In that case, Victoria Legal Aid (VLA) acted for Mr Forbath in seeking judicial review of decisions of Social Housing Victoria to issue a notice to vacate and apply for a warrant of possession. If acted upon, those decisions would have the effect of evicting Mr Forbath from his home in a rooming house.

VLA successfully obtained an injunction to restrain Social Housing Victoria from the issue and execution of the warrant for possession pending the hearing and determination of the judicial review proceeding, however prior to the hearing Social Housing Victoria withdrew its application for a warrant of possession and discontinued proceedings to evict Mr Forbath. This outcome means there was no determination as to whether Social Housing Victoria is a public authority within the meaning of the Charter when providing housing services.

Clarification as to whether such entities are covered may have to be explored outside of the courts, since clarification through Supreme Court jurisprudence is appearing to be increasingly unlikely. Victoria Legal Aid has informed the Commission that the *Forbath* proceeding is the third judicial review matter to have settled after filing proceedings that raised the question of whether a community housing provider is a functional public authority.

Ensuring the human rights of tenants are respected and protected in the provision of social housing services is of fundamental importance. This is particularly so taking into account that the people most affected by these decisions will often be the most vulnerable and disadvantaged in our community. As observed by Justice Bell, writing extra-judicially, '[f]or many years, public housing in Australia has been targeted at the most disadvantaged in our community – people with disabilities, single parents (especially mothers), the elderly and others who are wholly or mainly dependent on welfare and income support.'⁹⁸

⁹⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 2004, 1732.

⁹⁶ In two recent separate legal proceedings, Common Equity Housing Limited and Social Housing Victoria argued that, for the purposes of those proceedings, they were not covered by the Charter's public authority definition and not bound by the Charter's obligations.

⁹⁷ *Goode v Common Equity Housing* (VCAT Ref No H65/2013).

⁹⁸ See Justice Bell, 'Protecting public housing tenants in Australia from forced eviction: the fundamental importance of the human right to adequate housing and home', *Monash University Faculty of Law Costello Lecture 2012*, 18 September 2012.

Case law involving the Director of Housing demonstrates how human rights issues can arise in the provision of housing services and that compliance with the Charter can result in different decisions where the interests of a tenant and their family are taken into account.⁹⁹ Where the Charter does apply to entities providing housing services, it requires entities to consider the impact its decisions and actions will have on the human rights of tenants and other affected persons and to act compatibly with relevant rights.

If the Charter is to be effective in ensuring human rights compliance in the delivery of government services to people in Victoria, it must continue to apply to non-State entities where they exercise functions of a public nature on behalf of the State. The Charter will not be effective unless it works in practice to reflect the reality that modern governments frequently and increasingly outsource important government functions to non-government organisations.¹⁰⁰ Where a person in Victoria receives services from a private entity on behalf of the Victorian Government, that person must not fall outside the Charter's protections.

The Charter's obligation to act compatibly with human rights must apply broadly to non-government bodies when they are exercising functions of a public nature on behalf of the state. The Charter obligations on core public authorities and functional public authorities should be the same (that is, the consequences for a breach of the Charter should be the same, the same avenues of complaint and redress should be available and the same relief and remedies should be available for Charter breaches by both 'core' and 'functional' public authorities).

The Charter should continue to apply to non-State entities where they exercise functions of a public nature on behalf of the State or a public authority.

Retain flexible definition

The Commission recognises that greater Charter compliance by non-State entities that provide public services to Victorians could be achieved if there was clarity around whether non-State entities are bound by the Charter.

While options to increase clarity should be explored, in the Commission's view the flexible definition currently used should not be abandoned since this would risk narrowing the application of the Charter. An exhaustive list of public authorities should not be included in the Charter. A flexible definition that can be applied on a case-by-case basis takes into account that the category of functional public authority is intended to reflect that 'modern governments utilise diverse organisational arrangements to manage and deliver government services'¹⁰¹ and these arrangements are continually evolving. As Bell J considered in *Metro West*, "the functions of government can change as society can change, what may be seen to be a proper subject for government action or regulation in one era may be seen differently in the next" (at [131]).

Case law will continue to develop over time to clarify the status of functional public authorities. Until then, where uncertainty is a problem for the Charter's implementation, clarity can be achieved by providing further guidance by way of notes and examples in respect of the non-exhaustive list of factors in section 4 of the Charter; and by prescribing certain entities to be public authorities in certain of their functions (see 'more effective use of existing provisions', p55).

Further guidance in the Charter, in the form of notes or examples, could help to increase clarity. Some options are set out below:

- In relation to the factors in section 4(2)(a)-(e) that "may be taken into account" in determining if a function is of a public nature, further examples and notes to accompany

⁹⁹ See, for example, *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648 (17 December 2014).

¹⁰⁰ This was recognised when the Charter was enacted. See Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006 at 1293.

¹⁰¹ Explanatory Memorandum to the Charter, 4.

the factors in (b) and (d) could give a greater indication to authorities as to the type of functions that will be covered. For example, in the ACT, section 40A(3) of the *Human Rights Act 2004* provides that:

Without limiting subsection (1) or (2), the following functions are taken to be of a public nature:

- The operation of detention places and correctional centres;
- The provision of any of the following services:
 - gas, electricity and water supply
 - emergency services;
 - public health services;
 - public education;
 - public transport;
 - public housing.¹⁰²
- In relation to sections 4(4) and (5), which provide guidance on when an entity will be acting on behalf of the state or public authority, further examples could be provided. Any guidance should be consistent with the broad approach to this criterion in *Metro West* that the focus is on matters of substance, not form or legal technicalities and ‘covers relationships which may be looser than contract, agency and other legal categories but which still involve exercising functions of a public nature on behalf of the State or a public authority.’¹⁰³
- Clarification is needed as to how federal schemes will apply to Victorian public authorities. The Marine (Domestic Commercial Vessel National Law Application) Bill 2013 provided that “the *Charter of Human Rights and Responsibilities Act 2006* applies to a Victorian public authority (within the meaning of section 4 of that Act) when exercising powers delegated to that public authority under the applied provisions or the Commonwealth domestic commercial vessel national law or the *Australian Maritime Safety Authority Act 1990* of the Commonwealth”.¹⁰⁴ In the Commission’s view, clarification of this kind should be provided for all federal schemes where possible.

If a direct right of action is introduced or a clearer mechanism for people to complain about human rights breaches to an independent body (both are recommendations of the Commission), there would be greater scope for the development of case law in this area.

In the Commission’s view, the flexible definition of ‘public authority’ should be retained.

More effective use of existing provisions – prescribing entities to be public authorities

The power to make regulations to prescribe entities to be public authorities for the purposes of the Charter (see section 46(2)(a) and section 4(1)(h)) should be used where possible to provide clarity. To date, this power has not been exercised. This power could be used to increase clarity (and as a result, Charter compliance) by prescribing entities to be public authorities for the purposes of the Charter when exercising certain functions.

Unlike the ACT Human Rights Act, the Charter does not expressly provide that an entity that is not a public authority may ask the Minister to declare that the entity is subject to the obligations of a public authority (section 40D). However, in practice, the same result could be achieved by use of the Regulations power outlined above. For example, entities could be prescribed by regulations to be public authorities when they are exercising the functions of providing social housing. Alternatively, and this is dealt with further below, these housing providers could be required to be bound by the Charter in their function of providing housing

¹⁰² Although ‘social housing’ may be a more appropriate term.

¹⁰³ *Metro West*, [164].

¹⁰⁴ Marine (Domestic Commercial Vessel National Law Application) Bill 2013, Statement of Compatibility, Legislative Assembly, 8 May 2013, Hodgett MP, 1530.

services as a condition for registration with the Office of Housing, or as part of compliance with the performance standards that housing associations must comply with.

Accountability by government for non-State entities

Under the existing regime, public authorities can and should take steps to ensure that projects undertaken by third-party non-State entities are designed and implemented in ways that protect and promote human rights. This may occur in the tendering or procurement stage of a project or by setting guidelines for the work that is to be performed. Many Government departments and agencies already take steps to clarify the responsibility to act compatibly with the Charter in their agreements with non-State entities.

For example, Public Transport Victoria (PTV) provides public transport services through various operators, including Metro Trains Melbourne, Yarra Trams (Keolis Downer EDI) and V/Line. All operators must comply with the obligations imposed under the Charter as if they were a public body. Service delivery agreements with each of the operators include clauses on Charter compliance. In addition, each public transport operator has developed an Accessibility Action Plan outlining how it will comply with its legal responsibilities and broader objectives to achieve accessibility for all passengers.

The Victorian Public Sector Commission could prepare guidance on standard terms and conditions for inclusion in service agreements, contracts or arrangements that are entered into by the Victorian Government with external service providers.

Obligations on public authorities

The main purpose of the Charter is to protect and promote human rights in Victoria. It does this in several ways, one of the most important of which is by imposing an obligation on all public authorities to act and make decisions in a way that is compatible with human rights. Section 38(1) is one of the Charter's key provisions.

Section 38 plays an important role in ensuring that human rights are embedded into government policy and practice, and that human rights are respected on an everyday basis.

It must continue to be unlawful to act incompatibly with human rights and to fail to give proper consideration to human rights, although the consequences of unlawfulness are currently unclear.¹⁰⁵

Local laws and scrutiny of human rights impacts

Councils have power to make diverse laws for their local community however the Charter does not explicitly provide for scrutiny of human rights impacts of local laws. Local laws do not have the status of regulations, and do not entail the same scrutiny requirements. The Commission is of the view that making local laws constitutes an act or decision by a public authority, however a recent decision by the Full Court of the Federal Court has cast doubt over whether Councils are bound by section 38 when making local laws, as opposed to enacting them.

Kerrison v Melbourne City Council¹⁰⁶

In 2011, a protest movement occupied inner-city garden areas, in breach of a local law prohibiting camping and advertising in certain public places. Applicants brought a representative action in the Federal Court arguing, among other things, that the local law was incompatible with the rights to freedom of expression (section 15), peaceful assembly and association (section 16). On appeal, the Full Court found that:

- the Charter's compliance framework, which applies to regulations does not apply to local laws. The Victorian Parliament appeared to have made an express legislative choice to

¹⁰⁵ We are currently waiting on the decision in *Bare v Small* in the Court of Appeal which may clarify the consequences of s 38 unlawfulness.

¹⁰⁶ [2014] FCAFC 130

exempt local laws.¹⁰⁷ The *Subordinate Legislation Act 1994* requires a Member of Parliament to produce human rights certificates certifying whether a proposed statutory rule limits Charter rights but states that a legislative instrument does not include a local law.¹⁰⁸

- the requirement on public authorities in section 38(1) not ‘to act’ in a way that is incompatible with a human right is focused on conduct and does not apply to making local laws.¹⁰⁹
- the exception contained in section 38(2), where a public authority could not reasonably have acted differently because of a statutory provision suggests that section 38(1) is concerned with conduct under a provision and not the making of a provision itself.¹¹⁰

The *Kerrison* matter considered the question of whether the making of local laws is bound by section 38. Although the Federal Court found that section 38 did not apply to the making of local laws, instead capturing conduct engaged in pursuant to a local law, it is possible that a Victorian Court may reach a different conclusion. The Commission’s view is that section 38 does apply to local laws. Arguably, the question in Victoria whether section 38 applies to Councils making local laws is not yet settled. In the absence of a Victorian court making contrary findings about section 38, it would be helpful to confirm that Councils are bound to give proper consideration to relevant human rights when making local laws.

Individual community members should be able to refer to section 38 when raising issues of Charter incompatibility in situations where a local law may unreasonably limit their human rights, and councils should be explicitly required to consider human rights when they make local laws. There is no mechanism for scrutiny of the human rights implications raised by local laws. Nonetheless, the Commission notes the risk that a local law that was incompatible with human rights is likely to be beyond the power of the Act that permitted the regulation to be made.

In New Zealand, the New Zealand High Court (similar in status to an Australian supreme court) has held a local law to be invalid in the matter of *Schubert v Wanganui District Council*. In this case, a local law prohibited the display of gang insignia in public places and recreational areas, as a means of addressing public concern about the behaviour of gang members. A member of a Hells Angels motorcycle club applied for judicial review of the local law.

The High Court found that the law was invalid, partly because council did not consider the effect of the bylaw on the right to freedom of expression and also because it was beyond the power of the Act that permitted regulation of gang insignia.¹¹¹ The broad scope of prohibition on the public display of insignia was disproportionate. The Court found that, when making a bylaw, a Council needs to consider the significance of the right to freedom of expression. The New Zealand Centre for Human Rights noted that this case underlines the importance the courts place on regulatory authorities giving due consideration to the New Zealand *Bill of Rights Act 1990*.¹¹²

In the Commission’s view, to improve the human rights scrutiny of local laws, the Government should consider an amendment to section 119 of the *Local Government Act 1989*. This could require notice of a local law in the Government Gazette to take note of human rights issues raised, in addition to the purpose and general purport of the law. An amendment of this kind would enhance the accountability of local lawmakers for the types of conclusions they make about the applicability of human rights.

¹⁰⁷ [2014] FCAFC 130, para 184

¹⁰⁸ Section 12A(1), section 3, (definitions): legislative instrument means an instrument made under an Act or statutory rule that is of a legislative character but does not include (b) a local law made under Part 5 of the *Local Government Act 1989* and any other instrument made by a council under that Act.

¹⁰⁹ [2014] FCAFC 130, para 187.

¹¹⁰ [2014] FCAFC 130, para 189.

¹¹¹ [2011] NZAR 233, paras 97, 130, 167, 171 <<http://www.nzlii.org/nz/cases/NZHC/2011/48.html>>

¹¹² New Zealand Centre for Human Rights, *Law Policy and Practice Bulletin*, 18 December 2012 <<http://insider.thomsonreuters.co.nz/2012/12/centre-for-human-rights-law-policy-and-practice/>>

There is disparity among councils regarding how well they consider human rights when drafting and reviewing local laws. Some councils have reported that resourcing issues can impact their capacity to assess the human rights impact of local laws.¹¹³ It would be appropriate if councils can be better resourced to undertake human rights analysis of local laws.

Despite this, information provided by councils to Commission Charter Reports reflects that a number of Councils have taken the opportunity to strengthen human rights protections in local laws. Local Government Victoria has produced *Guidelines for Local Laws*, setting out a process to guide local councils developing local laws to consider the impact of the law on human rights as part of a Local Laws Community Impact Statement.¹¹⁴ Many Local Laws Community Impact Statements providing human rights analysis are available via the internet and the websites of local governments.

Some councils report that they have reviewed local laws in accordance with the guidelines. Changes to local laws prompted by human rights considerations have mainly related to participation in council meetings, focusing on increasing public access and strengthening council accountability to its constituency. For example, in 2012 Whittlesea City Council adopted the Procedural Matters Local Law, governing council meetings. This was amended to include provisions ensuring that people with disabilities can ask questions at council meetings.¹¹⁵ Boroondara City Council also reviewed its Meeting Procedure Local Law in 2011. Improvements were made to promote the right to freedom of expression and the right to participate in the conduct of public affairs.¹¹⁶

Councils routinely undertake a legislative review cycle. Under the Local Government Act, local laws are valid for ten years and must then be re-enacted. Some councils have incorporated a review of their local laws for Charter compatibility into their regular review process.¹¹⁷

These practices suggest that notwithstanding different economic environments, councils have capacity to consider human rights during the drafting or review of local laws.

Declaring entities not to be a public authority – a de facto ‘exemption’ provision?

The power to prescribe entities not to be public authorities for the purposes of the Charter (section 46(2)(b)) or when exercising certain functions (section 46(2)(c)) has in effect become an exemption provision. Currently, parole boards are declared in the regulations not to be public authorities. The effect of the latest 2013 regulations is to allow the parole boards to continue to operate without regard to the human rights protections afforded by the Charter until 2023. The Commission recommends that the parole boards exemption from the Charter should be removed (see discussion below) and that what has now become the ‘exemption provision’ also be removed from the Charter. This means removing section 4(1)(k) and amending section 46 to remove the power of the Governor in Council to make regulations prescribing entities not to be public authorities. If the power is retained, it should be used to provide clarity for entities by identifying those of their functions that clearly do not satisfy the functional public authority criteria.¹¹⁸

¹¹³ VEOHRC, *Rights in focus: Local government and the Charter of Human Rights and Responsibilities* (2012), p12

¹¹⁴ VEOHRC, *The Charter of Human Rights and Responsibilities: Local government and the operation of the Charter 2012*, p13, 14

¹¹⁵ VEOHRC, *Protecting us all: 2012 report on the operation of the Charter of Human Rights and Responsibilities*, p28

¹¹⁶ VEOHRC, *Rights in focus: 2011 report on the operation of the Charter of Human Rights and Responsibilities*, 33

¹¹⁷ Ibid.

¹¹⁸ Note, in 2011, the Commission recommended removing s 4(1)(k) and amending s 46 to remove the power of the Governor in Council to make regulations prescribing entities not to be public authorities (2011, Rec 43).

Application of the Charter to Parole Boards (section 4(1)(k))

The Charter provides a fair, effective and transparent framework for decision-making by all public authorities. The Adult Parole Board, Youth Parole Board and Youth Residential Board should have their exemption from the Charter removed.

Section 46 of the Charter provides the Governor in Council with the power to make regulations prescribing entities not to be public authorities in sub-sections 46(2)(b) and (c). The Adult Parole Board, Youth Parole Board and Youth Residential Board¹¹⁹ (Parole Boards) are the only entities that have been declared by regulations not to be public authorities for the purposes of the Charter. The Parole Boards are also excluded by law from being bound by the principles of natural justice.¹²⁰

The Parole Boards were first exempted from the Charter by regulations passed in 2007. The exemptions allowed the Parole Boards an extended time to prepare themselves for Charter compliance before they were legally bound to act compatibly with human rights and to give proper consideration to human rights in making decisions. The most recent exemption renewal made in 2013 will remain in force for 10 years (the maximum period possible).¹²¹

The principles of natural justice (also known as rules of procedural fairness) include the notions that a decision-maker must inform a person of the case against them and provide an opportunity to be heard, and that the decision-maker must be impartial. The same benefits could be said of the right to a fair hearing in section 24 of the Charter. As has been acknowledged by the Adult Parole Board,¹²² the main impact that Charter compliance will have on the Parole Boards is the need to provide a right to a fair hearing. The exclusion of the principles of natural justice in Victoria is in breach of the right to a fair hearing in section 24 of the Charter and should also be removed.

Other human rights of parolees that are potentially relevant include the right to liberty and security in section 21, the right to freedom of movement in section 12, the right to privacy and reputation in section 13, the right not to be subjected to compulsory medical treatment in section 10(c), and the rights of children in sections 17 and 23 of the Charter. At the same time, these rights must be balanced against other people's rights, including victims of crime and the general public.

The Commission acknowledges that the important functions performed by the Parole Boards in Victoria engage complex human rights considerations, particularly given the significance of parole to a person's liberty, the critical importance of public safety objectives and the rights of all other persons affected by parole decisions. However, while the work of the Parole Boards is complex and sensitive, the same can be said for the functions of many other public authorities that have been required to comply with the Charter since 1 January 2008.

The application of the Charter to the work of Parole Boards does not mean that the human rights of parolees will be elevated over and above public safety objectives and the rights of others. The human rights of parolees may be limited where it is reasonable and demonstrably justified to do so. The human rights of other persons which will be relevant include those of victims of crime, such as the right to life in section 9 of the Charter.¹²³ At present, the Parole Boards are not obliged to consider or act compatibly with the human rights of victims when exercising the Parole Boards' functions, duties and powers.

Parole Boards in other jurisdictions with human rights laws have achieved or are committed to achieving better human rights protections in their parole systems.¹²⁴ The measures taken

¹¹⁹ The Youth Residential Board will be abolished by the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic), s 154. That provision has yet to come into force.

¹²⁰ See, for example, *Corrections Act 1986* (Vic), s 69(2).

¹²¹ *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013*.

¹²² See Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 102-103.

¹²³ See Jeremy Gans et al, *Criminal Process and Human Rights* (2011) 91.

¹²⁴ In the ACT, the Sentence Administration Board must exercise its parole functions in a way that respects and protects the offender's human rights and observe natural justice. The UK has

in other jurisdictions show that incorporating human rights considerations into the parole system, such as the right to a fair hearing, is quite feasible and does not lead to the system being undermined. Parole systems have arguably changed for the better following the enactment of human rights laws in those jurisdictions,¹²⁵ with fairness as the common touchstone.

established a project to examine what changes are needed to parole following a significant judgement in *Osborn, Booth & Reilly v The Parole Board* [2013] UKSC 61. See <https://www.gov.uk/government/collections/parole-review-changes-in-reponse-to-the-osborn-judgment>. In New Zealand, the Parole Board must hold a hearing and give notice to the offender, and ensure that information on which it will make its decision is made available to the offender before the hearing. In Canada, parole is governed by guiding principles including making decisions that are 'consistent with the protection of society' and that 'are limited to only what is necessary and proportionate to the purpose' of parole; and providing offenders with relevant information, reasons for decisions and access to the review of decisions in order to 'ensure a fair and understandable' parole process: *Corrections and Conditional Release Act 1992*, s 101.

¹²⁵ Bronwyn Naylor and Johannes Schmidt, 'Do Prisoners Have a Right to Fairness Before the Parole Board?' (2010) 32(3) *Sydney Law Review* 437, 456.

7. Remedies

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

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

See also the discussion on complaints on p16.

The current remedies provision in section 39 of the Charter is inaccessible and inadequate. There is a need to ensure that the Charter achieves its purpose to protect and promote human rights and to create certainty for public authorities and the community in relation to the legal consequences of a breach of the Charter.

Having enforceable remedies would create that certainty and encourage a culture of valuing human rights in Victoria's public sector by compelling public authorities to amend their practices to ensure acts and decisions respect the rights of people affected by their actions and decisions. This could have a significant impact on the lives of people in Victoria by preventing human rights infringements from occurring.

Terms of Reference 2(b)

Recommendation 18

The Charter should be amended to provide a direct right of action in the Victorian Civil and Administrative Tribunal as an accessible, low cost jurisdiction, in respect of a complaint that a public authority has breached section 38 of the Charter. Where the Tribunal finds that a public authority has contravened section 38 of the Charter, it should be able to make a range of orders, including where appropriate, compensation for loss, damage or injury suffered in consequence of a contravention.

See also Recommendation 1 (above) – A person should have the option of bringing their dispute to the Commission for alternative dispute resolution prior to applying to the Tribunal.

Recommendation 19

The Charter should be amended to clarify that unlawfulness under section 38 of the Charter can be the sole ground upon which a person can seek judicial review of an administrative decision in the Supreme Court. Administrative law remedies include injunctive relief, declaratory relief, mandamus and certiorari.

Remedies provision: uncertainties and barriers

Currently, if a person wishes to bring legal proceedings on a ground of unlawfulness arising under the Charter, they must show a cause of action on another ground of unlawfulness in respect of the same act or decision of the public authority. This is set out in the complicated provision of section 39 of the Charter.

Section 38 sets out the obligations on public authorities under the Charter. Section 39 governs where a person can seek relief or remedy for a breach of section 38 in legal proceedings. It only enables a person to seek relief or remedy for an unlawful act or decision (a breach of section 38) where they have an existing proceeding against a public authority. It does not identify what type of relief or remedy is available for a breach of the Charter but specifically excludes an award of damages. The Charter does not enable a person to bring an independent action against a public authority on the basis of a breach of the Charter. It does not provide for a dispute resolution process for a person who claims that a public authority has breached section 38.

Some of the key uncertainties and barriers posed by section 39 of the Charter that have arisen in court and tribunal cases are:

- Section 39 is difficult to use and difficult to apply
- The need to attach a Charter claim to another claim significantly reduces the ability for individuals to obtain effective relief
- The jurisdiction of VCAT to consider Charter claims is limited
- There is no entitlement to damages

Section 39 is difficult to use and difficult to apply

The drafting of section 39 has created challenges:

- for people who wish to challenge an act or decision where it breaches the Charter and/or seek redress where their human rights have been infringed;
- for public authorities who wish to understand the legal consequences of an act or decision that breaches the Charter; and
- for courts and tribunals determining legal proceedings that raise the Charter.

Currently, if a person wishes to bring legal proceedings on a ground of unlawfulness arising under the Charter, they must show a cause of action on another ground before they can argue for a remedy for a public authority acting incompatibly or a failure of the public authority to consider their human rights. This is set out in section 39. The Court of Appeal has summarised the difficulties of section 39 as follows:

Section 38(1) of the Charter... imposes an obligation upon public authorities to comply with human rights. Regrettably, it does not specify what consequences, if any, are to flow from a breach of that obligation. The Charter does not create a cause of action for breach. Section 39, loosely described as the ‘remedies provision’, is drafted in terms that are convoluted and extraordinarily difficult to follow.¹²⁶

The Charter’s provisions on the obligations on public authorities, what a person can do if they believe the obligations have been breached, and the appropriate relief or remedy where a court or tribunal determines the obligations have been breached, do not meet community needs for a system that is simple to use and navigate.

The need to attach a Charter claim to another claim significantly reduces the ability for individuals to obtain effective relief

The section 39(1) condition requires a person to be able to seek relief or remedy on the ground that an act or decision of a public authority was unlawful on a non-Charter ground in order to seek the same relief or remedy for a breach of section 38 of the Charter. The need to attach a Charter claim to another claim can significantly reduce the ability for individuals to obtain effective relief.

The Supreme Court in *Goode v Common Equity Housing* [2014] VSC 585 (‘Goode’), while confirming VCAT’s jurisdiction to consider breaches of section 38 in certain proceedings, held that section 39(1) only permits relief or remedy on grounds of Charter unlawfulness to be granted in respect of the act or decision for which relief or remedy was sought on grounds of non-Charter unlawfulness. In other words, the act or decision for the Charter claim must be the same as that which is the subject of the non-Charter claim.

In making this finding, the Court observed at [45] that: “Section 39(1) was not intended to create a new cause of action based on Charter unlawfulness (however desirable that might have been). ... The provision was not designed to enable a person to seek relief or remedy on grounds of Charter unlawfulness with respect to acts or decisions not falling within the

¹²⁶ *Director of Housing v Sudi* at [214], (Weinberg J).

independent entitlement of the person to seek relief or remedy on grounds of non- Charter unlawfulness.”

This condition has been considered in VCAT’s Human Rights List in the following proceedings where people have raised a claim that a public authority has breached section 38 in an action claiming a contravention of the *Equal Opportunity Act 2010*.

In *RW v State of Victoria (Human Rights)* [2015] VCAT 266, VCAT held it was unable to consider the matters relating to alleged breaches of the Charter (allegations of the use of restraint and seclusion in a school) where they were not the subject matter of the alleged discrimination claim in the proceeding (allegations of disability discrimination in education). VCAT dismissed the allegations of disability discrimination in education under to the Equal Opportunity Act but held it was unable to consider the matters relating to alleged breaches of the Charter where they were not the subject of the discrimination claim.

Although the Commission (intervening) made submissions that VCAT was able to consider the alleged Charter breaches, VCAT held that it did not have jurisdiction to consider the allegations of restraint and seclusion in breach of section 38 of the Charter because those allegations had not been challenged as unlawful on a ground other than the Charter. VCAT relied on the Supreme Court’s decision in *Goode* in reaching this conclusion.

RW v State of Victoria demonstrates how the requirement to attach a Charter claim to another claim can remove the the ability for individuals to have alleged breaches of section 38 considered and potentially obtain relief for a breach of section 38.

There are examples where people have successfully attached a Charter claim to a claim under the Equal Opportunity Act where it has related to the conduct which is the subject of the Equal Opportunity Act claim.

- *Slattery v Manningham CC (Human Rights)* [2014] VCAT 1442 and [2013] VCAT 1869. These cases involved a claim that Manningham City Council breached the Equal Opportunity Act and the Charter. Both claims were successful. VCAT held that a decision of the local council to maintain a declaration prohibiting Mr Slattery from attending buildings owned, occupied or managed by the council was discrimination in breach of the Equal Opportunity Act and a breach of section 38 of the Charter because it was incompatible with Mr Slattery’s rights to equality, to freedom of expression and to participate in public affairs.
- *Kuyken v Lay (Human Rights)* [2013] VCAT 1972. This involved a claim that a decision by Victoria Police to introduce and enforce a new grooming standard was discriminatory in breach of the Equal Opportunity Act and incompatible with the right to freedom of expression in breach of the Charter. Both claims were unsuccessful. Unlike *RW v State of Victoria*, VCAT held that it had jurisdiction to consider the Charter claim because it related to the same decision that was the subject of the direct challenge brought before it under the Equal Opportunity Act. The Charter claim failed because VCAT held that the new grooming standard was not incompatible with the right to freedom of expression and therefore the decision was not unlawful under the Charter.
- *McAdam v Victoria University & Ors* [2010] VCAT 1429 and *McAdam v Victoria University (Anti-Discrimination)* [2011] VCAT 1262. This involved a claim that the University (which did not dispute whether it was a public authority under the Charter), breached the Equal Opportunity Act and the Charter in its provision of educational services to Ms McAdam. VCAT held that it had jurisdiction to consider the alleged breach of the Charter in the proceedings. However, VCAT ultimately found that the alleged breaches of the Equal Opportunity Act and the Charter were not proven and the claim was dismissed.

Section 39 has also been considered in VCAT’s Health and Privacy List, in an information privacy complaint in *Caripis v Victoria Police (Health and Privacy)* [2012] VCAT 1472. *Caripis* involved a claim that Victoria Police had breached the *Information Privacy Act 2000* and the Charter by retaining images of her in film and photographs that were taken during a protest at Hazelwood power station. VCAT considered it did have jurisdiction to consider the alleged

breach of the Charter in the proceedings.¹²⁷ However, no Charter unlawfulness was found on the basis that retaining the protest footage was not incompatible with human rights and that in any event Victoria Police could not reasonably have made a different decision because retention of the footage was required by the *Public Records Act 1973*.

Some Supreme Court decisions have provided some clarity on the operation of the requirement to attach a Charter claim to a non-Charter claim operates:

- The Supreme Court has held that the condition in section 39(1) to have a right independent of the Charter to seek relief or remedy for a breach of section 38 does not require the independent non-Charter ground to be successful or determined. (See decisions in *Patrick's Case* ('*Patrick's Case*'), *DPP v De Bono* [2013] VSC 407 ('*De Bono*'), *Goode and Burgess v Director of Housing* [2014] VSC 648 ('*Burgess*').)
- The Supreme Court has held that the condition in section 39(1) is not restricted to a ground in a judicial review action. It can also be an additional claim of unlawfulness in an action against a public authority alleging unlawfulness contrary to a law other than the Charter. The section 39(1) condition can be satisfied in judicial review proceedings in the Supreme Court (see, for example, *Patrick's Case*) and in court and tribunal proceedings otherwise challenging the lawfulness of a public authority's act or decision (see, for example, *Goode* and also the VCAT decisions above of *Slattery, Kuyken, McAdam and Caripis*).

However despite some guidance emerging in the case law on how the condition operates, the need to attach a Charter claim to another claim significantly narrows the opportunity for individuals to seek relief for alleged Charter breaches.

The jurisdiction of VCAT to consider Charter claims is limited

The jurisdiction of VCAT to consider Charter claims is particularly limited, despite being the most expeditious and cost effective forum for determining disputes over rights and obligations.

Impact of the Sudi decision

In *Director of Housing v Sudi* (2011) 33 VR 559, the Court of Appeal found that VCAT did not have jurisdiction to consider whether the Director of Housing had breached section 38 of the Charter in seeking an order for possession of Mr Sudi's home under the *Residential Tenancies Act 1997*.

Mr Sudi had sought to defend the application for possession on the basis that the decision was incompatible with his right not to have his home arbitrarily interfered with under the Charter.

VCAT held that it had jurisdiction to consider the breach of section 38 because it had jurisdiction to determine whether the Director's application was made lawfully and was valid. VCAT is created by statute and only has powers that are given to it by statute. Under the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act), VCAT has two types of jurisdiction: original jurisdiction and review jurisdiction (see section 40). The original jurisdiction is invoked by a person who is entitled under an enabling act to apply to VCAT, where an act allows for a matter to be referred to VCAT or otherwise permits VCAT to consider it (see VCAT Act, Division 2 of Part 2). Review jurisdiction is conferred on VCAT by an enabling act giving VCAT power to review a decision made by a decision-maker (see VCAT Act, Division 3 of Part 3). In considering the Director's application to the Tribunal for possession of the premises under the *Residential Tenancies Act 1997*, VCAT was acting in its original jurisdiction.

On appeal, the Court of Appeal held that the question of the lawfulness of the Director's decision to apply for a possession order was collateral to the questions in the possession proceeding. The Court held that VCAT did not have original jurisdiction to determine a question of law by way of judicial or collateral review and nor did section 39(1) grant VCAT a

¹²⁷ *Caripis v Victoria Police (Health and Privacy)* [2012] VCAT 1472, [100].

basis for review outside of its ordinary jurisdiction. The Court held that neither the VCAT Act, the *Residential Tenancies Act 1997* nor section 39 of the Charter enabled VCAT to undertake a collateral review of the Director's decision to apply for a possession order. Therefore, VCAT had no jurisdiction to consider whether the Director had breached section 38 of the Charter.

The practical impact of this decision is that it prevents a person from raising a public authority's breach of the Charter as a defence in proceedings brought by the decision-maker to enforce the decision affecting them.¹²⁸ Such as in *Sudi*, where in proceedings against Mr Sudi for possession of his home under the Residential Tenancies Act, Mr Sudi sought to argue the possession order should not be granted on the basis that the decision to apply for the possession order was in breach of the Charter. Instead, in such circumstances a person must challenge the decision on the basis it breached the Charter by making an application for a judicial review of the decision in the Supreme Court.

The *Sudi* decision significantly restricts the ability of people to raise a breach of section 38 in VCAT proceedings where the lawfulness of the public authority's decision is collateral to (not the direct subject of) that proceeding. For tenants, it means having to go to the Supreme Court to challenge eviction decisions on Charter grounds, which is complex and costly and beyond the reach of most public housing tenants.

In *Burgess*, such a case was run in the Supreme Court. This was also in the context of a person seeking to assert their human rights to challenge a decision to evict them from public housing. In *Burgess*, the Supreme Court found that the Director of Housing had failed to take into account the rights of the tenant and her son to protection of the family unit and the best interests of children under the Charter when deciding to issue a notice to vacate and to apply for a warrant of possession.

However, the Court held that it could not make an order granting the remedy to set aside the decision to issue the notice to vacate because the decision was of no legal effect once VCAT had made a possession order. In practice, this means the window of time that tenants have to enforce their human rights when facing eviction is even narrower. They either make their challenge after the Director has made the decision to issue the notice to vacate but before VCAT has made a possession order, or after the Director has made a decision to purchase a warrant.

This example demonstrates the complexity involved for a person in navigating in what circumstances, at what time and how they can challenge the decision of a public authority claimed to be a breach of section 38.

While it is important that judicial review is available as a means to challenge a decision because it is unlawful under the Charter, it is inadequate that this is the only means to do so in such cases, particularly given the cost and time associated with doing so. The Charter should also enable a person to rely on the fact that a public authority has acted in breach of the Charter to provide a defence in legal proceedings against a person where their human rights have been infringed or have not been properly considered. In some circumstances it may also be impracticable or impossible to seek judicial review of a decision (and obtain an appropriate remedy) due to the operation of the legislative scheme under which the decision is made.

Chilling effect of Sudi

Beyond the legal consequences of the *Sudi* decision on how a person can seek redress for a Charter breach in Victoria's courts and tribunals, the *Sudi* decision has had a significant chilling effect on the use of the Charter. Following the decision, in the exercise of its education function and in the training of public authorities and other entities, the Commission heard that a number of public authorities believed that *Sudi* meant a person could no longer raise an alleged breach of section 38 in any VCAT proceeding at all. Further, the Court of

¹²⁸ See M Narayan, 'Creature of Statute, Beast of Burden: The VCAT and the Heavy Lifting of Human Rights' *AIAL Forum No 68* (2011) at p 9, which discusses approaches to challenging an administrative decision and using the Charter as a 'shield' and a 'sword'.

Appeal's decision is complex and difficult to understand and the Commission is concerned that it may have deterred people from relying on the Charter in legal proceedings.

It is also important to recognise the impact, and potential chilling effect, of Victorian Charter jurisprudence on the development of human rights law in other jurisdictions. For example, the *Sudi* decision has been referred to in proceedings in the ACT raising the ACT Human Rights Act to argue that ACT Civil and Administrative Tribunal (ACAT) has no power to enquire whether a decision of the ACT Commissioner for Social Housing to apply for a termination of tenancy complied with the Human Rights Act. There have been conflicting approaches to whether *Sudi* is followed. In at least one case, ACAT considered the implication of *Sudi* meant that a person would have to start proceedings in the Supreme Court to contest an eviction on human rights grounds,¹²⁹ whereas in another, ACAT did not accept this argument based on the different wording of the ACT remedies provision.¹³⁰

No entitlement to damages

The Charter currently provides that a person is not entitled to be awarded any damages because of a breach of the Charter.

In *Slattery v Manningham CC* [2014] VCAT 1442, in accordance with section 39 of the Charter, the Applicant sought the same relief or remedy that was available in his non-Charter action for a breach of the Equal Opportunity Act 2010 under section 125 of the Act.¹³¹ By way of remedy for the breaches of the Act (that the council decision to ban the Applicant from all council buildings was unlawful discrimination) and the Charter (that the decision was incompatible with the human rights to freedom from discrimination (section 8), freedom of expression (section 15) and the right to participate in public life (section 18)), VCAT:

- Ordered the Council revoke the declaration prohibiting the applicant from attending any building that is owned, occupied or managed by the Council
- Ordered the Council provide training on the Charter and local government for its councillors, CEO and Directors,
- Ordered Council pay the applicant \$14,000, and

¹²⁹ *Thorntwaite and Commissioner for Social Housing (Residential Tenancies)* [2012] ACAT 11, see at [24]: "Given that VCAT is building up probably more jurisprudence than we are at ACAT at present (VCAT's population base is, after all, over 15 times that of the ACT.), it is certainly an authority which I intend to follow and I accept the Director of Housing v *Sudi* as being the latest and definitive view in terms of its interpretation of the Human Rights Act of the ACT."

¹³⁰ *Commissioner for Social Housing in the ACT v Pearce (Residential Tenancies)* [2014] ACAT 19, [12]. However, the Tribunal did not accept this submission (see [21]-[24]). The Tribunal said s 40C(2)(b) of the *Human Rights Act 2004* allows 'a victim of any unlawful act by a public authority to rely on human rights as part of any other legal proceeding in a court or tribunal'. The Tribunal said this would have allowed the individual to seek relief from termination of the tenancy by making an argument relying on the right to privacy, family and home.

¹³¹ Section 125 of the *Equal Opportunity Act 2010* states: What may the Tribunal decide? After hearing the evidence and representations that the parties to an application desire to adduce or make, the Tribunal may—

- (a) find that a person has contravened a provision of Part 4, 6 or 7 and make any one or more of the following orders—
 - (i) order that the person refrain from committing any further contravention of this Act;
 - (ii) an order that the person pay to the applicant, within a specified period, an amount the Tribunal thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the contravention;
 - (iii) an order that the person do anything specified in the order with a view to redressing any loss, damage or injury suffered by the applicant as a result of the contravention; or
- (b) find that a person has contravened a provision of Part 4, 6 or 7 but decline to take any further action; or
- (c) find that a person has not contravened a provision of Part 4, 6 or 7 and make an order that the application or part of the application be dismissed.

- Declared that the Council breached the Applicant's human rights under sections 18, 15 and 8 of the Charter, by maintaining the ban that prohibited the Applicant from attending any building that is owned, occupied or managed by the Respondent.

Because the Charter's remedies provisions exclude an award of damages for Charter unlawfulness, the Tribunal was only able to award compensation in relation to the finding of unlawful discrimination in breach of the Equal Opportunity Act. However, had there been a finding that the Council's conduct had breached the Charter but not the Equal Opportunity Act, the Tribunal would have been unable to award compensation to the Applicant. The Commission considers this is unsatisfactory. While non-monetary remedies will be sufficient to remedy a breach of the Charter in some cases, in others compensation is necessary to provide an effective remedy where a person's human rights have been infringed (see further below).

Resolving problems with the current remedies provision

The problems with the current remedies provision should be resolved by amending the Charter to provide for a direct right of action in VCAT, as an accessible low cost forum, in respect of a complaint that a public authority has breached section 38 of the Charter. As with the process under the Equal Opportunity Act the Charter should provide the option of first resolving the complaint through the Commission's alternative dispute resolution service. VCAT should be able to make a range of orders, including to compensate an individual for loss, damage or injury suffered as a result of a Charter breach.

Charter unlawfulness could still be raised in judicial review proceedings where appropriate, including as a sole ground of judicial review. Charter unlawfulness must also be able to be raised in other legal proceedings where appropriate.

Direct and freestanding right of action in VCAT

The duty in section 38 of the Charter should be enforceable through a direct right of action against public authorities. Raising a breach of the Charter in legal proceedings should not need to be ancillary to an existing cause of action. The Commission believes the most accessible forum to determine questions of a breach of the Charter and the remedy to address that breach is VCAT.

To the extent there is any concern about the appropriateness of VCAT to consider certain breaches of section 38, the existing powers of VCAT to manage applications should be taken into account. For example, a judicial member of VCAT has powers under the VCAT Act at any time make an order striking out all or part of a proceeding if it considers that the subject-matter of the proceeding would be more appropriately dealt with by a tribunal (other than VCAT), a court or any other person or body (VCAT Act, section 77(1)). It may also refer the matter to the relevant tribunal, court or other person or body where it considers appropriate to do so (section 77(3)). With consent of the President of VCAT, VCAT may also refer any question of law arising in a proceeding to the Supreme Court or the Court of Appeal for decision (VCAT Act, section 96(1)) on an application of a party or on the Tribunal's own initiative.

If a person does apply to VCAT, after hearing the evidence and representations that the parties make, VCAT should be able to make a finding on whether a public authority has contravened section 38 of the Charter or not.

VCAT should be able to grant remedies to give effect to and vindicate the human rights in the Charter. Where VCAT finds that a public authority has contravened section 38 of the Charter, VCAT should be able to make a range of orders designed to:

- ensure that the public authority refrains from committing any further contravention

- redress any loss, damage or injury suffered by the applicant as a result of the contravention (for example, an order for human rights education and training¹³²)
- compensate the applicant for loss, damage or injury suffered in consequence of the contravention, where appropriate.

In accordance with its general powers under the VCAT Act, VCAT has additional powers to grant injunctions and make declarations.

Comparative freestanding right of action in the ACT

Since 1 January 2009, the ACT Human Rights Act has placed express substantive and procedural obligations on public authorities similar to section 38 of the Charter (in ACT Human Rights Act, section 40B) made enforceable through a direct right of action in the Supreme Court, which may grant any remedy other than damages (ACT Human Rights Act, section 40C). This amendment was intended to provide a more direct avenue for people aggrieved by a breach of their human rights. The 12-month review into the ACT Human Rights Act considered that the provisions would strengthen the human rights culture in the ACT, and would increase compliance with human rights by government officials.¹³³ Chief Justice Merrell has commented extrajudicially that to the extent the ACT provision is a simplification of Victoria's section 39, it is to be welcomed.¹³⁴

Effective remedies and an entitlement to damages

Where there is a finding that a public authority has contravened section 38 of the Charter, a court or tribunal should be able to make a range of orders including, where appropriate, compensation for loss, damage or injury suffered in consequence of a contravention.

Although non-monetary orders may in many cases provide an effective remedy for a breach of human rights obligations by a public authority,¹³⁵ this may not always be the case. For example, an award of compensation may be the only effective remedy for a past breach of human rights.¹³⁶

Awards of damages are available for human rights breaches in jurisdictions with comparative statutory human rights acts, including in New Zealand and the United Kingdom. In the ACT, compensation is available for violations of certain rights.

The experience in the United Kingdom and New Zealand is that even where monetary relief is available, damages are awarded in limited circumstances.

In New Zealand, although the *Bill of Rights Act 1990* (NZ) does not set out available remedies for human rights breaches, the New Zealand courts have found damages to be a just and appropriate remedy for human rights infringements.¹³⁷ However, Chief Justice Elias CJ has observed that the number of cases where damages have been sought against the State since 1994 is small, "suggesting that early predictions of a flood of claims to vex the

¹³² See for example, *Slattery v Manningham CC (Human Rights)* [2014] VCAT 1442, where the applicant sought the same relief or remedy that was available in his non-Charter action for breach of the *Equal Opportunity Act 2010* under s 125 of the *Equal Opportunity Act 2010*. The orders included training on the Charter.

¹³³ The ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation A Report to the Department of Justice and Community Safety* (2009), 51.

¹³⁴ Speech by Chief Justice Helen Murrell "ACT Human Rights Act – A Judicial Perspective" *Conference on the Tenth Anniversary of the ACT Human Rights Act* (1 July 2014), 6.

¹³⁵ Such as the remedies available by way of seeking judicial review of a decision may be appropriate (injunctive relief, declaratory relief, mandamus, certiorari) and those remedies noted in s 39(2)(b) of the Charter of "a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence" because of a Charter breach. See also *Slattery v Manningham City Council* [2014] VCAT 1442, in which VCAT made an order that the local council provide human rights training for its Councillors, CEO and Directors in addition to a declaration of the Charter breach.

¹³⁶ See Watchirs and McKinnon, 'Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia' (2010) 33(1) *UNSW Law Journal* 136, 158.

¹³⁷ See *Taunoa v Attorney-General* [2008] 1 NZLR 429 and *Attorney-General v Chapman* [2011] NZSC 110 (16 September 2011).

administration of justice are well astray, as such predictions usually are.”¹³⁸ What amounts to an effective remedy for a breach of the New Zealand Bill of Rights Act was summarised by Chief Justice Elias in *Attorney-General v Chapman*:¹³⁹

What is effective remedy for Bill of Rights breach [sic] differs according to the particular breach and its circumstances. To date, the remedies ordered in New Zealand have included exclusion of evidence,¹⁴⁰ stay of proceedings,¹⁴¹ directions to administrative and judicial bodies,¹⁴² development of the common law to achieve consistency with the Bill of Rights Act,¹⁴³ and damages.¹⁴⁴ In large part such remedies have been adapted for the enforcement and protection of rights from “[t]he ordinary range of remedies”¹⁴⁵ But the courts have recognised that the Act requires “development of the law when necessary” by the courts if they are not to fail in the duty to give a remedy where rights have been infringed.¹⁴⁶

In the United Kingdom, where a court finds that any act or proposed act of a public authority is unlawful under the *Human Rights Act 1998* (UK) it ‘may grant such relief or remedy, or make such an order, within its powers as it considers just and appropriate’.¹⁴⁷ This includes damages, however only where the court is satisfied the award of damages “is necessary to afford just satisfaction to the person in whose favour it is made”.¹⁴⁸ The Act directs the court to take into account the principles applied by the European Court of Human Rights in relation to awards of compensation under the Convention,¹⁴⁹ which has involved the courts looking to the European Court’s decisions for precedents on the levels of compensation awarded for equivalent human rights breaches.¹⁵⁰

Taking into account the intention of human rights claims “to uphold minimum human rights standards and to vindicate those rights”, the UK courts have considered that:

“The remedy of damages generally plays a less prominent role in actions based on breaches of articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages. Where an infringement of an individual’s human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance.”¹⁵¹

¹³⁸ *Attorney-General v Chapman* [2011] NZSC 110 (16 September 2011), [5]. Note that 1994 is when the New Zealand Court of Appeal first recognised a public law claim for damages against the state for a breach of the New Zealand Bill of Rights Act.

¹³⁹ [2011] NZSC 110 (16 September 2011), [2].

¹⁴⁰ See, for example, *R v Te Kira* [1993] 3 NZLR 257 (CA).

¹⁴¹ See, for example, *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA).

¹⁴² As in *Bakker v District Court at Te Awamutu* HC Hamilton CP35/99, 6 August 1999 per Tompkins J.

¹⁴³ See *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [111] per Gault P and Blanchard J and at [229] per Tipping J.

¹⁴⁴ See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

¹⁴⁵ *Simpson v Attorney-General* (Baigent’s case) [1994] 3 NZLR 667 (CA) at 676.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Human Rights Act 1998* (UK), s 8(1).

¹⁴⁸ *Human Rights Act 1998* (UK), s 8(3).

¹⁴⁹ *Human Rights Act 1998* (UK), s 8(4).

¹⁵⁰ *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, [19].

¹⁵¹ This statement of the UK Court of Appeal in *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 at [52]-[53] was approved by Lord Bingham in *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 at [9]. *R (Greenfield)* is the leading UK case on the remedy of damages under s 8 of the *Human Rights Act 1998* (UK). Recent UK Supreme Court cases following *R (Greenfield)* are *Rabone & Anor v Pennine Care NHS Foundation* [2012] UKSC 2 (see at [82]) and *Faulkner, R (on the application of) v Secretary of State for Justice & Anor* [2013] UKSC (see at [26]).

While the ACT Human Rights Act excludes damages as a general remedy,¹⁵² two provisions in the Act include a right to compensation. Section 18(7) provides for compensation for a breach of the right not to be subjected to arbitrary arrest or detention.¹⁵³ This is based on Article 9(5) of the *International Covenant on Civil and Political Rights* ('ICCPR'), which states: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Section 23(2) provides a right to compensation for wrongful conviction, which is based on Article 14(6) of the ICCPR. The Commission is only aware of one case, *Morro v Australian Capital Territory* [2009] ACTSC 118, where compensation has been awarded under these provisions.

Judicial review

The availability of judicial review (under both the *Administrative Law Act 1978* or Order 56 of Ch 1 of the Supreme Court Rules) remains an important avenue by which people can seek relief or remedy in respect of a public authority's decision that infringes human rights or fails to give proper consideration to human rights. It enables the Supreme Court to grant a range of remedies such as injunctive relief, declaratory relief (which may be an important and appropriate vindication for the person in certain circumstances),¹⁵⁴ mandamus and certiorari.

Judicial review should be available in respect of decisions where the sole ground of review is that the public authority's decision is incompatible with human rights or failed to give proper consideration to human rights. A person should not require a non-Charter related ground of review to be able to challenge a public authority's decision. A breach of the Charter should be sufficient.

Judicial review should not be the only available recourse to challenge a public authority on the basis that its conduct is in breach of section 38. Less formal avenues of resolving a dispute between a person and a public authority will often be appropriate, such as through an alternative dispute resolution process or in VCAT, as discussed above. Bringing proceedings in the Supreme Court can be costly and can make seeking redress for human rights breaches impossible for many people.

An unresolved question is whether section 39(1) allows a person to raise a breach of section 38 as the only ground of review in a judicial review proceeding. Another related question is whether a person needs to bring a cause of action on a non-Charter basis to raise Charter unlawfulness or whether they only need to show that the decision would be amenable to challenge on a ground of unlawfulness outside of the Charter.

In *Kerrison v Melbourne City Council* [2014] FCAFC 130 at [148] the Full Federal Court (Flick Jagot and Mortimer JJ) observed that the condition in section 39(1) may not require a person to actually bring a cause of action independent to the Charter unlawfulness:

"In section 39, the Charter contains a restriction on the bringing of "freestanding" challenges to, amongst other things, the conduct of a public authority, requiring that any challenge also be at least amenable to a challenge to its lawfulness on a basis outside the Charter. It may be that such a challenge also needs in fact to be brought, however that debate about the construction of section 39 need not be determined in this proceeding."

Some commentators have suggested that the section 39(1) condition allows a Charter breach to be a sole ground of judicial review. That is, the condition may only require that a

¹⁵² Section 40C(4) of the *Human Rights Act 2004* (ACT) states 'The Supreme Court may, in a proceeding under subsection (2) grant the relief it considers appropriate except damages.'

¹⁵³ The ACT Supreme Court confirmed that s 18(7) confers a statutory right to compensation in *Morro v Australian Capital Territory* [2009] ACTSC 118.

¹⁵⁴ Declaratory relief has also been recognised as important in VCAT proceedings where a breach of the Charter has been found: see *Kracke v Mental Health Review Board (General)* [2009] VCAT 646, where a declaration was granted in relation to a Charter breach. Justice Bell (then President of VCAT) stated at [820]: 'Where human rights are breached, both the individual and society have a strong interest in the remedy of a declaration, in which inheres their final vindication.'

form of relief or remedy would have been available had the public authority acted unlawfully under some non-Charter law and that it does not matter whether, in the circumstances of the particular case, the person in fact has such a claim.¹⁵⁵ Another approach is that a non-Charter ground must be of sufficient merit to survive a strike out application to satisfy the condition in section 39(1).¹⁵⁶

Ambiguity in section 39(2)

The wording in section 39(2) that section 39 does not “affect” any right is unclear. The Explanatory Memorandum adds some clarity by stating that the Charter ‘does not displace a person’s right to seek any remedy in respect of an act or decision of a public authority, including the right to seek judicial review, a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.’

The reference to the remedies in this section – the right to seek judicial review, a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence – suggests these are indicative of the remedies Parliament contemplated a person may be able to seek on a Charter ground of unlawfulness by adding Charter unlawfulness as a further ground in the cause of action for such a remedy. It is important that the Charter enables a person to seek this range of relief and remedies under the Charter on the basis of Charter unlawfulness and that these remedies should be available for Charter unlawfulness, however the effect of section 39(2) is not entirely clear.

Clear provisions on both the obligations of public authorities to respect and consider human rights *and* on meaningful and enforceable remedies available for non-compliance would better ensure that public authorities can comply with their obligations and understand the consequences of non-compliance.

Clear provisions on how to seek a remedy where a public authority breaches the Charter’s obligations and the remedies available would improve human rights outcomes in practice.

Relying on Charter unlawfulness in other proceedings

Individuals should continue to be able to rely on Charter unlawfulness in actions brought against public authorities on the basis of non-Charter unlawfulness or in proceedings brought against them.

For example, in the tenancy context, where the Director of Housing seeks to evict a person by making an application to VCAT for a possession order, a person should be able to argue against the application on the basis that the Director’s decision to apply for the order was unlawful under the Charter.

An example in another context is where a person may seek to rely on their human rights in proceedings is in criminal proceedings where a person may seek to have evidence against them excluded under section 138 of the *Evidence Act 2008* on the basis that it was obtained unlawfully. Evidence may be obtained unlawfully if it is obtained in a manner in breach of section 38 of the Charter.¹⁵⁷

This is the case under the ACT Human Rights Act. Under section 40C of the Act, if a person claims a public authority has acted in contravention of section 40B, the person may either start a proceeding in the Supreme Court against the public authority, or rely on the person’s rights under the Act in other legal proceedings. The ACT remedies provision is a demonstration that the Charter’s remedies provision need not be so complicated.

¹⁵⁵ See Jeremy Gans, *The Charter’s Irremediable Remedies Provision* (2009) 33 MULR 105, 122.

¹⁵⁶ See Pamela Tate SC Solicitor-General, *A Practical Introduction to the Charter of Human Rights and Responsibilities* (2007), 15.

¹⁵⁷ See, for example, *DPP v Kaba* [2014] VSC 52.

Calculation of damages

Finally, where a breach of section 38 is raised as an additional ground or claim in a non-Charter cause of action, Charter unlawfulness should be able to influence the calculation or award of damages where that remedy has been sought in relation to the non-Charter cause of action.

8. Statutory construction, including the proportionality test in section 7(2) and internal limitations.

Terms of reference:

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

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

Terms of Reference 2(c)

Recommendation 20

The interpretive mandate is one of the primary vehicles for protecting and promoting human rights under the Charter. Following the High Court's decision in *Momcilovic v The Queen* (2011) 245 CLR 1, there has been considerable uncertainty about the approach and scope of section 32(1). The Commission maintains that section 32(1) was intended to be a stronger rule of interpretation than ordinary principles of interpretation or the common law principle of legality and proposes that section 32(1) be amended to clarify that intention.

Terms of Reference 2(d)

Recommendation 21

It is currently unclear whether interpreting statutory provisions in a way that is 'compatible' with human rights is to be informed by section 7(2) of the Charter, which sets out the test for when human rights may be reasonably limited. The Commission's view is that section 7(2) does apply to the interpretative task.

In relation to the obligations of public authorities, the Commission submits that an act of a public authority will be 'incompatible' with a human right under section 38(1) of the Charter if it limits a human right and if the limitation is not reasonable and demonstrably justified under section 7(2) of the Charter. This view is supported by jurisprudence in Victoria, spanning the life of the Charter. The application of section 7(2) to statutory construction (section 32) should be consistent with its application to the obligations on public authorities (section 38). Accordingly, the Commission recommends amending the Charter to clarify that section 7(2) does apply to both sections 32 and 38.

Scope of section 32(1)

The requirement in section 32 of the Charter that all Victorian laws are interpreted so far as possible in a way that is compatible with human rights is central to the Charter's purpose to protect and promote human rights. It is one of the primary vehicles by which the purpose of the Charter (to protect and promote human rights) is to be achieved. Section 32 is essential to maintaining meaningful and robust human rights outcomes for Victorians.

The Commission's view is that section 32(1) of the Charter was intended to replicate section 3(1) of the United Kingdom *Human Rights Act 1998*.¹⁵⁸ It had a strong-reaching effect requiring legislation to be interpreted (or reinterpreted) compatibly with human rights, which may have authorised or required departure from Parliament's original intention in enacting

¹⁵⁸ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2844.

the legislation. This approach was supported in some of the early cases in Victoria.¹⁵⁹ Nevertheless, even under this approach section 32(1) was still subject to limits. Parliament remained sovereign under the Charter and interpretation under section 32(1) still had to be consistent with the ‘underlying thrust’ of the legislation, and ‘go with the grain of the legislation’. Courts were not to ‘strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation’.¹⁶⁰

However, this approach was not accepted by the High Court in *Momcilovic v The Queen (Momcilovic)* which found by a 6:1 majority that section 32(1) was an ordinary principle of statutory interpretation and did not replicate the position in the United Kingdom.¹⁶¹ The Victorian Court of Appeal – with the exception of Justice Tate – has interpreted *Momcilovic* as saying that section 32(1) is equivalent to the ‘principle of legality’ with a wider field of application.

In *Slaveski v Smith*,¹⁶² the Court of Appeal cited the judgment of Chief Justice French as representative of the High Court’s views on this issue. The principle of legality is a common law presumption that Parliament does not intend to abrogate or curtail fundamental common law rights, freedoms and immunities except by clear and unambiguous language.

The Court of Appeal in *Slaveski v Smith* went on to say:

Consequently, if the words of a statute [sic] are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.¹⁶³

By contrast, Justice Tate has interpreted some judges in *Momcilovic* as recognising that section 32(1) ‘might more stringently require 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’.¹⁶⁴ In *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor*, her Honour said (although it was not necessary to decide in that case):

the proposition that section 32 applies to the interpretation of statutes in the same manner as the principle of legality but with a broader range of rights in its field of application should not be read as implying that section 32 is no more than a ‘codification’ of the principle of legality. ...

Six members of the High Court made it plain that section 32 of the Charter was not analogous in its operation to section 3 of the Human Rights Act 1998 (UK), but rather required a court to apply the techniques of statutory

¹⁵⁹ See *Kracke v Mental Health Review Board* (2009) 29 VAR 1; *RJE v Secretary to the Department of Justice* (2008) 21 VR 526, 556-7 [114].

¹⁶⁰ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2844. This is consistent with the United Kingdom case of *Ghaidan v Ghodin-Mendoza* [2004] 2 AC 557 which is the leading authority on s 3(1) of the *Human Rights Act 1998*. See Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 82-3.

¹⁶¹ (2011) 245 CLR 1.

¹⁶² (2012) 34 VR 206.

¹⁶³ (2012) 34 VR 206, 215 [24].

¹⁶⁴ *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37, [188]-[190].

construction set out in Project Blue Sky. Nevertheless, there was recognition that compliance with a rule of interpretation, mandated by the Legislature, that directs that a construction be favoured that is compatible with human rights, might more stringently require 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.¹⁶⁵

Commentators have also questioned whether the Court of Appeal's approach in interpreting *Momcilovic* is correct.¹⁶⁶ Section 32(1) clearly requires that statutory provisions be interpreted compatibly with human rights 'so far as it is possible to do so'. Pearce and Geddes, in their commentary on statutory interpretation, have said that this 'seems to posit a stronger test than is applicable' to common law presumptions, such as the principle of legality.¹⁶⁷

The Commission considers that section 32(1) was intended to be a stronger rule than the principle of legality or ordinary principles of interpretation. Section 32 of the Charter should be amended to clarify that intention.

Section 7(2) of the Charter and its relationship to section 32

Human rights are not absolute. The Charter includes a general limitations clause (section 7(2)) which provides that all rights may be subject 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. The proportionality test in section 7(2) provides a clear and effective framework for considering the limits that may be placed on human rights, having regard to competing public interests and policy objectives.

Following the decision in *Momcilovic v The Queen*,¹⁶⁸ there has been a great deal of confusion regarding how the test in section 7(2) applies in relation to statutory construction (section 32). The Court of Appeal has considered that there is no obvious ratio as to whether section 7(2) should be considered as part of the section 32(1) interpretative exercise¹⁶⁹ so it remains unclear whether a limitation on human rights will result in a statutory provision being incompatible with human rights or whether a limitation on human rights only be incompatible if it is not reasonable and demonstrably justified, having regard to the factors set out in section 7(2). This has left the Victorian courts in a difficult position as it is unclear which approach to follow.

The Commission's view is that the interpretive task required by section 32 *does* include the proportionality analysis under section 7(2) for several reasons.

First, section 7(2) reflects that human rights under the Charter are not absolute. It recognises that there will be circumstances in which limits on human rights are permissible. Practically, it would be unworkable for all human rights to be applied in an absolute way, unless the scope of Charter rights are conflated with justification and proportionality-type considerations, or their scope narrowly drawn. The Commission considers that the better approach is that Charter rights 'should be construed in the broadest possible way before consideration is given to whether they should be limited in accordance with' section 7(2).¹⁷⁰ That provision provides a clear and effective framework for considering the limits that may be placed on human rights, having regard to competing public interests and policy objectives.

¹⁶⁵ [2013] VSCA 37, [188]-[190]; see also Justice Pamela Tate, 'Statutory Interpretive 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* 43, 66-7.

¹⁶⁶ See Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian Charter of Human Rights and Responsibilities: the *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340; Sir Anthony Mason, 'Statutory Interpretive Techniques under the Charter: Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69, 70-3.

¹⁶⁷ Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (8th ed, 2014) 252.

¹⁶⁸ (2011) 245 CLR 1.

¹⁶⁹ *WK v The Queen* [2011] VSCA 345, [55] per Nettle JA.

¹⁷⁰ *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 434 [80].

Second, the location of section 7(2) within Part 2 of the Charter strongly suggests that the question of whether a statutory provision is 'compatible' with human rights can only be determined by considering the relevant human right in combination with section 7(2). That is reinforced by the structure of the Charter as a whole, which uses the concept of compatibility (and incompatibility) throughout. The concept of compatibility should be given a consistent meaning wherever it is used in the Charter. Section 7(2) informs section 32(1), so that a limitation on human rights is compatible where it is reasonable and demonstrably justified. Otherwise there is very little or no work for section 7(2) to do throughout the Charter – which does not reflect its central importance. As Justice Tate has observed, compatibility with human rights by reference to section 7(2) informs the three principal obligations that make up the framework of the Charter. One is statutory interpretation under section 32(1). Another is the drafting of statements of compatibility for Bills, which have 'almost invariably' sought to address section 7(2) factors when considering their compatibility. The third is the obligation on public authorities to act compatibly with human rights under section 38(1).¹⁷¹

Third, the application of section 7(2) to section 32(1) is consistent with the approach taken in other jurisdictions with bills of rights, and at international law. Section 7(2) is known as a general limitations clause. Such clauses can be found in bills of rights in New Zealand, Canada and South Africa, where the courts take justification and proportionality considerations into account when interpreting legislation compatibly with human rights. International human rights treaties – such as the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights* (which is incorporated into domestic law in the United Kingdom by the *Human Rights Act 1998*) – do not contain general limitations clauses. Nevertheless, human rights under those treaties are subject to internal limitations expressed in the rights themselves or treated as implicitly subject to limitations (unless the particular human right is considered absolute at international law).

Fourth, in the Commission's view, the legislative history to the Charter makes clear that human rights are subject to limitations, that section 7(2) informs section 32(1), and that the same approach is to be adopted as comparative jurisdictions with bills of rights and at international law. This is borne out in the Explanatory Memorandum,¹⁷² the Second Reading Speech¹⁷³ and the report by the Victorian Human Rights Consultation Committee leading up to the Charter's enactment. For instance, in the Committee's report, under the heading 'Interpretive clause and Declarations of Incompatibility', the Committee said:¹⁷⁴

An interpretive clause is a now a standard feature of the human rights laws in the United Kingdom, New Zealand and the ACT. The basic principle is that of consistency: a law or action 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.

... The court or tribunal will then look at the legislation ... and ask questions such as:

- Does the legislation restrict the right?
- Is the restriction reasonable or justifiable?

Fifth, recent case law developments on the principle of legality may be of relevance. In *DPP v Kaba*,¹⁷⁵ the Supreme Court determined the interpretation of the *Road Safety Act 1986* (Vic) in respect of whether police have a power to randomly stop and search vehicles. Although not necessary to determine the issue, Justice Bell considered that where there is a 'plainly rights-infringing provision', the court must determine its scope and extent. This may

¹⁷¹ Justice Pamela Tate, 'Statutory Interpretive 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* 43, 50-1.

¹⁷² Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2828.

¹⁷³ Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls).

¹⁷⁴ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 117-8.

¹⁷⁵ [2014] VSC 52.

require identifying the extent of the interference by reference to the purpose of the provision in question, the nature of the infringement and the relation between the two. That is, a proportionality analysis.¹⁷⁶ If that is the position under the principle of legality, then the Commission considers there is no reason why proportionality under section 7(2) cannot apply in a similar way to section 32(1) of the Charter.

The Commission therefore recommends that the Charter should be amended to make clear that section 7(2) applies in interpreting legislation compatibly with human rights pursuant to section 32(1).

Section 7(2) of the Charter and its relationship to section 38

The application of section 7(2) to statutory construction (section 32) must be consistent with its application to the obligations of public authorities (s38). The Commission's view is that 'compatibility' under section 38 also means compatibly with human rights as reasonably limited by section 7(2).

Section 38(1) of the Charter has two limbs. The first limb of section 38(1) makes it unlawful to act (defined in section 3 to include a failure to act or a proposal to act) in a way that is incompatible with a human right. The second limb, which is procedural in character, requires public authorities to give "proper consideration" to relevant human rights in making decisions.

The procedural limb of section 38(1) makes the human rights in Part 2 of the Charter a mandatory relevant consideration for all decisions made by public authorities. That limb requires public authorities to consider both whether any of the human rights in Part 2 of the Charter will be limited if a particular decision is made and, if so, whether such a limitation is justified. It therefore subjects decisions of public authorities to a higher standard of scrutiny than under the traditional "relevant considerations" ground of judicial review.

The Report of the Human Rights Consultation Committee suggests that it was intended that the second limb of section 38(1) set out expressly what was already implicit in the first limb. Thus, having noted that it was important that public authorities not simply give lip service to human rights, the Committee said¹⁷⁷:

The obligation to observe Charter rights would establish the principle that human rights must be adequately considered by public authorities when making decisions and delivering services. The ability to apply for judicial review or a declaration of unlawfulness for failure to meet that obligation would mean that the traditionally narrow grounds of administrative law would be updated to give life to the enforcement of this new obligation. It would be better to set out clearly in the Charter that those two avenues are available than to allow it to develop in an ad hoc way over time.

The Commission is of the view that it is possible for a public authority to decide to act in a manner incompatible with human rights without breaching the procedural limb. Like the traditional requirement to take into account "relevant considerations", the procedural limb ensures that human rights are properly considered, but it does not mandate a particular outcome. That said, the range of permissible outcomes will be constrained by section 38(1), because a decision that results in any act that is not "compatible with human rights" will be unlawful by reason of the first limb of section 38(1).

The Commission submits that an act of a public authority will be incompatible with a human right if it limits a right and if the limitation is not a reasonable limit that is demonstrably justified in a free and democratic society under section 7(2) of the Charter. Therefore, whether a public authority has complied with their obligations under section 38 depends on the scope of the relevant rights at issue and the application of the reasonable limits provision

¹⁷⁶ [2014] VSC 52, [196].

¹⁷⁷ Human Rights Consultation Committee, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), 124-125.

in section 7(2). The Commission's view is supported by jurisprudence in Victoria, spanning the life of the Charter.¹⁷⁸

In *Sabet v Medical Practitioners Board* (2008) 20 VR 414 at [108], Justice Hollingworth considered whether the relevant public authority had imposed any limitation on the relevant right and whether the limitation was reasonable and justified having regard to section 7(2)¹⁷⁹. This approach was followed by Justice Bell in *Patrick's Case* [2011] VSC 327 at [304]-[306] where he found that judicial review of a public authority's decision in accordance with section 38 of the Charter required consideration and application of the proportionality test. Most recently in Victoria, Justice Bell has held in *DPP v Kaba* that "in relation to the concept of incompatibility of human rights, sections 7(2) and 38(1) must be read and applied together". Perhaps most significantly, a majority of the High Court in *Momcilovic* found that section 7(2) was relevant to an assessment of compatibility under section 38(1)¹⁸⁰.

The Commission is of the view that the section 7(2) proportionality test is a requisite consideration when determining whether a public authority has complied with its obligations under section 38. The Commission recommends clarifying the application of section 7(2) to both sections 32 and 38 to remove confusion as to how it applies.

Application of internal limitations in context of section 7(2)

Any clarification of the proportionality test in section 7(2) should also extend to a discussion about internal limitations. Some rights in the Charter contain 'internal limitations' in addition to the requirement in section 7(2) that applies to all rights. It is unclear if these limitations apply *in addition* to the general limitations clause in section 7(2), or instead of it.

Section 7(2) should be retained as the primary mechanism for a proportionality analysis as it provides a clear and workable test for determining whether limitations on rights are reasonable and proportionate.

Where a right in the Charter is expressed in terms that contain an internal or specific limitation (such as the right to privacy in section 13), that limitation should be considered as part of the broad proportionality analysis that is undertaken when following the steps in section 7(2). That is, any internal limits should be used to inform what should be taken into account when determining whether any limits are reasonable and justified under section 7(2).

Rights containing internal limitations (which have been adapted from international law) should be applied consistently in the Charter to avoid confusion in the interpretation and application of these rights.

Section 7(2) provides that all rights may be subject 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.

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

¹⁷⁸ 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; *Sabet v Medical Practitioners Board* (2008) 20 VR 414 at [108]; *Patrick's Case* [2011] VSC 327 at [304]-[306]; *DPP v Kaba* [2014] VSC 52 (18 December 2014) [468]. See, especially, *Momcilovic v The Queen* (2011) 245 CLR 1 at [165]-[168] (Gummow and Hayne JJ) at [416] (Heydon J), at [681] (Bell J); but compare [32]-[34] (French CJ), rejecting a role for s 7(2) in the assessment of compatibility under s 38(1); Crennan and Kiefel JJ did not take a view on the issue.

¹⁷⁹ See Background Brief, 22.

¹⁸⁰ (2011) 245 CLR 1 at [165]-[168] (Gummow and Hayne JJ) at [416] (Heydon J), at [681] (Bell J); but compare [32]-[34] (French CJ), rejecting a role for s 7(2) in the assessment of compatibility under s 38(1); Crennan and Kiefel JJ did not take a view on the issue.

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*.

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

This general limitations clause operates in concert with internal limitations that are expressed within the terms of a right (such as the right to life, freedom of movement, right to privacy, right to peaceful assembly, right to property and freedom from arbitrary arrest and detention). This coexistence can lead to some confusion when trying to determine whether a limit on a right is reasonable and proportionate.

In particular, there is some confusion as to how to interpret the internal limits on account of the Charter adopting the internal limitations modelled on the ICCPR rights in some instances, but not in others. For example, the right to freedom of expression in the Charter (section 15) recognises limitations on the right for the protection of national security, public order, public health or public morality, which is modelled on Article 19(2) of the ICCPR. However, the right to peaceful assembly and freedom of association in the Charter (section 15) contains similar internal limitations at international law, but are not expressly included in the Charter. This inconsistency results in confusion for both those applying and interpreting the Charter rights in Victoria.

The Commission submits that if it is Parliament's wish to borrow internal limitations from international law for inclusion in the Charter, then this should be done with more clarity and applied consistently throughout the Charter.

The Commission submits that if Parliament wishes to maintain a dual approach to a limitations analysis (that is, a general limitations clause and specific internal limits), the internal limits should be used to inform the overall proportionality analysis undertaken in accordance with section 7(2). We agree with Justice Bell's analysis in *Kracke* ((2009) 29 VAR 1 at [109]-[110]):

Where rights are expressed in terms that contain a specific limitation, the nature and content of the rights in their plain state are not ... reduced by the specific limitation. Rather, the specific limitation is seen as an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision in section 7(2).

Thus, when identifying the scope of the right at the engagement stage, this is done broadly and purposively, even where the right contains a specific limitation. Such a limitation becomes subsumed in the overall justification analysis which is undertaken in the next stage.

The Commission submits that this is the most clear and simple way of dealing with the coexistence of a general limitations clause and specific internal limits.

9. Courts and tribunals

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

In the Commission's view, the current approach in the case law to the obligations of courts and tribunals, including under section 4(1)(j) and 6(2)(b) of the Charter, is clear and appropriate. Accordingly, the Commission makes no recommendation for clarity in relation to this term of reference.

The obligations on courts and tribunals is set out in section 4(1)(j) and section 6(2)(b). The two provisions are interrelated and amendments to one could have significant implications for the way in which the other is interpreted. There was initial uncertainty over the definition of when a court or tribunal is acting in an 'administrative capacity' under section 4(1)(j) and consequently the extent to which courts and tribunals are public authorities for the purposes of section 38. There was also initial uncertainty about the extent to which human rights in Part 2 apply directly to courts and tribunals by way of section 6(2)(b). In the Commission's view, this uncertainty has been adequately clarified in the case law to date on the Charter.

Section 4(1)(j)

Section 4(1)(j) provides that a 'public authority' does not include 'a court or tribunal except when it is acting in an administrative capacity'. 'Court' means the Supreme Court, County Court, Magistrates' Court, the Children's Court or the Coroners Court. The meaning of 'administrative capacity' and, to a lesser extent, 'tribunal', have been the cause of some uncertainty.

The Human Rights Consultation Committee report suggests that courts and tribunals were excluded from the definition of 'public authorities' except when acting in an administrative capacity because of concerns that making the courts bound to protect human rights could provide scope to develop the common law in accordance with the Charter.¹⁸¹ This would be at odds with the High Court's insistence on a single Australian common law.¹⁸²

The explanatory memorandum to the Charter stated that

For example, [courts and tribunals] are considered to be public authorities when hiring staff. The obligation to comply with the Charter does not, however, extend generally ... to the courts when acting in a judicial or quasi-judicial capacity (paragraphs (i) and (j)).

The courts do not appear to have encountered much difficulty in determining what constitutes a 'tribunal'.¹⁸³ The case law confirms that VCAT,¹⁸⁴ the Mental Health Review Board¹⁸⁵ and the Medical Practitioner's Board of Victoria¹⁸⁶ are all tribunals for the purposes of the Charter.

The courts have held that 'administrative capacity' means the exercise of 'administrative power' in a public law or common law sense, as against 'judicial' power.¹⁸⁷ In *Kracke v*

¹⁸¹ *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), 59.

¹⁸² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (563-564); *Lipohar v R* [1999] HCA 65; (1999) 200 CLR 485 at [24]-[25] (Gleeson CJ).

¹⁸³ In *Kracke v Mental Health Review Board* (2009) 29 VAR 1 ('*Kracke*') (2009) 29 VAR 1, Bell J observed that '[A] tribunal is a person or body who, under a statute operates independently of government and possesses a limited and specified jurisdiction or authority to make particular decisions of a judicial or administrative character applying general principles of law or policy' [305].

¹⁸⁴ *Kracke* (2009) 29 VAR 1; *PJB v Melbourne Health* [2011] VSC 327.

¹⁸⁵ *Kracke* (2009) 29 VAR 1.

¹⁸⁶ *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414.

¹⁸⁷ See *R v Williams* [2007] VSC 7 (15 January 2007); *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414; *Kracke* (2009) 29 VAR 1; *PJB v Melbourne Health* [2011] VSC 327

Mental Health Review Board (Kracke),¹⁸⁸ Bell J observed that the note to section 4(1)(j)¹⁸⁹ ‘strongly suggests “administrative capacity” is a reference to the exercise of administrative power, as against judicial power, in the public law sense’.¹⁹⁰ The courts have used Commonwealth constitutional and administrative law jurisprudence to distinguish between these types of power.¹⁹¹ In *PJB v Melbourne Health*, Bell J set out a list of principles to consider in determining the nature of power exercised by a court or tribunal.¹⁹² Bell J also rejected the notion of a ‘quasi-judicial’ capacity as formalistic and distracting.¹⁹³

The ACT *Human Rights Act 2004* takes a similar approach to the Charter in relation to courts, providing that ‘public authority does not include ... a court, except when acting in an administrative capacity’ (section 40(2)). In the ACT, tribunals are not expressly excluded from the definition of public authority. The UK and New Zealand take a different approach. The UK Human Rights Act section 6(3)(a) provides that “‘public authority’ includes ... a court or tribunal’. As a result, in a claim involving private parties in an existing cause of action, the court ‘must act compatibly with both parties’ Convention rights’.¹⁹⁴ The New Zealand Bill of Rights Act applies ‘to acts done ... by the legislative, executive, or judicial branches of the Government of New Zealand; or ... by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law’.

In the Commission’s view, the current approach in the case law to the definition of ‘tribunal’ in section 4(1)(j) is adequate. To schedule an exhaustive list of bodies considered to be tribunals for the Charter¹⁹⁵ would risk overlooking bodies which ought to be considered tribunals, and would be an administrative burden to maintain.

Further, assuming that the concerns raised about the potential impact on the common law are warranted, the current approach in the case law to the definition of ‘administrative capacity’ in section 4(1)(j) is also adequate.

Courts and tribunals can and should be considered public authorities with obligations under section 38 of the Charter when exercising administrative power. For example, VCAT has informed the Commission that the registry considers the Charter’s rights to equality and a fair hearing and where necessary it takes steps to adopt less formal processes and provide more additional information or supports (such as interpreters) to ensure these rights are complied with before and during hearings.¹⁹⁶

It is also appropriate that courts and tribunals should be exempt from being considered ‘public authorities’ and from the obligations under section 38 when exercising judicial power. Making courts public authorities could open them to collateral attack under section 38 (ie the failure of courts to comply with section 38 would be unlawful and open to challenge in administrative or other legal proceedings).

Section 6(2)(b)

Section 6(2)(b) provides that the Charter applies to ‘courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3’. ‘Function’ includes a ‘reference to

¹⁸⁸ (2009) 29 VAR 1.

¹⁸⁹ The note to s 4(1)(j) provides that: Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

¹⁹⁰ *Kracke* (2009) 29 VAR 1 [270].

¹⁹¹ See, eg, *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414 [125]-[126]; *Kracke* (2009) 29 VAR 1 [284]ff.

¹⁹² *PJB v Melbourne Health* [2011] VSC 327, [124].

¹⁹³ *PJB v Melbourne Health* [2011] VSC 327, [117].

¹⁹⁴ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 All ER 995 [132].

¹⁹⁵ As was recommended by SARC in the Four Year Charter Review (Recommendation 29).

¹⁹⁶ VEOHRC, *2014 Report on the operation of the Charter of Human Rights and Responsibilities* (2015), 89.

a power, authority and duty',¹⁹⁷ including performance of a duty.¹⁹⁸ 'Functions under Division 3 of Part 3' include referring questions of law to the Supreme Court (section 33); the interpretive obligation (section 32); and the power to make declarations of inconsistent interpretation (section 36).

The meaning of 'functions under Part 2' in section 6(2)(b) remains unclear.¹⁹⁹ Part 2 sets out the human rights that are protected under the Charter and includes the general limitations clause. Some of the rights in Part 2 have an obvious or direct relationship with the courts (eg the right to apply to a court for a declaration or order regarding the lawfulness of detention: section 21(7)); others have no obvious and direct relevance to the courts (eg the right to freedom from forced work section 11). The case law and commentary identify a broad, intermediate and narrow approach to the functions of courts and tribunals under Part 2.²⁰⁰

Under a broad approach, courts and tribunals can enforce directly any and all of the rights set out in Part 2.²⁰¹ This approach would provide the greatest protection for human rights. The broad construction is supported by: the absence of any words limiting the functions in Part 2 to particular rights,²⁰² the fact that '[a]s institutions of justice with responsibility for interpreting and enforcing human rights it is natural and appropriate that courts and tribunals should apply those rights themselves';²⁰³ and the symmetry between enforcing and observing human rights that would result.²⁰⁴ The broad approach has been endorsed by some advocacy groups.²⁰⁵

The broad approach would not appear to be consistent with section 4(1)(j), which excludes courts and tribunals from the application of section 38 except when they are acting in an administrative capacity. It is also inconsistent with the phrase 'to the extent that' in section 6(2)(b), which indicates that there are limits to the functions courts and tribunals have under Part 2. A broad approach would bring in all of the rights in Part 2 which are excluded under section 4(1)(j) (although they would apply directly, not by way of section 38). Further, it is not clear how remedies for breach by courts would operate, and whether section 39 would apply. Finally, the broad approach raises a question about the development of the common law.²⁰⁶

Under an intermediate approach, courts and tribunals can enforce any of the rights in Part 2 that relate to court and tribunal proceedings.²⁰⁷ The actual engagement and application of rights would depend on the scope of the right concerned and the facts and circumstances of the case. The rights covered under the intermediate approach would probably include, at a minimum: sections 8(3),²⁰⁸ 10(b),²⁰⁹ section 21(5)(c); 21(6)-(8); 23(2)-(3); 24; 25; 26 and 27.²¹⁰

The intermediate approach has been favoured by the courts to date.²¹¹ The cases of *De Simone v Bevnol Constructions*,²¹² *Re Lifestyle Communities Ltd (No 3)*,²¹³ *Slaveski v*

¹⁹⁷ Section 3(2)(a).

¹⁹⁸ Section 3(2)(b).

¹⁹⁹ *R v Williams* [2007] VSC 2 (15 January 2007) [55] (King J).

²⁰⁰ *Kracke* (2009) 29 VAR 1 [241]ff. Caroline Evans and Simon Evans, *Australian Bills of Rights* (LexisNexis, 2008), 12-14 [1.41]-[1.44]; Timothy Lau, 'Section 6(2)(b) of the Victorian Charter: A problematic provision' (2012) 23 *Public Law Review* 181.

²⁰¹ Evans and Evans, above n 200, [1.41].

²⁰² Human Rights Law Resource Centre, 'Human Rights Law Resource Centre's Supplementary Written Submissions', *Kracke v Mental Health Review Board*, (20 November 2008) [8].

²⁰³ *Kracke* (2009) 29 VAR 1 [243].

²⁰⁴ *Kracke* (2009) 29 VAR 1 [243].

²⁰⁵ Human Rights Law Resource Centre, 'Human Rights Law Resource Centre's Supplementary Written Submissions', *Kracke v Mental Health Review Board*, (20 November 2008) [6]-[9].

²⁰⁶ Lau, above n 200, 194-5.

²⁰⁷ *Kracke* (2009) 29 VAR 1 [250]; Evans and Evans, above n 200, [1.42].

²⁰⁸ In *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, Bell J held that s 8(3), in so far as it has procedural implications, was also directly applicable to courts and tribunals by way of s 6(2)(b).

²⁰⁹ *Kracke* (2009) 29 VAR 1 [253].

²¹⁰ See Evans and Evans, above n 200[142].

²¹¹ Expressly endorsed in *Kracke* (2009) 29 VAR 1.

²¹² (2009) 25 VR 237.

Smith,²¹⁴ *Secretary to the Department of Human Services v Sanding*²¹⁵ and *Victoria Police Toll Enforcement v Taha*²¹⁶ all considered rights which would not fall within the narrow approach, but which were related to court and tribunal proceedings. Crennan and Kiefel JJ's comments in *Momcilovic v The Queen* in relation to the right to a fair hearing would appear to endorse this approach:

Some 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, and that the matters guaranteed by the Charter with respect to a criminal trial are provided.²¹⁷

The implications of this approach is that the scope of applicable rights does depend on the facts and circumstances of the particular case. For example, the right to use one's own language (section 19(1)) would generally not relate to the functions of courts, but could do if it involved the need for an interpreter in court. In addition, the intermediate approach may raise the constitutional and remedy-related issues discussed above in relation to the broad approach (how remedies for breach by courts would operate; whether section 39 would apply; and the development of the common law).²¹⁸

Under a narrow approach, courts and tribunals have the power directly to enforce only the rights set out in Part 2 that are *explicitly and exclusively* directed to court and tribunal proceedings.²¹⁹ This approach covers a finite list of Part 2 rights: sections 21(5)(c); section 21(6)-(8); 24(2)-(3). It would not include sections 8, 23, 24(1) or 27. Presumably, the remedy for breach would be limited to an appeal.²²⁰

This approach accords with the exemption in section 4(1)(j), because there would be no overlap with the obligations of public authorities in section 38.²²¹ Some commentators suggest that this approach would not give rise to significant constitutional issues as it relates only to technical, procedural rights in court proceedings.²²² However, the effect of this approach would be the absence of criminal process rights (sections 25-27),²²³ creating 'serious gaps in the protection of those rights'.²²⁴ The narrow approach has been endorsed by some commentators.²²⁵

In the Commission's submissions in *Kracke*, we referred to the approach taken in the ACT, where courts are similarly not public authorities, observing that '[a]lthough there is no specific application provision akin to section 6 in the ACT, ACT courts have proceeded on the basis that they are required to apply and respect the right to a fair hearing'.²²⁶

In the Commission's view, the current approach in the case law to the application of Part 2 to courts and tribunals by way of section 6(2)(b) is appropriate. It reflects the 'intermediate' approach, whereby courts and tribunals can directly enforce any of the rights in Part 2 that relate to court and tribunal proceedings.

²¹³ [2009] VCAT 1869.

²¹⁴ [2012] VSCA 25, [54] fn 27.

²¹⁵ [2011] VSC 42 [166].

²¹⁶ [2013] VSCA 37 [248] (Tate JA).

²¹⁷ (2011) 245 CLR 1 at [525].

²¹⁸ Lau, above n 200, 194-5.

²¹⁹ Evans and Evans, above n 200, [1.42].

²²⁰ *Ibid.*

²²¹ Lau, above n 200, 194.

²²² *Ibid.* 195.

²²³ *R v Williams* [2007] VSC 2 (15 January 2007) [54] (King J). Criminal process rights would be excluded because they apply to the executive as well as courts and tribunals.

²²⁴ Evans and Evans, above n 200, [1.44]. King J commented on this incongruity in *R v Williams* [2007] VSC2 [55].

²²⁵ Lau, above n 200, 189.

²²⁶ Citing *Commonwealth of Australia v Davis Samuel Pty Ltd (no 3)* [2008] ACTSC 76 (unreported) and *R v Griffin* [2007] ACTCA 6 (unreported).

Adopting the intermediate approach means that it is not possible to set out a definitive list of rights which apply to courts and tribunals. However, this approach provides flexibility for courts to consider relevant rights depending on the scope of the right concerned and the facts and circumstances of the case.

10. Override declarations

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

Section 31 of the Charter enables Parliament in exceptional circumstances to declare that the Charter has no application to an Act or a provision of an Act. This means that the requirement in section 32 to interpret the provision in a way that is compatible with human rights does not apply and the Supreme Court cannot make a declaration of inconsistent interpretation in respect of that statutory provision. In the Commission's view, section 31 of the Charter is unnecessary. If courts are unable to interpret a statutory provision consistently with human rights, the Court may make a declaration of inconsistent interpretation. Importantly, a declaration of inconsistent interpretation does not affect in any way the validity, operation or enforcement of the statutory provision but triggers the requirement of a written response to Parliament from the relevant Minister. The impact of an override declaration is to undermine the 'dialogue' process established under the Charter between the courts and Parliament.

Recommendation 22

The override provision in section 31 of the Charter is unnecessary and should be repealed.

Recommendation 23

If the override provision is retained, further guidance is needed as to when an override declaration may be appropriate and how such a declaration should be drafted. The Scrutiny of Acts and Regulations Committee could prepare guidance of this nature.

Discussion

Since the four-year review there have been two override declarations. Neither of these have been used in the way anticipated when the override declaration was introduced – one was to maintain cross jurisdictional consistency in the application of a national uniform law, and the other was to make a law specifically in relation to one prisoner (Julian Knight).

Victoria's override provision

Section 31 provides that Parliament can 'override' the application of the Charter by declaring an Act or a provision of an Act has effect despite being incompatible with human rights. 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)). If an override declaration is made in respect of a statutory provision, then to the extent of the declaration, the Charter has no application to that provision (section 31(6)). The section 32 interpretive obligation and the section 36 declaration of inconsistency power will not apply to legislation subject to an override declaration, nor will the obligations on public authorities in section 38. Section 31 incorporates some safeguards: declarations are to be made only in exceptional circumstances (section 31(3)-(4)); and are subject to a renewable five year sunset clause (section 31(7)-(8)).

General purpose of override

An override (generally referred to as 'derogation' at the international level) allows for the temporary suspension of rights in exceptional circumstances. Provisions allowing for overrides or derogations of human rights are aimed at ensuring the executive government can respond to difficult situations. The constitutional arrangements of many states allow for an increase in executive power and a reduction in judicial power to give the executive more scope to respond to public emergencies. Typical examples of where an override or derogation might be invoked include threats to national security or a major natural disaster.

Article 4 of the International Covenant on Civil and Political Rights (ICCPR) sets out the parameters for derogations. It provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, [states] may take measures derogating from their obligations under the [ICCPR] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 4(2) of the ICCPR excludes certain rights from the power of derogation.²²⁷

This approach has been adapted in other jurisdictions including in the European Convention on Human Rights and Fundamental Freedoms,²²⁸ the Canadian Charter,²²⁹ the South African Bill of Rights,²³⁰ and the UK Human Rights Act.²³¹

Incorporation of override provision in Charter

The Human Rights Consultation Committee noted the existence of the override clause in the Canadian Charter and stated that it could 'see the value in having an override clause that can be used in exceptional circumstances and that is time limited'.²³² The Committee said that 'Parliament should only be able to use the override clause in exceptional circumstances', citing the ICCPR as useful in 'setting out the circumstances when an override might apply, for example during a public emergency'.²³³ The Committee was 'strongly of the view that it would be inappropriate to use the override clause to sanction a breach of important rights such as the right to life, freedom from slavery, freedom from torture and freedom of conscience, thought and religion'.²³⁴

The Explanatory Memorandum to the Charter states that section 31 is intended to be invoked only 'when Parliament is introducing new legislation and exceptional circumstances exist

²²⁷ There is no permissible derogation from the right to life, freedom from torture or cruel, inhuman and degrading treatment or punishment, and freedom from medical or scientific experimentation without consent, freedom from slavery and servitude, the right not to be imprisoned because of an inability to pay a contractual debt, the prohibition on retrospective operation of criminal laws, the right to recognition as a person before the law, and the freedom of thought, conscience and religion. The Human Rights Committee has expanded this list and has also stated that the power to derogate under article 4 cannot be used in a way that results in an indirect derogation from a non-derogable right: see commentary in Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32 *Melbourne University Law Review* 422, 438.

²²⁸ Art 15(1) confers the power of derogation and art 15(2) states that there can be no derogation from the right to life except in respect of deaths arising from lawful acts of war (art 2); the prohibition on torture (art 3); the prohibition on slavery and servitude (art 4(1)); and the prohibition on retrospective criminal punishment (art 7).

²²⁹ Section 33 of the Canadian Charter provides that Parliament can expressly declare in legislation that the legislation shall operate *notwithstanding* a provision of the Canadian Charter for a (renewable) five-year period (it is known as the 'notwithstanding' clause). Section 33 cannot be used to override democratic rights (ss 3-5), mobility rights (s 6) and language rights (ss 16-23).

²³⁰ The South African Bill of Rights permits derogations in certain circumstances, but prohibits derogation from the right to equality with respect to unfair discrimination solely on proscribed grounds (s 9); the right to human dignity (s 10), the right to life (s 11), the prohibition on torture or cruel, inhuman or degrading treatment or punishment (ss 12(1)(d) and (e)); the right not to be subjected to medical or scientific experimentation without providing informed consent (s 12(2)(c)); the prohibition on slavery and servitude (s 13); certain children's rights (s 28) and certain rights relating to arrest, detention and fair trial (s 35).

²³¹ UK Human Rights Act 1998 is based on its obligations under the ECHR, it identifies 'designated derogations' made by the Secretary of State (s 14).

²³² Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (2005), 75.

²³³ *Ibid.*

²³⁴ *Ibid.*

which require Parliament to depart from the Charter in a specific manner and for a fixed period of time'.²³⁵

Safeguards

Three types of safeguards can be identified which provide a check on the use of derogation or override powers.²³⁶

The first is a requirement that derogation or overrides be temporary. This is reflected in section 31(7) of the Charter which provides that an override declaration will expire five years after it comes into operation (a sunset clause). However, an override declaration made under the Charter may be continuously renewed; and, as discussed below in relation to the second override made in Victoria, the legislation may expressly specify that the time limit is not to apply.

The second type of safeguard is identification of the particular circumstances which may give rise to derogation or an override declaration. The Charter specifies 'exceptional circumstances' (section 31(3)-(4)). The explanatory memorandum indicated that this would include 'threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria'.²³⁷ While the comments in the explanatory memorandum are useful, they do not determine the meaning of 'exceptional circumstances'. Commentary from human rights experts suggest that circumstances such as 'a war, a terrorist emergency, or a severe natural disaster, such as a major flood or earthquake' might give rise to use of the override power.²³⁸

Finally, derogation or override provisions may be limited in terms of their effect – that is, a proportionality requirement. For example, the ICCPR article 4 limits the effect of derogation 'to the extent strictly required by the exigencies of the situation, that such measures are not inconsistent with other obligations under international law and do not involve discrimination' on specified grounds. A similar provision exists in article 15 of the ECHR. The Charter does not include any limits in this respect.

Application of the override in Victoria

The override provision has been used twice in Victoria since the Charter was introduced, both times since SARC reviewed the Charter in 2011.

The first override declaration was made in section 6 of the *Legal Profession Uniform Law Application Act 2014*. The Act 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 the host jurisdiction as a law of their own jurisdiction.²³⁹ 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 performing uniform law functions, are required to act compatibly with the charter act despite having no experience with its requirements.²⁴⁰

In the absence of an override declaration, the statement of compatibility identified two problems in the application of the Charter to a national law. Since all Victorian laws must be

²³⁵ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21.

²³⁶ As identified by Debeljak: see Debeljak, above n 227, 441.

²³⁷ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21.

²³⁸ Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) 824-5, cited in Debeljak, above n 227, 442.

²³⁹ Currently, Victoria and New South Wales are participating in the national scheme.

²⁴⁰ Victoria, *Parliamentary Debates*, Assembly, 12 December 2013, 4661 (Robert Clark).

interpreted consistently with the Charter, other jurisdictions applying the law would also have to consider the Charter when interpreting the law. Secondly, the requirement in section 38 of the Charter to act consistently with human rights would apply to Victorian public authorities with regulatory functions applying the law, but not to bodies in other States and Territories.

This is the second time since the Charter's enactment that Victoria has hosted a national or uniform law.²⁴¹ Parliament did not enact an override declaration in relation to the previous national law. The Commission made a submission to SARC about the proposed override, noting the importance of a statement explaining 'exceptional circumstances'; application of the sunset clause; and the need to ensure that national uniform laws applying in Victoria are compatible with human rights.²⁴²

SARC questioned whether the statement in the Bill constituted an 'override statement' for the purposes of the Charter.²⁴³ An override statement was later provided by the Attorney-General. SARC noted that the approach of the 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. SARC referred to Parliament the question of whether or not these provisions are reasonable limits on human rights.

The second override declaration was made in relation to the *Corrections Amendment (Parole) Act 2014*. The Act amends the *Corrections Act 1986* (Vic) to restrict the capacity of the Parole Board to grant convicted murderer Julian Knight parole unless he is 'in imminent danger of dying, or seriously incapacitated'. The Act explicitly excludes the application of the Charter and the need for the override declaration to be re-enacted after five years. The override statement in the Minister's second reading speech stated that:

Although the government considers that the Bill is compatible with the Charter, it is possible that a court may take a different view. In this exceptional case, the Charter is being overridden and its application excluded to ensure that the life sentences imposed by 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.²⁴⁴

SARC commented that 'whether the amendments sought to be made by the Bill constitute grounds for an 'exceptional circumstance' is a matter for Parliament.²⁴⁵ SARC noted that although Parliament can pass laws that are incompatible with the Charter, the Bill nonetheless engaged and potentially limited Charter rights. In considering whether these rights were reasonably limited, SARC noted that the Statement of Compatibility did not discuss whether there were any less restrictive means reasonably available to achieve the Bill's intended purpose.

In relation to the Uniform Law, the Commission notes the recent views of the Commonwealth Joint Committee of Human Rights that 'the issue of compatibility with human rights should be an integral part of the development of any national scheme'.²⁴⁶ Further, the Victorian Government could have made use of other mechanisms to achieve its objectives such as prescribing national regulatory bodies not to be public authorities under the Charter when undertaking certain functions. In relation to the amendment to the Corrections Act, alternatives to use of the override ought to have been considered, including passing

²⁴¹ SARC, Alert Digest No. 1 of 2014. The previous occasion was the Education and Care Services National Law, a schedule to the *Education and Care Services National Law Act 2010* (Vic).

²⁴² VEOHRC, Submission to SARC, 31 January 2014.

²⁴³ See Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 1 of 2014, 4 February 2014, 19-21.

²⁴⁴ Second Reading Speech, Corrections Amendment (Parole) Bill 2013.

²⁴⁵ SARC, Parliament of Victoria, *Alert Digest*, No 3 of 2014, 11 March 2014, 2.

²⁴⁶ Joint Committee on Human Rights, Committee Reports 2013 – Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2013, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/32013/c09>.

legislation that would be subject to scrutiny by the courts, allowing for an institutional dialogue about appropriate limits on human rights. Moreover, any override should remain constrained by the existing sunset clause to ensure that any decision to re-enact the override would be subject to review and public scrutiny.

SARC four-year review

In the four-year review of the Charter (at which point the override declaration had not been used), SARC considered the override provision ‘unnecessary ... given that the Charter is an ordinary statute and the Parliament is therefore free to amend or repeal it at any time, or pass a Bill that is incompatible with human rights’.²⁴⁷

SARC observed that both the legislation permitting random weapons searches (accompanied by a statement that the legislation was partially incompatible with human rights) and the deemed possession provision in Victoria’s drugs statute (which the Court of Appeal at that stage had declared to be incapable of interpretation consistently with human rights) were and would remain valid in Victoria, despite no override declaration having been made.²⁴⁸ Further, SARC commented that the inclusion of section 31 could ‘create the misleading impression that an override declaration is the only way that the Charter can be ‘overridden’’. On this basis, SARC recommended that the override provision be repealed.²⁴⁹

Commission’s view

In the Commission’s view, neither of these override declarations is consistent with the theoretical justification for the use of an override provision.

Further, the override provision is unnecessary and should be repealed. The Charter is designed to preserve parliamentary sovereignty by limiting the powers of the judiciary. Legislation cannot be declared invalid by the judiciary under the Charter. This means that, unlike the situation in Canada, the override provision does not represent a means by which legislation which is held to be invalid by reason of incompatibility with Charter rights can nevertheless be passed and remain valid. Consequently, the judicial interpretation and declaration powers in the Charter are legally sufficient, without an override provision, to preserve parliamentary sovereignty. Further, the override provision undermines the dialogue process established under the Charter, as it prevents the judiciary from interpreting law for compatibility and considering whether a declaration of incompatibility is warranted.

If the override provision is not repealed, the Commission recommends the identification of protected or non-derogable rights that cannot be subject to the override provision. The current provision is so broad as to be inconsistent with Australia’s international obligations and out of step with comparative domestic instruments.²⁵⁰ The Charter is unique in not identifying protected or non-derogable rights which are immune from the override provision.²⁵¹ It would appear that all rights in the Charter may be subject to an override declaration. Identifying certain rights as not amenable to override would not prevent the Parliament from enacting laws incompatible with those rights. Rather, it would require that, in order to comply with the Charter, such laws would be subject to the section 32 interpretation and section 36 declaration of incompatibility powers of the courts. It would also place greater emphasis on the need to justify such legislation and would ensure enhanced scrutiny.

²⁴⁷ SARC, *Review of Charter of Human Rights and Responsibilities Act 2006*, 99 [432].

²⁴⁸ *Ibid*, 99 [430]. *Summary Offences and Control of Weapons Amendment Act 2009* and *Control of Weapons Amendment Act 2010* were each accompanied by statements of compatibility stating that particular clauses were ‘incompatible’ with certain Charter rights.

²⁴⁹ *Ibid*, Recommendation 21.

²⁵⁰ Debeljak, above n 227, 440.

²⁵¹ Debeljak has suggested that it might be possible to read in non-derogability by way of s 32 of the Charter (Debeljak, above n 227, 440), given that international law and the judgments of domestic courts may be considered in interpreting a statutory provision under s 32(2); however, she concludes that s 31(9), which provides that a failure to comply with the legislative procedural aspects does not affect the validity of an override, means that it may not be possible to use s 32(1) and 32(2) to secure a greater level of substantive accountability for override declarations. (Debeljak, above n 227, 447).

The safeguards included in the Charter's override provision are also inadequate and should be strengthened if the override is retained. In particular, 'exceptional circumstances' could be redefined to better reflect 'threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria'.²⁵² The Commission is of the view that resorting to an override should only occur in extreme situations, particularly where there is an evidence-base and urgent serious risk to public security or a state of emergency. Further, the effects of an override derogation could be limited by references to a proportionality requirement. Such limits on the override power would provide useful guidance to lawmakers considering whether to make an override declaration.

Ultimately, if an override provision is retained, the Commission is of the view that guidance is needed as to when an override declaration may be appropriate and how such a declaration should be drafted. Guidance of this nature could be prepared by SARC.

²⁵² Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21.

11. Declarations of inconsistent interpretation

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

Recommendation 24

The section 36 declaration of inconsistent interpretation is an integral feature of the dialogue model of human rights protection, supports parliamentary sovereignty and should be retained.

Discussion

The Charter's requirement that all statutory provisions be interpreted compatibly with human rights is not unlimited. Specifically, the endeavour to interpret statutory provisions compatibly with human rights must stop at the point at which such an interpretation would be inconsistent with the purpose of the relevant provision. As discussed earlier in this submission, this was confirmed by a High Court majority in *Momcilovic v The Queen* (2011) 245 CLR 1 to amount to an ordinary approach to statutory interpretation.

If a statutory provision cannot be interpreted compatibly with human rights, the relevant court or tribunal must apply the human rights inconsistent interpretation of the provision. However, should the proceedings be before the Supreme Court or Court of Appeal, the Court has the additional discretion to make a declaration of inconsistent interpretation.²⁵³

A declaration of inconsistent interpretation does not affect the validity of the particular statutory provision or the rights of any party to the relevant proceedings.²⁵⁴ A declaration acts as a form of notification from the judiciary to the legislature that an aspect of Victorian law is, in the view of the Supreme Court or Court of Appeal, inconsistent with human rights and needs to be scrutinised. The making of a declaration triggers the following process under section 36(6)-(7) and section 37:

- the declaration is forwarded to the Attorney-General
- if the relevant statutory provision falls within the portfolio of another Minister, the Attorney-General must forward the declaration to that Minister
- within six months, the responsible Minister must respond to the declaration and the response must be tabled in Parliament and published in the Victorian Government Gazette.

Section 36 declarations of inconsistent interpretation do not encroach on parliamentary sovereignty, but offer information to Parliament to help it do its work. As Chief Justice French of the High Court has said, section 36 provides 'a mechanism by which the Court can direct the attention of the legislature, through the Executive Government of Victoria, to disconformity between a law of the State and a human right set out in the Charter'.²⁵⁵ The Commission's view is that the declaration provision and obligation on the responsible Minister to respond are integral features of a robust human rights dialogue. It has been said elsewhere that declarations of inconsistent interpretation and the ensuing process affords 'an opportunity to assist in making human rights effective'.²⁵⁶

Evidence from the United Kingdom also demonstrates that declarations are effective in bringing issues of human rights compatibility to the attention of Parliament. In December

²⁵³ Section 36(2), *Charter of Human Rights and Responsibilities*.

²⁵⁴ Section 36(5), *Charter of Human Rights and Responsibilities*.

²⁵⁵ *Momcilovic v The Queen* (2011) 245 CLR 1, 67 [95].

²⁵⁶ Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008) 153.

2014, at the time the Ministry of Justice published a 2013-2014 report on responding to human rights judgments, it was reported that 20 declarations of incompatibility had been made by the courts under the *Human Rights Act 1998* and finalised (i.e. they were not subject to further appeal). All of those declarations had been addressed (except for one declaration which was under consideration as to how to remedy the incompatibility).²⁵⁷

A declaration of inconsistent interpretation has only been made on one occasion in Victoria – in *R v Momcilovic* before the Court of Appeal.²⁵⁸ That Court issued a declaration in relation to section 5 of the *Drugs, Poisons and Controlled Substances Act 1981*, which deemed a person to be in possession of drugs unless they satisfied the court to the contrary. The Court of Appeal held that section 5 could not be interpreted compatibly with the right to be presumed innocent under section 25(1) of the Charter. However, the declaration was set aside on appeal to the High Court in *Momcilovic v The Queen*.

In *Momcilovic v The Queen*, a High Court majority confirmed that section 36 declarations of inconsistent interpretations were valid under the Constitution. The views reached by each justice of the High Court is summarised in the 2015 Charter Review Background brief.²⁵⁹

The Commission submits that the power of the Supreme Court and Court of Appeal to make a declaration and the requirement that the Minister responsible prepare a written response laid before Parliament is an important and effective provision because it facilitates the robust and public institutional dialogue intended by the Charter.

Accordingly, the Commission is strongly in favour of section 36 declarations being retained. However, it considers that sections 36 and 37 could be modified so that the declaration of inconsistent interpretation be renamed the declaration of *incompatible* interpretation (like in the United Kingdom and Australian Capital Territory). The Commission notes that the use in sections 36 and 37 of the words ‘inconsistent’ and ‘consistently’, rather than ‘incompatible’ and ‘compatibly’, is not explained in the parliamentary materials and appears to be anomalous. Amending these terms in sections 36 and 37 would ensure consistency of terminology used in the Charter and better characterises the circumstances in which a declaration may be made – i.e. where a statutory provision cannot be interpreted *compatibly* with a human right.

Since *Momcilovic*, there have been no further declarations of inconsistent interpretation. There appears to be general reluctance from the courts to issue declarations. Given the centrality of sections 36 and 37, the Commission strongly suggests that the 2015 Review of the Charter explore ways to address this reluctance, so that declarations of inconsistent interpretation are made where it is appropriate to do so.

²⁵⁷ Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2013-14* (2014) 32.

²⁵⁸ (2010) 25 VR 436.

²⁵⁹ Charter Review: Background Brief on Terms of Reference, 21 April 2015.

12. Notification provision

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

Recommendation 25

The notifications in section 35 and section 36 of the Charter are an important vehicle for the Commission to exercise its intervention function effectively. The Commission is open to modifications to the notification provisions and processes to address concerns that the current requirements may deter people from raising the Charter in proceedings.

Purpose of the notice provisions

The purpose of the notification provisions in the Charter is to alert the Attorney-General and Commission to proceedings in the Supreme Court and County Court involving the application of the Charter so they can decide whether to intervene in the proceedings.

To achieve this purpose, the notification provisions require notice in the prescribed form to be given to the Attorney-General and the Commission:

- in proceedings where a question of law arises that relates to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter (section 35(1)(a)),
- in any case where a question is referred to the Supreme Court under section 33 of the Charter (section 35(1)(b)), and
- if the Supreme Court is considering making a declaration of inconsistent interpretation (section 36(3)).

The Charter requires notice to be given in both the Supreme Court and the County Court because the County Court is the principal trial court in Victoria.²⁶⁰ There is no requirement for a court to discontinue a proceeding pending the service of a notice and no requirement that a reasonable time pass for the Attorney-General and the Commission to decide whether to intervene in the proceeding.

The ACT Human Rights Act also has a notification provision in section 34 of that Act in relation to Supreme Court proceedings. The ACT Human Rights Act requires proceedings to be halted if the notice provisions are not complied with, but retains discretion for the Supreme Court to hear and decide a proceeding in certain limited circumstances and to continue to hear evidence and argument severable from any matter involving the application of the ACT Human Rights Act.

Notice provisions in practice

In proceedings where a Charter question arises or is referred to the Supreme Court under section 33 of the Charter, the party to a proceeding is required to give notice. In cases where the Supreme Court is considering making a declaration of inconsistency, the court must ensure notice is given.

The prescribed form for notices is contained in the *Charter of Human Rights and Responsibilities (General) Regulations 2007*.²⁶¹ In the case of notices under section 35, Form 1 requires the party who raises the question to:

- state specifically the question arising,

²⁶⁰ Human Rights Consultation Committee Report (2005), p 83.

²⁶¹ 'For the purpose of section 35(1) of the Charter of Human Rights and Responsibilities the prescribed form of notice to the Attorney-General or the Victorian Equal Opportunity and Human Rights Commission is in Form 1 of the Schedule' (r. 5). 'For the purpose of section 36(3) of the *Charter of Human Rights and Responsibilities Act 2006* the prescribed form of notice that the Supreme Court is considering making a declaration of inconsistent interpretation is in Form 2 of the Schedule.' (r 6).

- state the facts showing the matter is one to which either a question of law arises that relates to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter, and
- state the relevant directions, if any, made by the Court in relation to the proceeding and provide details of the next directions/hearing date.
- send a copy of the notice to the Prothonotary of the Supreme Court/Registrar of the Court of Appeal.

The Commission provides guidance material on its website along with material to assist parties to prepare the notice, including a word template of Form 1 from the Regulations, and details about how to provide the notice to the Attorney-General or Commission (contact names, fax and email details).²⁶²

The Supreme Court trial division issued guidance to practitioners in a notifications practice note in August 2008.²⁶³ In particular, the Practice Note:

- Sets out the Supreme Court's concern to ensure that parties comply with section 35 at the earliest opportunity to 'avoid delays and the wastage of costs which could occur as a result of late compliance.'
- Informs practitioners that if a notice is served in close proximity to a hearing or trial, which necessitates an adjournment, it will be a matter for the Judge or Master hearing the proceeding.
- Advises practitioners that the Attorney-General and Commission have indicated that in the ordinary course 14 days is the expected response time to a section 35 notice and that meeting that response time will be assisted if practitioners provide copies of the relevant court documents together with the notice.

Notices received by the Commission

From 2008 to 31 May 2015, the Commission has received section 35 notices in approximately 267 proceedings.

Since January 2011, the Commission has received section 35 notices in 118 proceedings. Of these 118 notices, 103 were in the Supreme Court or County Court. Although the section 35 notice requirement only applies in the County Court and Supreme Court (Trial Division and Court of Appeal), the Commission sometimes receives notice in proceedings in other courts and tribunals.

The Commission may also become aware of and intervene in proceedings in the Human Rights Division at VCAT in its monitoring of anti-discrimination directions hearings in that list. The Commission monitors the directions hearings in those proceedings to facilitate its functions under the *Equal Opportunity Act 2010* and to identify proceedings that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation in which it may seek leave to intervene in under section 159 of the Equal Opportunity Act.

While the Commission has intervened in a small number of VCAT proceedings where it has become aware of the matter through monitoring directions hearings in the VCAT anti-

²⁶² <<http://www.humanrightscommission.vic.gov.au/index.php/the-role-of-the-commission-under-the-charter/interventions/section-35-notice>>

²⁶³ *Practice Note No 3 of 2008: Notification of matters arising under the Charter of Human Rights and Responsibilities Act 2006*, which was issued by the Supreme Court trial division in August 2008.

discrimination list,²⁶⁴ the Commission is made aware of the majority of proceedings it intervenes in through a section 35 notice.²⁶⁵

On one occasion, the Commission was contacted by the Coroners Court to make submissions in relation to a human rights issue that arose. The Commission intervened in the coronial proceedings to do so.²⁶⁶

Section 35 notices received from January 2011 to May 2015						
	2011	2012	2013	2014	2015 (at 31 May)	Total
High Court	1	1	0	0	0	2
Federal Court	0	1	0	0	0	1
Court of Appeal	2	8	4	5	2	21
Supreme Court	17	13	12	12	4	58
County Court	8	6	3	5	2	24
Magistrates' Court	0	0	0	0	1	1
Children's Court	1	0	0	0	0	1
VCAT	6	3	1	0	0	10
Total	35	32	20	22	9	118

In summary during this period:

- Of the 118 proceedings in which notice was received the Commission intervened in 16 proceedings. Two of these resolved prior to hearing and three raising the same issue were heard and determined together.

²⁶⁴ In the last four years (since January 2011), the Commission has intervened in three matters under s 40 of the Charter in which it did not receive a notice: *RW v State of Victoria (Department of Education and Early Childhood Development)* [2015] VCAT 266; *Zia v Monash Health* (settled); and *Goode v Common Equity Housing* (VCAT, not yet heard). Note that this does not include the Commission's interventions under s 159 of the *Equal Opportunity Act 2010*.

²⁶⁵ In the last four years (since January 2011), the Commission has made submissions in the following proceedings, which it became aware of because a notice under s 35 of the Charter was served: *PJB v Melbourne Health* [2011] VSC 327; *Taha v Magistrates' Court* [2011] VSC 327 and *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; *Momcilovic v the Queen* [2011] HCA 34; *WK v The Queen* [2011] VSCA 345; *Aitken v State of Victoria* [2012] VCAT 1547; *Nigro v Secretary, DOJ* [2013] VSCA 213 (three proceedings were heard together in this case); *Slaveski v The Queen (on the application of the Prothonotary of the Supreme Court of the State of Victoria)* [2012] VSCA 48; *DPP v Leys & Leys* [2012] VSCA 304; *A & B v Children's Court of Victoria* [2012] VSC 589; *Re Beth* [2013] VSC 189 and *Re Beth* [2014] VSC 121; *The Queen v Chaouk* [2013] VSCA 99; *Christian Youth Camps Ltd & Ors v Cobaw Community Health* [2014] VSCA 75 and [2014] HCATrans 289; *DPP v Kaba* [2014] VSC 52; *Goode v Common Equity Housing* [2014] VSC 585; *Bare v Small (Protective Costs Order application)* [2013] VSCA 204 and *Bare v Small* (Court of Appeal, heard in May 2014); and *Fertility Control Clinic v Melbourne City Council* (Supreme Court, heard in June 2015). Note that in two interventions during this period, *Raytheon Anti-Discrimination Exemption* (VCAT) and *Inquest into the Death of Christian Peck* (Coroners Court), the Commission was informed of the proceeding by the court or tribunal.

²⁶⁶ *Inquest into the Death of Christian Peck*. At the time of writing there is no finding in this inquest.

- The Commission intervened and made submissions in proceedings during this period independently of the notice provision:
 - where it was a party to the proceeding on appeal: *Momcilovic v the Queen*,²⁶⁷ *WK v The Queen*,²⁶⁸ *Christian Youth Camps Ltd & Ors v Cobaw Community Health*²⁶⁹ and the application to the High Court for special leave to appeal from that decision,²⁷⁰ *Victoria Police Toll Enforcement v Taha*,²⁷¹ *Bare v Small (Protective Costs Order application)*,²⁷² and *Bare v Small*.²⁷³ See also *Re Beth*,²⁷⁴ where there was a hearing to review the orders made in the earlier proceeding in which the Commission intervened.
 - where it became aware of the proceeding in its monitoring of proceedings in the VCAT Human Rights List: *RW v State of Victoria (Department of Education and Early Childhood Development)*²⁷⁵ and *Zia v Monash Health*,²⁷⁶ and *Goode v Common Equity Housing*.²⁷⁷
 - where it was informed of the proceeding by the court or tribunal: *Raytheon Anti-Discrimination Exemption (VCAT)*²⁷⁸ and *Inquest into the Death of Christian Peck (Coroners Court)*.

While the Commission did not intervene in any County Court proceedings during this period, important questions on the Charter's application can and do arise in the County Court. To date the Commission has intervened in three County Court proceedings in which significant Charter questions arose: *In the matter of the Adoption Act, AB and VEOHRC and DHS and Separate Representative of J*,²⁷⁹ *DPP v KW*,²⁸⁰ and *R v Fenech, Murone and Fenech*.²⁸¹

See further the list of Commission's interventions under section 40 of the Charter in the Appendix on p107.

Commission response to notices

On receipt of a section 35 notice in a proceeding, the Commission decides whether or not to intervene in accordance with its guidelines, which are available to the public.²⁸² The information in the notice and any additional material provided about the proceedings and the human rights issues raised inform the Commission's decision.

Although section 35 does not require proceedings to be adjourned pending service of the notification or to await a response from the Attorney-General or the Commission, the Commission is nevertheless conscious not to cause or contribute to undue delay to proceedings where it receives a notice.

The Commission's response time to a notice depends on the case and takes into account all information and time constraints in the circumstances. The Commission is aware of the

²⁶⁷ [2011] HCA 34

²⁶⁸ [2011] VSCA 345

²⁶⁹ [2014] VSCA 75

²⁷⁰ [2014] HCATrans 289

²⁷¹ [2013] VSCA 37

²⁷² [2013] VSCA 204

²⁷³ Heard in the Court of Appeal in May 2014. Decision reserved.

²⁷⁴ [2014] VSC 121

²⁷⁵ [2015] VCAT 266

²⁷⁶ Settled.

²⁷⁷ In VCAT, not yet heard.

²⁷⁸ Section 91 of the Equal Opportunity Act 2010 provides that an applicant for an exemption under the act must give a copy of the application to the Commission.

²⁷⁹ Unreported, County Court of Victoria, Judge Pullen, 6 August 2010.

²⁸⁰ Unreported, County Court of Victoria, Judge Mullaly, 2 May 2011. Although note this decision was overturned on appeal in *WK v The Queen*. See summary of this case in VEOHRC submission to the Four Year Review, p 169.

²⁸¹ Unreported, County Court of Victoria, 2010.

²⁸² <<http://www.humanrightscommission.vic.gov.au/index.php/the-role-of-the-commission-under-the-charter/interventions/intervention-guidelines>>

guidance in the Supreme Court's Practice Note that 'in the ordinary course 14 days is the expected response time' and that 'the Court expects that the Attorney-General and the Commission will have regard to the urgency of the application and communicate their intentions as soon as possible to the Court and the parties'.

The Commission frequently receives notification in matters where it is required to respond on an urgent basis and, where it does intervene, to comply with short time frames for the filing of submissions and hearing of the proceeding.

Examples include:

- In *Re Beth*,²⁸³ the Commission received a notice on 22 November 2012 of a Charter question arising in an urgent application by the Secretary to the Department of Human Services in the *parens patriae* jurisdiction of the Supreme Court for orders to detain a 15 year old girl with an intellectual disability in a locked residential facility for her care and protection.

The Commission notified that it would intervene on 26 November 2012 and filed written submissions and appeared before the Supreme Court on 27 November 2012 in the hearing of an interim application. The provision of notice and intervention by the Commission caused no delay to the proceedings. The Commission was one of several parties that intervened at the invitation of the Secretary in light of the unusual circumstances of the case and the important human rights concerns it raised. The contribution of the Commission and other parties was to highlight the safeguards required to ensure the orders could be made in a rights-compatible way. Although the presence of the Commission (and other interveners) may have extended the proceedings, this was on account of the important and novel issues raised.

- In *The Queen v Chaouk*,²⁸⁴ the Commission received a notice on 22 April 2013 of Charter questions arising in an interlocutory appeal against a Supreme Court order to stay a criminal proceeding on the basis that the accused could not get a fair trial without a solicitor to instruct counsel on a day to day basis for the duration of the trial. Both the Commission and the Attorney-General intervened. The Commission notified that it would intervene on 26 April 2013, filed written submissions on 29 April 2013, and appeared (with senior counsel) at the hearing on 1 and 2 May 2013.

The provision of notice and intervention by the Commission caused no delay to the proceedings or the determination of the proceedings.

- In *Castro v Warke*, a County Court proceeding in August 2014 that was subsequently discontinued, the Commission received a notice of a Charter question in a proceeding fixed for hearing that afternoon in the County Court. The Commission responded within two hours of receiving the notice that it would not intervene in the proceedings. Awaiting a response from the Commission caused no delay to the proceedings.

The Commission understands that the County Court adjourned the hearing of the proceeding and made new directions to allow the Attorney-General to respond to the notice, who subsequently intervened in the proceeding (however the appeal was subsequently discontinued). Relevantly, the proceeding did not relate to any person in custody and the Commission is not aware of any party objecting to the adjournment in that case.

- In a Court of Appeal proceeding in August 2014, *The Queen v D'Angelo*, the Commission received a Charter notice in which lawyers for the accused identified a Charter question arising in the context of a murder trial scheduled to begin the following day. The Commission was contacted at lunchtime on the first day of hearing and told that the trial had been stood down pending a response from the Commission. The Commission responded to the Court within a few hours. The Commission understands the Charter question was ultimately not raised in the proceeding.

²⁸³ See *Re Beth* [2013] VSC 189 and *Re Beth (No 3)* [2014] VSC 121.

²⁸⁴ [2013] VSCA 99.

How does a notice of a declaration of inconsistent interpretation under section 36 work in practice?

There has only been one declaration of inconsistency under the Charter in *R v Momcilovic* [2010] VSCA 50.²⁸⁵ In that proceeding, the Court of Appeal provided a notice under section 36(3) in the prescribed form with a draft declaration, giving the Attorney-General and the Commission an opportunity to make submissions about the proposed declaration.²⁸⁶

While there have been applications for a declaration of inconsistent interpretation in the Courts since,²⁸⁷ and the Commission has drawn the section 36(3) requirement to the attention of the Supreme Court in proceedings where it may be relevant, the Commission has not received a notice under section 36(3) of the Charter in any other proceedings.

The benefit of the section 35 notice requirement

The notice requirement ensures the Attorney-General and Commission can, in appropriate cases, exercise the intervention powers that are provided for in the Charter and remain important to the development of Charter jurisprudence.

Practitioners and the courts have expressed their appreciation for the Commission's human rights expertise in its role as an independent and impartial intervener.²⁸⁸ Overall, feedback from stakeholders is very positive regarding the Commission's intervention function. The absence of a notice requirement would inhibit the ability of the Commission to intervene in cases.

An additional benefit of the notification requirement is that in requiring parties to provide one, it clearly defines the key questions relating to the application of the Charter and questions of interpretation of provisions compatibly with the Charter's human rights that arise in the proceeding. This can contribute to streamlining the hearing of a proceeding in respect of the Charter questions arising.

Challenges of the section 35 notice requirement

The Commission observes that the notification requirement may discourage parties from raising the Charter in proceedings. During consultations with stakeholders in the Commission's 2014/15 review of its intervention functions, the Commission received comments that the notice requirement may be a disincentive to parties raising the Charter.

One judge commented that there were instances where parties might not rely on the Charter because they do not want to turn the proceeding into a Charter 'test case'. It was commented that parties are particularly reluctant to raise the Charter in the Practice Court of the Supreme Court where there is 'no time to waste'.

The Commission heard that in cases where a party considers the Charter will affect the speed in which proceedings are resolved and consider their Charter argument will have a marginal impact on the outcome of the proceeding, they might dispense with reliance on the Charter and take an alternative approach to avoid the notice requirement.

The Commission also heard a concern that a notice requirement may prevent the "mainstreaming" of the Charter because it prevents the Charter from being raised by parties like other Victorian laws.

Another concern raised is that parties in proceedings against the state may be reluctant to provide a notice that could result in the Attorney-General intervening to make submissions on the Charter questions because they do not want to invite the involvement of another government party.

²⁸⁵ [2010] VSCA 50.

²⁸⁶ [2010] VSCA 50, [156]-[157].

²⁸⁷ See, eg, *Magee v Wallace* [2014] VSC 643.

²⁸⁸ VEOHRC, *Review of the Commission's intervention functions in the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Equal Opportunity Act 2010 (Vic)* (2015).

On the other hand, judges and practitioners were supportive of the contribution that interveners made in proceedings and the importance of interveners' specialist expertise on the Charter in proceedings where significant Charter questions are being determined.

Potential options to overcome challenges

The Commission is open to modifications to the notification provisions and processes to address concerns that the current requirements may deter people from raising the Charter in proceedings

Potential options to amend the notice requirement

It may be possible to amend the notice requirement to enable a court to waive the requirement to give notice in certain circumstances, for example where the court is of the view it would be necessary in the interests of justice to do so or where the court is of the view that no Charter question arises.

Potential options to improve the notice process

Updates to Court practice notes and other guidance to practitioners could be made to address some concerns and to make the notice requirement easier for parties.

While a notice requirement and intervention by the Attorney-General and /or Commission may prolong the length of proceedings where a significant or complex Charter question arises, this will not always be the case. Further guidance could be provided to practitioners to address unnecessary concerns that the notice requirement and intervention will always cause delay or prolong proceedings. For example, the Supreme Court's Practice Note refers to the issue of delay in a number of areas, however in the Commission's experience the risk of delay from notification and intervention is not so high as this guidance suggests. It could also clarify that there is no requirement in the Charter to adjourn proceedings to allow for the service of a notice or to await responses. Where the Commission does intervene it is guided by the Court in regards to case management and the fixing of dates.

The Practice Note guidance appears to be directed at regulating a significant number of interventions resulting from Charter notifications, where in practice this has not been the case.

The Commission supports the provision in the Charter's notice requirement that a party need not give notice to the Attorney-General where the State is already a party to the proceeding (section 35(2)). However, the Supreme Court Practice Note on notifications advises that the party ought inform the Attorney-General at an early stage of the proceeding even where the state is a party to the proceeding to avoid potential delay. The Commission considers this guidance may have been designed as a case management measure at a time where the Court expected the Attorney-General would seek to intervene in a greater number of proceedings than has been the case. It is out of date and should be removed from the Practice Note.

In the County Court, further guidance about the process for providing notice under the Charter and the Charter's requirements could be provided in the court's guidance notes to practitioners.²⁸⁹

²⁸⁹ For example, in the criminal division, the *County Court Criminal Division Practice Note* (PNCR 1-2015) released on 20 May 2015 is 'the first stage of a major revision of what was the County Court Criminal Procedure Practice Note'. The website states that 'the new Practice Note has been restructured to mirror the ordinary progress of a criminal proceeding through the County Court. The second stage of the major revision will involve consultation with the profession and will be finalised in the latter half of 2015.'

13. The Definition of “Discrimination” in the Charter

Terms of Reference 2(i). any other desirable amendments.

When the Charter was enacted, the definition of discrimination in the Charter was linked to the meaning of discrimination in the *Equal Opportunity Act 1995*, which at that time was direct or indirect discrimination on the basis of a protected attribute. Since that time, the meaning of discrimination in the *Equal Opportunity Act 2010* has expanded to include a range of other conduct, listed in section 7(1)(b) of the Act. It is not clear whether these new types of discrimination are included within the meaning of discrimination in the Charter and if so, whether that outcome would be workable or desirable given the multiple uses of the term discrimination throughout the Charter.

Recommendation 26

The Commission recommends clarifying the meaning of discrimination in the Charter. Options include:

- Aligning the Charter with the meaning of discrimination under the International Covenant on Civil and Political Rights; or
- Retaining consistency with the Equal Opportunity Act but limiting the meaning of discrimination to direct or indirect discrimination on the basis of the protected attributes.

Discussion

‘Discrimination’ under the Equal Opportunity Act includes both direct and indirect discrimination on the basis of an attribute. Since the introduction of the 2010 Equal Opportunity Act, ‘discrimination’ in section 7 of the Act also means a contravention of sections 17, 19, 20, 22, 32, 33, 40, 45, 54, 55 or 56 of the Act. These sections include accommodating parental or carer responsibilities, providing reasonable adjustments for a person with a disability, refusing to allow assistance dogs, or refusing to allow alterations in accommodation. It is unclear if this extended meaning of discrimination has been imported into the Charter, and if so, how this can work in practice. This concern extends further than the right to equality in section 8. Other rights include the term ‘without discrimination’ and it is unclear if these provisions are also bound to the definition of discrimination under the Equal Opportunity Act.

Subsections 8(2) and 8(3) of the Charter provide that every person has the right to enjoy his or her human rights without discrimination; is entitled to equal protection of the law without discrimination, and the right to equal and effective protection against discrimination. Discrimination is therefore a core term for the right to equality.

Due to amendments to the definition of discrimination in the *Equal Opportunity Act 1995* in 2008 and the introduction of a further expanded definition of discrimination in the 2010 Equal Opportunity Act, it is now unclear as to precisely what forms of discrimination the Charter now covers. This is because the Charter definition refers to discrimination within the meaning of the Equal Opportunity Act on the basis of an attribute. However, the Equal Opportunity Act now includes other forms of discrimination that are breaches of specific obligations in the act without reference to the tests for direct or indirect discrimination on the basis of an attribute. The definition therefore needs to be amended to clarify what is covered.

Legislative history

Consistency in the definition of “discrimination” between the Charter and Equal Opportunity Act 1995 was a key objective of the Human Rights Consultation Committee in preparing its

Consultation Report that guided the drafting of the Charter.²⁹⁰ Parliament accepted this reasoning in the Explanatory Memorandum to the Charter, outlining that the definition of discrimination was to be the same in the Charter and the Equal Opportunity Act.²⁹¹ When the Charter was enacted the definition of discrimination referred to the 1995 Equal Opportunity Act:

"discrimination", in relation to a person, means discrimination (within the meaning of the *Equal Opportunity Act 1995*) on the basis of an attribute set out in section 6 of that Act;

At that time, the 1995 Equal Opportunity Act simply defined discrimination as direct or indirect discrimination. However, additional discrimination provisions relating to accommodation of parental and carer responsibilities were introduced and captured in the definition of discrimination in 2008,²⁹² and in the Equal Opportunity Act 2010, additional matters such as the failure to make reasonable adjustments were included in the definition of discrimination.

When the 2010 Equal Opportunity Act was introduced the definition of "discrimination" in section 3 of the Charter was amended to ensure that the definition of discrimination in the Charter refers to the new Equal Opportunity Act.²⁹³ This involved a simple substitution of the names of the Acts. It appears that Parliament did not intend to change the scope of the definition, only to update the name of the Act. The amendment unfortunately failed to recognise that the definition of discrimination within the meaning of the 2010 Equal Opportunity Act had changed in significant ways from that in the 1995 Equal Opportunity Act at the Charter's enactment.

Dispute over meaning of discrimination

Section 7 of Equal Opportunity Act currently defines discrimination as follows (emphasis added):

7. Meaning of discrimination

(1) Discrimination means:

- (a) direct or indirect discrimination on the basis of an attribute; or
- (b) a contravention of section 17, 19, 20, 22, 32, 33, 40, 45, 54, 55 or 56.

The subsequent amendments to the 1995 Equal Opportunity Act and the enactment of the 2010 Equal Opportunity Act which include forms of discrimination which do not make reference to discrimination specifically "on the basis of an attribute", have created some doubt as to whether the Charter only incorporates direct and indirect discrimination from the 2010 Equal Opportunity Act "on the basis of an attribute", or includes the other forms of discrimination in the 2010 Equal Opportunity Act as set out in section 7(1)(b). If that were the case, some forms of discrimination, such as failure to make reasonable adjustments under section 40, would be incorporated into the meaning of discrimination in the Charter for the purpose of the right to equality.

It is important to note that the Commission considers that definition of discrimination in the Charter relates to any form of discrimination – whether it is lawfully exempted or excepted conduct or unlawful conduct. This is because the 2010 Equal Opportunity Act operates to first define discrimination in section 7, then goes on to provide how discrimination may be lawful or unlawful in section 13. There is no comparable distinction made in the definition in

²⁹⁰ *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2006) 35.

²⁹¹ Explanatory Memorandum Charter of Rights and Responsibilities Bill 2006 (Vic), 9-10.

²⁹² *Equal Opportunity Amendment (Family Responsibilities) Act 2008*. This Act also amended the definition of discrimination to include those new provisions.

²⁹³ *Equal Opportunity Act 2010*, Schedule item 1.2; Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic), p80

the Charter; however discrimination will be not be unlawful under section 38 of the Charter if the right to equality is reasonably limited by section 7(2).

Case law on section 8

The meaning of discrimination in the Charter was considered briefly in the Supreme Court appeal decision *Kuyken v Chief Commissioner of Police* [2015] VSC 204 (14 May 2015) (*Kuyken*). Justice Garde noted that section 8(3) of the Charter is derived from Article 26 of the International Covenant on Civil and Political Rights (ICCPR), and accepted the comments of Justice Bell in *Lifestyles Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 explaining that section 8(3) is narrower in scope than article 26 of the ICCPR in two respects. First, it has a “closed” definition of discrimination (in referring to the definition of discrimination on the basis of an attribute within the meaning of the 1995 Equal Opportunity Act as it was at the time) whereas the *International Covenant on Civil and Political Rights* extends to any discrimination on any ground. Second, the right is subject to reasonable limitations under section 7(2), whereas article 26 of the ICCPR is not.²⁹⁴

Justice Garde did not consider the issue as to whether section 7(1)(b) forms of discrimination were included. Rather, his area of concern was whether the definition of discrimination in section 8 took into account exemptions and exceptions in the Equal Opportunity Act 2010. The issue was ultimately resolved by reference to the Tribunal’s decision at first instance, which accepted that section 8(3) was engaged by the claim but that the conduct was authorised by section 5(2) of the [Police Regulation Act].²⁹⁵

As far as the Commission is aware, aside from *Kuyken*, the definition of discrimination in section 8 of the Charter has only been considered in a trio of non-contested exemption applications under the Equal Opportunity Act 2010 in support of this proposition.²⁹⁶ Member Dea stated in each:²⁹⁷

...the reference to section 6 indicates that, for the purposes of the Charter, the reference to discrimination is more limited than discrimination under the EO Act. The EO Act prohibits direct and indirect discrimination on the basis of an attribute or as a result of a contravention of one of the obligations to make accommodations or adjustments.^[EN] The Charter definition only refers to the former.

The footnote in each decision referred to section 7(1)(a) and (b) of the 2010 Equal Opportunity Act. In each of these exemption application cases, neither the Commission (as intervener) nor the Applicants made submissions on the definition of “discrimination” as the focus was on whether the conduct was a special measure. Member Dea noted in her decisions that the potential limitation may not have been intended by Parliament.²⁹⁸

The issue was also raised in the contested hearing *RW v State of Victoria (Human Rights)* [2015] VCAT 266 (3 March 2015), but the Tribunal did not decide the issue or discuss it in its reasoning. It stands that the non-contested exemption application decisions of Member Dea of the Tribunal are the only authority on point, and there is still ambiguity over the meaning of discrimination in section 3 of the Charter.

Internal consistency

While the Charter was initially intended to align the meaning of discrimination with that in the 1995 Equal Opportunity Act, there is a question as to whether amending the meaning to

²⁹⁴ *Kuyken v Chief Commissioner of Police* [2015] VSC 204 [27]-[35]

²⁹⁵ *Kuyken v Chief Commissioner of Police* [2015] VSC 204 [37]

²⁹⁶ *Lifestyles Communities (No 3)* was decided under the *Equal Opportunity Act 1995*

²⁹⁷ *Re The Ian Potter Museum of Art* [2011] VCAT 2236 at [44]; *Re Cummeragunja Housing & Development Aboriginal Corporation* [2011] VCAT 2237 at [47]; *Re Parks Victoria* [2011] VCAT 2238 at [56].

²⁹⁸ *Re The Ian Potter Museum of Art* [2011] VCAT 2236 at [46]; *Re Cummeragunja Housing & Development Aboriginal Corporation* [2011] VCAT 2237 at [49]; *Re Parks Victoria* [2011] VCAT 2238 at [58].

incorporate all forms of discrimination under the 2010 Equal Opportunity Act (such as failure to provide reasonable adjustments to a person with a disability) would be a logical extension to the meaning of discrimination within the context of the Charter. For example, it could work with part of section 8(3) providing for equal and effective protection against discrimination, but is likely to be illogical when applied to the remaining right “to the equal protection of the law without discrimination”, or section 8(2) right to enjoy human rights without discrimination.

Moreover, the term discrimination is used in other rights:²⁹⁹

- section 17(2), where every child has the right, without discrimination, to protection in their best interest;
- section 18(1) where every person has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs;
- section 18(2) where every person has the right, and is to have the opportunity, without discrimination, to vote and have access to the Victorian public service and public office (i.e. to be able to run for office);
- section 25(2) relating to the provision of minimum guarantees “without discrimination” for a person charged with a criminal offence (e.g. be informed of the charge, to have adequate time and facilities to prepare his or her defence, or to be tried without unreasonable delay).

It is unlikely that incorporation of a broader definition of discrimination, as is now the case under section 7 of the 2010 Equal Opportunity Act, would be appropriate for these types of Charter rights.

Approaches in other jurisdictions

In the ACT, section 8 of the *Human Rights Act 2004* provides for a similar right to equality as in section 8 of the Charter. However, it differs in two key areas to the Charter – the meaning of discrimination and the attributes that are protected:

- section 8(2) provides that “Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind” and
- section 8(3) provides “Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.”

The term discrimination is not defined in the Human Rights Act dictionary, nor is it linked back to the ACT *Discrimination Act 1991*, which defines discrimination in section 8. The right to equality is also not linked to specific protected attributes, whether in the ACT Discrimination Act or otherwise. Section 8 does include a note setting out examples of discrimination: “Discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.” However, under section 132 *Legislation Act 2001* (ACT), examples are not limited and can be expanded upon.

Like the Charter, the ACT Human Rights Act gives express recognition to civil and political rights enshrined in the *International Covenant on Civil and Political Rights* and was intended to be interpreted according to international law and jurisprudence.³⁰⁰ Like section 8 of the Charter, the origins of section 8 of the ACT Human Rights Act can be found in Article 2 of the ICCPR, which deals with the right to enjoy other rights without distinction of any kind, and Article 26 of the ICCPR, which provides for the right of equality before the law and the

²⁹⁹ It is unclear to the Commission whether Parliament intended the words “without discrimination” in these sections to have the same meaning as in s 8, although that is the effect of the closed definition in s 3. The Commission also notes that the inclusion of the words “without discrimination” in these sections appears redundant given the right in s 8(2) to enjoy human rights without discrimination would cover these provisions unless they were intended to have a different meaning to ‘discrimination’ in s 8.

³⁰⁰ Explanatory Memorandum to the Human Rights Bill 2003 (ACT), 3-4. 5

prohibition against discrimination. Neither article limits protection to particular attributes, but provides protection against discrimination or inequality on any ground or status.

The United Nations General Comment No. 18 “Non-Discrimination” (1989) defines discrimination as used in Article 26 as follows:³⁰¹

... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose and effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Therefore, the ACT Human Rights Act right to equality and protection from discrimination incorporates a broader definition of discrimination that does not encompass only direct and indirect discrimination on specific grounds. It is also clearly broader in its application and scope given the international focus of its clause.

The United Kingdom *Human Rights Act 1998* operates to incorporate the provisions of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms into domestic law. The right to non-discrimination in the Convention is found in Article 14:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (emphasis added)

As with the ACT approach, the right to non-discrimination is not based on a specific definition of discrimination nor is it tied to specific protected attributes.

A different approach is taken in the New Zealand *Bill of Rights Act 1990* (NZBORA). Section 19 of NZBORA provides simply that “Everyone has the right to freedom from discrimination on the grounds of discrimination in the *Human Rights Act 1993*”, with an exception for special measures. Therefore, the right to discrimination is tied to the protected grounds of discrimination in the NZ Human Rights Act.

Options for amendments

In light of the various methods of incorporating the right to non-discrimination and equality into domestic law, we consider there are two main options that could be considered for the purposes of the clarifying the meaning of discrimination in the Charter.

1. Align the Charter with the meaning of discrimination under the ICCPR. Under this option, the definition of discrimination in section 3 is not linked back to the definition in the 2010 Equal Opportunity Act, nor restricted to discrimination “on the basis of an attribute”. This definition would remove confusion and ambiguity over the interaction between the section 7(1)(b) types of discrimination in the 2010 Equal Opportunity Act and the Charter, and would be more workable in practice. It would result in greater consistency with international and domestic human rights instruments and is the approach followed in the ACT and the UK.
2. Retain consistency with the Equal Opportunity Act. Under this option, the definition of discrimination in section 3 would be linked to the 2010 Equal Opportunity Act but limited to direct or indirect discrimination on the basis of a protected attribute. This would reflect the original intention in the Charter and also provide a practical solution.

³⁰¹ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), paragraph 7

14. Further reviews

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

Recommendation 27

The Commission does not consider that any further review of the Charter is necessary.

If further reviews are legislated, they should:

- ensure that they include a broad-based consultation process with sufficient time for interested individuals and agencies to participate
- be less frequent than four-yearly
- ensure they do not coincide with electoral cycles.

Discussion

There were compelling reasons for legislating periodic reviews of the Charter. Firstly, regular reviews were considered necessary to assess whether the Charter was working effectively and continuing to reflect the values and aspirations of the community. Secondly, there were many strongly held views put forward in the initial consultation that were supported by a substantial number of submissions, but were not reflected in the model of the Charter. These were particularly around the inclusion of additional rights and the availability of a remedy for human rights breaches. The reviews – particularly the four-year review that mandated consideration of specific issues – provided an opportunity to reconsider these issues.³⁰² Finally, regular reviews provide an opportunity to enhance the operation of the Charter and reflect on the growing jurisprudence and practice.

These reasons remain valid. Further reviews can provide an opportunity to consolidate and improve the operation of the Charter. Without a legislated review, the Charter may remain static and although amendment is possible, there will be no fixed opportunity for the community and interested bodies to contribute to the dialogue.

In contrast, the Charter as a Victorian law is unique in providing for regular periodic reviews.³⁰³ Removing the periodic review would not necessarily mean that the Charter remains static. The Charter, like any law, can be reviewed by government or referred to the Law Reform Commission for review if concerns are identified. Having a review built into the Charter can create an impression that the existence of the Charter, or parts of the Charter, may be open for reconsideration or dilution.

Regular reviews are also resource-intensive for the government and the community. We saw the community expend considerable energy to provide submissions to the four-year review, which did not result in significant enhancements to protect rights. Accordingly, for the reasons set out above and because of the length of time the Charter has been in operation, the Commission does not consider that further built-in reviews are necessary.

If future reviews are legislated, they should include a requirement for a broad-based consultation process with sufficient time for interested individuals and agencies to participate. Further, any future reviews should be less frequent than four-yearly.

Finally, the timing of the four and eight year Charter reviews coincided with the electoral cycle of the Victorian Parliament. In both instances, the review took place immediately after a change in government, which left the government with little time to run the review process in

³⁰² Rights, Responsibilities, Respect: Report of the Human Rights Consultation Committee, pp 135-138.

³⁰³ Although note the reference in the ACT to a review of the inclusion of economic, social and cultural rights in s 43 of the ACT Human Rights Act. This section expires on 1 January 2016.

order to meet the legislated deadlines. If further reviews are legislated, they should be timed in such a way as to avoid this recurrence.

Appendix: Overview of Commission's Charter Interventions

July 2011–2015

(For interventions from 2008–2011, see *Submission to the Four Year Review of the Charter*, Appendix N)

Commission Interventions in 2011

***WK v The Queen* [2011] VSCA 345**

(Appeal from DPP v KW [2011] VCC (2 May 2011))

Nature of Proceedings

The accused sought to appeal a County Court decision to allow a taped phone conversation between him and the complainant to be used as evidence against him in his criminal trial. The tape recording is what is referred to as a "pretext conversation": a conversation initiated by the complainant to elicit admissions from the person alleged to have committed an offence against them. The pretext conversation took place at the suggestion of investigating police and was recorded at a police station with police equipment. The accused sought to exclude the use of the conversation as evidence on the basis that it was obtained in breach of the *Surveillance Devices Act 1999* and in breach of Victoria Police's obligations as a public authority under the Charter.

The County Court decided not to exclude the evidence because the desirability of admitting the evidence outweighed the undesirability. However, the Court held that, interpreted compatibly with privacy right in section 13 of the Charter, the *Surveillance Devices Act 1999* required police obtain a warrant when they use a surveillance device through another person. The Court held that police had breached section 38 of the Charter by acting incompatibly with the privacy right in taping the conversation and that this breach was relevant to the exercise of the discretion to admit evidence under section 138 of the *Evidence Act 2008*.

The Commission's position

The Commission was a party to the appeal having intervened in the proceeding in the County Court. The Commission had intervened in the County Court proceeding to make submissions about the obligations of Victoria Police under the Charter and on the interpretation of the *Surveillance Devices Act* and *Evidence Act* compatibly with the privacy right in the Charter. The Commission intervened because evidence gathering by police can significantly impact on the enjoyment of rights in Victoria.

In the Court of Appeal, the Commission submitted that the County Court's interpretation of the *Surveillance Devices Act* was correct because the requirement for a warrant ensured against arbitrary interferences with privacy. The Commission also submitted that the County Court was correct to conclude that the police use of the listening device was a breach of section 38 of the Charter relevant to the discretion under the *Evidence Act*.

Outcome

The Court of Appeal found there had been no error in the County Court's decision to admit the evidence and refused leave to appeal. However, the Court of Appeal held that there had been no breach of the *Surveillance Devices Act* because the complainant had made the recording in her capacity as a private citizen and there had been no breach of the right to privacy. The Court held that, even if there had been, the recording should not be excluded from evidence in the trial.

Aitken v State of Victoria (Department of Education and Early Childhood Development)
[2012] VCAT 1547

Nature of Proceedings

Parents at three Victorian State primary schools challenged the provision of Special Religious Instruction (SRI) at their schools as amounting to direct and ongoing discrimination against their children because their children were segregated from their classmates when SRI took place and not provided alternative instruction during that time. SRI is "instruction provided by churches and other religious groups and based on distinctive religious tenets and beliefs". In two-thirds of government primary schools in Victoria, it is provided in one 30-minute class a week on a non-compulsory basis. Its provision is governed by the *Education and Training Reform Act 2006* and Departmental Policy.

The parents sought a change to the Departmental Policy that SRI be offered on an 'opt in' rather than 'opt out' basis, timetabled outside school hours and, if not timetabled outside school hours, require that students not attending SRI be given alternative instruction.

The Commission's position

The Charter question arising was regarding the interpretation of the religious instruction provisions in the *Education and Training Reform Act 2006* compatibly with the rights to equality (section 8) and freedom of thought, conscience and belief (section 14). The Commission submitted that it was possible to interpret the relevant provisions compatibly with these rights so as not to require government schools to provide SRI during ordinary school hours or, alternatively, so as not to prohibit other students from receiving alternative instruction during that time.

Outcome

The Tribunal held that there was no discrimination. The Tribunal found that the *Education and Training Reform Act 2006* provisions did not require schools to provide SRI, but did envisage that SRI may be provided during school hours while ensuring participation is not compulsory. The Tribunal held that the provisions had no ambiguity and that the application of section 32 of the Charter to reach a different interpretation was not necessary because this ordinary meaning was compatible with human rights.

Raytheon Anti-Discrimination Exemption

Nature of Proceedings

Raytheon sought a three-year exemption from provisions in the *Equal Opportunity Act 1995* to be able to seek information from their prospective employees and contract workers about their nationality and place of birth, and to refuse to employ them based on this information. This information was sought to comply with United States laws relating to defence contracts.

The Commission's position

The Commission intervened to submit that the exemption power should be interpreted narrowly (compatibly with the rights to equality and privacy in sections 8 and 13 of the Charter) and that the applicant had not discharged the onus required to demonstrably justify the limits to the equality right that would flow from granting of the proposed exemption. The Commission submitted that the exemption application should be refused on this basis.

Outcome

The Tribunal granted the exemption. It held that the conduct was a reasonable limit on the rights to equality and privacy. VCAT held that although these rights were of fundamental importance, that the purpose of the limitation was also vitally important for national security as it enabled the Australian Government to maintain its defence capability and develop its defence industry.

Commission Interventions in 2012

Slaveski v The Queen (on the application of the Prothonotary of the Supreme Court of Victoria) [2012] VSCA 48

Nature of Proceedings

The question arose in this proceeding was whether a trial judge was acting in an administrative capacity within the meaning of section 4(1)(j) of the Charter and, therefore, acting as a public authority bound by section 38 of the Charter when deciding on an adjournment application made during a criminal trial.

The Commission's position

The Commission intervened to make submissions on the application of the Charter to the courts. The Commission submitted that a trial judge was acting in an administrative capacity within the meaning of section 4(1)(j) of the Charter when deciding on an adjournment application and must, therefore, act compatibly with human rights when doing so.

Outcome

The Court held that when a trial judge determines to grant or refuse an adjournment of the trial, the judge exercises judicial power, which involves the governance of a trial for the determination of criminal guilt and its punishment or, in a civil proceeding, the determination of a dispute *inter partes*, and is not acting in an administrative capacity within the meaning of section 4(1)(j) of the Charter.

Christian Youth Camps Ltd & Ors v Cobaw Community Health Ltd & Ors [2014] VSCA 75

(Appeal from Cobaw Community Health Service v Christian Youth Camps & Anor [2010] VCAT 1613)

Nature of Proceedings

This case was an appeal against a 2010 VCAT decision that found Christian Youth Camps (CYC) had unlawfully discriminated against a group of same-sex attracted young people by denying them use of a CYC-owned and operated Phillip Island Youth Camp.

VCAT held that CYC had discriminated against the group in contravention of the *Equal Opportunity Act 1995* and had not made out its claim that CYC's conduct fell within the religious exceptions of the Equal Opportunity Act. The religious exceptions in sections 75(2) and 77 provide that discrimination is not prohibited by a body established for religious purposes, where the conduct conforms with the doctrines of religion or is necessary to avoid injury to the religious sensitivities of the people of the religion; or where it is necessary to comply with genuine religious beliefs or principles. CYC appealed the decision to the Court of Appeal.

The Commission's position

The Commission intervened in the VCAT proceeding to make submissions on the interpretation of the religious exceptions compatibly with the human rights to equality and freedom of religion in sections 8 and 14 of the Charter. In the appeal, the Commission made submissions on the application of the Charter and the interpretation of the Equal Opportunity Act.

Outcome

The Court considered that because the relevant conduct occurred before the interpretive rule in section 32 of the Charter entered into force, the Tribunal erred in applying section 32 in the proceeding. However, it found that the error did not affect the Tribunal's reasoning. The Court dismissed the appeal by CYC and found that it had unlawfully discriminated against Cobaw and the group of same sex attracted young people on the basis of their sexual orientation.

The Court of Appeal's decision considered the interpretation of the religious exemptions in sections 75 and 77 of the Equal Opportunity Act without regard to the Charter. In regard to

section 75, the Court held that CYC was not “a body established for religious purposes” and therefore could not rely on the exemption. Even if CYC was such a body, the refusal was not ‘necessary’ to avoid injury to religious sensibilities. In regard to section 77, corporations cannot hold religious beliefs and therefore CYC could not rely on this exemption. Further, the refusal was not “necessary” to comply with genuine religious beliefs or principles. In a dissenting judgement, Justice Redlich held that section 77 could apply to corporations as well as individuals, and that both CYC and the manager were able to rely on the exception as their conduct was necessary in order for them to comply with their genuine religious beliefs or principles.

DPP v Leys and Leys [2012] VSCA 304

Nature of Proceedings

In this appeal of a County Court sentencing decision, a question was raised as to the interpretation of a transitional provision in the *Sentencing Act 1991* compatibly with the human right to liberty in the Charter. The transitional provision concerned the transition between the old sentencing regime, which included community-based orders, to a new scheme of community corrections orders. A literal interpretation of the provision would have meant that, at the time of sentencing, although the option to sentence someone to a community-based order had been repealed, the option to sentence someone to a community corrections order had not yet entered into force. On a literal interpretation, the only sentencing options available would be a fine or imprisonment.

The Commission’s position

The Commission intervened under the Charter to make submissions on the proper application of the obligation in section 32 to interpret laws compatibly with human rights and the meaning of the right not to be subjected to arbitrary detention in section 21 of the Charter.

Outcome

The Court of Appeal agreed with the Commission’s submission that a literal interpretation of the provision was unacceptable. However, it found that it was unnecessary to rely of the Charter to reach this conclusion, because the same conclusion was reached on ordinary principles of interpretation.

Victoria Toll & Anor v Taha and Anor [2013] VSCA 37

(Appeal from *Taha v Broadmeadows Magistrates’ Court* [2011] VSC 642)

Nature of Proceedings

This case was an appeal from a Supreme Court decision, which held that the Magistrates’ Court was required to make enquiries about the circumstances of the offender, including any intellectual disability, before making an imprisonment order against an individual for unpaid fines under the *Infringements Act 2006*.

The Commission’s position

The Commission was a party to the appeal having intervened in the Supreme Court proceeding. The Commission made submissions on the interpretation of the Infringements Act compatibly with the human rights to equality, liberty and a fair hearing in sections 8, 21 and 24 of the Charter. The Commission argued that the obligation in section 32 of the Charter to interpret laws compatibly with human rights meant that the Infringements Act must be interpreted as requiring a Magistrate to consider the individual circumstances of an individual and to determine whether alternatives to imprisonment were available and appropriate.

Outcome

The Court of Appeal decision upheld the Supreme Court's ruling that a Magistrate is required to make enquiries as to whether individuals before them have a disability or other special circumstances before making an imprisonment order against an individual.

A & B v Children's Court of Victoria [2012] VSC 589

Nature of Proceedings

This was a judicial review of a Children's Court determination that two children (aged 9 and 11) were not mature enough to be represented on a direct instructions basis. The case raised the proper interpretation of the legal representation provision of the *Children, Youth and Families Act 2005* (CYFA) (section 524) compatibly with the rights of children to protection in their best interests, the right to equality and the right to a fair hearing in sections 17, 8 and 24 of the Charter.

The Commission's position

The Commission intervened under the Charter to make submissions on:

- the scope of the children's right in section 17 of the Charter and the importance of considering children's rights when determining whether an action is in their best interests;
- the scope of the rights to equality and a fair hearing and that these rights require the Children's Court to assess the particular child's stage of development and not make a decision about their maturity solely based on their age;
- the interpretation of the Children, Youth and Families Act compatibly with these rights (allowing a child to have direct instructions representation where they are mature enough to give instructions on any material issue and not necessarily all issues);
- the application of the fair hearing right and equality right to the Children's Court.

Outcome

Consistently with the relevant rights in the Charter, the Supreme Court held that in assessing whether a child is mature enough to give instructions requires considerations of more than just a child's age and must also assess the child's development and capacity to give instructions. Children may be mature enough to give instructions on some matters and not others.

Nigro & Ors v Secretary to the Department of Justice [2013] VSCA 213

Nature of Proceedings

This case involved three separate appeals against supervision orders made by the County Court under the *Serious Sex Offenders (Detention and Supervision) Act 2009*. The Commission received a Charter notice in each appeal after the Court of Appeal identified that there was a question regarding the impact of the Charter on the interpretation of the test as to when a court can make a supervision order. The Act provides that a person can be subject to a supervision order if they represent an "unacceptable risk" to the community.

The Commission's position

The Commission made submissions on the application of the Charter to the interpretation of the relevant provisions.

The Commission submitted that while the Charter does not affect the interpretation of the phrase "unacceptable risk", it does affect the interpretation of the statutory discretion as to when a court may make a supervision order and the conditions the order imposes. Depending on the conditions imposed, an order could limit the rights to privacy, freedom of movement, liberty, freedom of association and freedom from medical treatment without consent.

The Commission submitted that the discretion should be exercised compatibly with human rights so that a court only imposes conditions that are proportionate to the level and nature of the risk the person represents.

Outcome

The Court considered how the human rights to freedom of movement, privacy and liberty affect the interpretation of provisions as to when the Court can make a supervision order.

The Court held that a finding of unacceptable risk is compatible with the Charter, because the threshold for when a risk is unacceptable depends on both the severity of the conduct in question and the likelihood of it occurring, and, therefore, enabled an appropriate balance of the competing considerations of rights and risk. The Charter did not affect the interpretation of that phrase.

The Court held that the discretion as to when a court may make an order and the conditions it imposes is not to be construed as subject to human rights limitations because that construction is inconsistent with the text and purpose of the Serious Sex Offenders (Detention and Supervision) Act, which specifies the extent to which the court is obliged to ensure that its orders are Charter-compliant.

Commission Interventions in 2013

Re Beth – an application in the parens patriae jurisdiction [2013] VSC 189

Nature of Proceedings

These proceedings involved an application by the Secretary to the Department of Human Services to the Supreme Court to make orders in its *parens patriae* jurisdiction to authorise the placement of 15-year-old Beth (a pseudonym) in a purpose-renovated secure and lockable house staffed with 2:1 carer support for her care and protection.

The Commission's position

The Commission submitted that while the placement would result in significant limitations on Beth's rights to liberty, privacy, and freedom of movement, the placement would be compatible with those rights if the restrictions were the least restrictive necessary to achieve the purpose of caring for and protecting her. The Commission made submissions regarding the safeguards that should apply to the placement to ensure the restrictions were compatible with Beth's human rights, including oversight of the placement by the Office of the Public Advocate and Victoria's Child Safety Commissioner, and that Beth have independent legal representation.

Outcome

The Court made orders authorising the placement subject to specific oversight conditions, further review of the orders and independent legal representation for Beth. The Court ruled that although the placement would interfere with Beth's human rights, in particular her right to liberty, the interference was reasonable, necessary and proportionate in the circumstances and in Beth's best interests. The Court considered that what is in Beth's "best interests" must be informed by a consideration of her human rights, and concluded that the orders were compatible with her rights. The Court made orders authorising the placement.

Bare v Small (Court of Appeal, hearing date May 2014) and Bare v Small [2013] VSCA 204 (Application for a Protective Costs Order)

(Appeal from *Bare v Small* [2013] VSC 129)

Nature of Proceedings

In this matter, a young man of Ethiopian descent complained to the then Office of Police Integrity (OPI) (now the Independent Broad-based Anti-corruption Commission (IBAC)) that he was treated in a cruel, inhuman and degrading way by Victoria Police. OPI referred his complaint to Victoria Police for internal investigation rather than conducting an independent investigation. Mr. Bare sought a review of OPI's decision.

The Commission's position

The Commission intervened in the Supreme Court proceeding and remained as an intervener in the appeal.

The Supreme Court decided that section 10(b) does not include an implied procedural right to an effective and independent investigation. The Court also ruled that, even had OPI's

decision been incompatible with human rights, a privative clause in the *Police Integrity Act 2008* excluded the decision from judicial review unless it was made in jurisdictional error (where a decision maker exceeds the limits of their decision making power). The Court decided that acting unlawfully under section 38 was not a jurisdictional error.

In the appeal, the Commission made submissions on a number of issues in which it had an ongoing interest including the relevance of international law to the interpretation of the rights in the Charter, the impact of a breach of section 38 on the validity of a public authority's decision, and the application of the right not to be treated in a cruel, inhuman or degrading way.

Mr. Bare appealed the decision. The Commission made submissions in support of the applicant's application for a Protective Costs Order, which was granted.

Outcome

The Court of Appeal's decision in the appeal is reserved.

Inquest into the Death of Christian Peck (March 2013)

The Commission was asked by the Coroners Court to make submissions on the application of the Charter and the scope of relevant human rights to assist the Coroners Court in the Inquest into the Death of Christian Peck, a four-year-old boy with autism who drowned after he wandered from his family home. The Court was considering various management strategies for children at risk of absconding due to a disability such as autism, including the use of GPS tracking devices. The Commission made submissions about the application of the Charter in this context.

The Queen v Chaouk [2013] VSCA 99

Nature of Proceedings

The case concerned Victoria Legal Aid's (VLA) criminal law guidelines that came into force in January 2013 to limit funding for instructing solicitors to two half days of the trial. The proceeding was an interlocutory appeal by the Director of Public Prosecutions of the Supreme Court's decision to stay a criminal trial of an indigent accused because it was likely to be unfair unless he had a solicitor to instruct counsel on a day-to-day basis for his 2-3 week trial. Lawyers for Mr. Chaouk raised the Charter to argue that the rights to a fair hearing and rights in criminal proceedings provided a further basis on which the Court could stay the trial and, additionally, that VLA's guidelines were incompatible with those rights.

The Commission's position

The Commission intervened to make submissions on the requirements for a fair trial in sections 24 and 25 of the Charter. The Commission submitted that the absence of an instructing solicitor might result in an unfair trial in certain circumstances. In particular, the absence of an instructing solicitor may prevent a person from participating in proceedings in a meaningful way, prevent a defendant from the effective realisation of the right to have adequate time and facilities to prepare a defence, and give rise to an inequality of arms between the prosecution and defence. The Commission submitted that, in the circumstances of a particular trial, VLA's guidelines may be incompatible with the right to a fair hearing because of their blanket and inflexible application.

Outcome

The Court of Appeal upheld the Supreme Court's decision to stay the trial without having to decide the Charter issues. It affirmed the importance of instructing solicitors to ensuring a fair trial. It did not need to rule on the arguments raised under the Charter because it decided in favour of Mr. Chaouk on other grounds of appeal.

Following the decision, VLA recognised the importance placed by the Court of Appeal on having instructing solicitors in a trial to ensure a fair hearing and introduced interim guidelines allowing more flexibility in the funding of second lawyers in criminal trials.

DPP v Kaba [2014] VSC 52

Nature of Proceedings

Mr Kaba, an Australian man born in Africa, was a passenger in a car subject to a random stop and licence and registration check by two uniformed police officers. Mr Kaba walked away from the car. The police, without suspecting Mr Kaba of any wrongdoing, repeatedly pressed him for his name and address. Mr Kaba refused the requests using offensive language and protested about racist harassment. He was arrested for using offensive language and failing to state his name and address. He was led handcuffed to the police vehicle and he allegedly assaulted one of the officers.

At the hearing of the charges against Mr Kaba, the Magistrate exercised his discretion in section 138 of the *Evidence Act 2008* not to admit the evidence of offending on the grounds that it was the result of unlawful and improper conduct by the police in carrying out a vehicle check. The Magistrate found the police had no power under the *Road Safety Act 1986* to carry out the check and had breached the driver's and Mr Kaba's rights to freedom of movement and privacy protected by the Charter. The police applied for judicial review of the Magistrate's ruling in the Supreme Court.

The Commission's position

The Commission intervened to make submissions on the interpretation of the Road Safety Act and its compatibility with human rights, the obligations of police as a public authority under the Charter, and the exercise of discretion to exclude evidence where evidence is obtained in breach of rights.

The Commission submitted:

- section 59(1) of the Road Safety Act does not give police an unfettered power to stop motorists because such a power amounted to an unjustified limit on the right to freedom of movement, there being less restrictive means to achieve road safety;
- in this case, the random traffic stop breached Mr Kaba's right to freedom of movement (in section 12 of the Charter) and the repeated demands for identification breached Mr Kaba's right to privacy (in section 13(a) of the Charter); and,
- both these breaches of rights were unlawful under section 38 of the Charter and warranted the exclusion of the evidence under section 138 of the *Evidence Act*.

Outcome

The Court found that the Magistrate erred in interpreting section 59(1) of the Road Safety Act and found that police do have a power of random stop and check under that provision. However, the Court found that the Magistrate was correct to find that the police demands for Mr Kaba's name without authority breached Mr. Kaba's rights to privacy and freedom of movement.

The Magistrate's decision not to admit the evidence was based on both findings, one of which Justice Bell considered to be in error. Justice Bell quashed the decision and directed that the case be returned to the Magistrate for reconsideration.

Commission Interventions in 2014

Re Beth (No 3) [2014] VSC 121 (review)

Nature of Proceedings

This was an application for review and extension of orders made in *Re Beth* [2013] VSC 189 (see above) enabling a child to be placed in a locked residential facility and restricted.

The Commission's position

The Commission intervened in the initial proceeding and remained as an intervener in the review proceeding.

The Commission's position was that continued orders authorising Beth's placement in a residential facility would be compatible with Beth's human rights, so long as it was the least restrictive means necessary for her care and protection in the best interests of the child and that there were safeguards to ensure her rights were not unjustifiably limited.

The Commission made submissions on essential safeguards that must apply to the placement to ensure the restrictions on Beth's right to liberty were proportionate, including regular review of the placement, effective independent oversight and the requirement that Beth have independent legal representation when the Court undertook a review of the orders authorising the placement.

Outcome

The Supreme Court granted an extension of the orders after being satisfied on the evidence that they were reasonably necessary and justified for the protection of Beth's best interests and would not interfere with Beth's liberty and rights beyond what was reasonably necessary. Important safeguards ensuring this included the requirement for provision of care in accordance with a behaviour support plan and a statutory case plan, the requirement that there be independent vetting and supervision of the operation of the order, the provision for a progress report and the reservation of liberty to apply to those having a part in that process of vetting and supervision.

Christian Youth Camps Ltd & Ors v Cobaw Community Health Ltd & Ors [2014] HCATrans 289

Nature of Proceedings

Christian Youth Camps Limited made an application for special leave to appeal to the High Court.

The Commission's position

The Commission was a party to the proceeding having intervened in the Court of Appeal and VCAT proceedings below. In this application, the Commission submitted that leave to appeal should not be granted.

Outcome

Special leave to appeal was refused.

Ziarata Zia v Monash Health (VCAT – settled)

Nature of Proceedings

This matter involved an allegation of discrimination in the provision of goods and services on the basis of religious belief and sex under the *Equal Opportunity Act 2010*. It raised a question as to whether Monash Health had breached the Charter by failing to give proper consideration to Mrs. Zia's human rights to equality, freedom of religion and belief and cultural rights.

The Commission's position

In relation to the Charter, the Commission made submissions on the scope of relevant human rights and the obligation on the public authority to act compatibly with them.

Outcome

The case settled before hearing.

Goode v Common Equity Housing [2014] VSC 585

Nature of Proceedings

The proceeding raised a question whether, under s 39 of the Charter, the Victorian Civil and Administrative Tribunal had jurisdiction to consider a claim that a public authority acted unlawfully under the Charter where a person's claim that the authority acted unlawfully for a reason other than the Charter is not determined or rejected.

The Commission's position

The Commission intervened to make submissions on the operation of section 39 of the Charter. The Commission submitted that it is not necessary that a claim against a public authority for non-Charter unlawfulness be determined and upheld in order for the Tribunal to have jurisdiction under s 39 of the Charter to consider a claim that a public authority acted unlawfully under the Charter.

Outcome

Consistent with the Commission's submissions, the Supreme Court held that while section 39 of the Charter does not create a new cause of action based on Charter unlawfulness, the Tribunal does have jurisdiction under section 39 to determine whether a public authority acted unlawfully under the Charter even where the claim for non-Charter unlawfulness is not determined or rejected. The Court remitted the matter to VCAT to reconsider the Charter claim.