



**Rights, Responsibilities and Respect**  
The Report of the Human Rights Consultation Committee



**To protect and promote human rights**

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## **Introduction and summary**

After six months of listening to Victorians of all ages and backgrounds across the State, it is clear that a substantial majority of the people we heard from want their human rights to be better protected by the law. While Victorians do not want radical change, they do support reform that will strengthen their democracy and Victoria's system of government. In this area, they see Victoria playing a leading role among the Australian States.

Many people want to see their human rights better protected to shield themselves and their families from the potential misuse of government power. For even more people, however, the desire for change reflects their aspiration to live in a society that continues to strive for the values that they hold dear, such as equality, justice and a 'fair go' for all.

The idea of a community based upon a culture of values and human rights is one that we heard again and again during our consultations. Victorians sought not just a new law, but something that could help build a society in which government, Parliament, the courts and the people themselves have an understanding of and respect for our basic rights and responsibilities.

Based upon what we have heard, we recommend in this report that the Victorian Parliament enact a Charter of Human Rights and Responsibilities. This Charter would not be modelled on the United States Bill of Rights. It would not give the final say to the courts, nor would it set down unchangeable rights in the Victorian Constitution. Instead, the Victorian Charter should be an ordinary Act of Parliament like the human rights laws operating in the Australian Capital Territory, New Zealand and the United Kingdom. This would ensure the continuing sovereignty of the Victorian Parliament.

The United Kingdom has a system of law and government similar to Victoria and its *Human Rights Act* 1998 has been a success without giving rise to the litigation and other problems sometimes associated with the United States Bill of Rights. Its law has also proved effective in balancing issues such as the need to fight terrorism with the democratic and other principles required for a free society.

Victoria's Charter of Human Rights and Responsibilities should be written in clear language. It should also include a preamble that sets out the community values that underpin it. In this form, the Charter could be used in schools and for broader community education, such as for new migrants to Victoria.

The Charter would also play an important role in policy development within government, in the preparation of legislation, in the way in which courts and tribunals interpret laws and in the manner in which public officials treat people within Victoria.

We recommend that the Charter protect those rights that are the most important to an open and free Victorian democracy, such as the rights to expression, to association, to the protection of families and to vote. These rights are contained in the *International Covenant on Civil and Political Rights* 1966, to which Australia has been a party for many years. We have said that some of the



rights in this instrument need to be modified or even not included to make sure that the Charter best matches the contemporary aspirations of the Victorian people.

The rights in the Charter would not be absolute. The Charter would make it clear that these rights can be limited, as occurs in other nations, where this can be justified as part of living in a free and democratic society. This would mean that our elected representatives can continue to make decisions on behalf of the community about matters such as how best to balance rights against each other, protect Victorians from crime, and distribute limited funds amongst competing demands. We also consider that the Charter should recognise the power of the Victorian Parliament, not just to balance such interests, but to override the rights listed in the Charter where this is needed for the benefit of the community as a whole.

Many Victorians said that the Charter should also contain rights relating to matters such as food, education, housing and health, as found in the *International Covenant on Economic, Social and Cultural Rights* 1966, as well as more specific rights for Indigenous people, women and other groups. While we agree that these rights are important, we have not recommended that they be included in the Charter at this stage. Based on what we have been told by the community, we think that the focus should be on the democratic rights that apply equally to everyone.

This conclusion needs to be seen in light of our recommendation that the Charter include a mechanism for review and change. It would enable these rights and other issues to be considered again down the track. Indeed, we do not expect that the Charter would remain unchanged, but that it would be updated and improved with the benefit of experience and in line with community thinking. The Charter should be the start of incremental change, not the end of it.

An important aim of the Charter of Human Rights and Responsibilities would be to create a new dialogue on human rights between the community and government. The Charter would mean that rights and responsibilities would be taken into account from the earliest stages of government decision-making to help prevent human rights problems emerging in the first place. The key aspects of this dialogue, as adapted and improved from best practice in the Australian Capital Territory and nations such as the United Kingdom, Canada and New Zealand, would be:

- The **community** would receive the benefit of the rights listed in the Charter.
- Public servants would take the human rights in the Charter into account in developing new **policies**.
- **Public authorities** like government departments would be required to comply with the Charter. If they fail to do so, a person who has been adversely affected by a government decision, as is possible now under Victorian law, would be able to have the decision examined in court. There would be no right to damages.

- Government departments and other public authorities could undertake **audits** of their programs and policies to check that they comply with the Charter.
- Where decisions need to be made about new laws or major policies, submissions to Cabinet would be accompanied by a **Human Rights Impact Statement**.
- When a Bill is introduced into the Victorian Parliament, it would be accompanied by a **Statement of Compatibility** made by the Attorney-General that would set out with reasons whether the Bill complies with the Charter. Parliament would be able to pass the Bill whether or not it is thought to comply with the Charter.
- The Parliament's **Human Rights Scrutiny Committee** would have a special role in examining these Statements of Compatibility. It would advise Parliament on the human rights implications of a Bill.
- Victorian courts and tribunals would be required to **interpret** all legislation, so far as is possible to do so, in a way that is consistent with the Charter. In doing so, they would need to take account of why the law was passed in the first place.
- The Attorney-General and Victorian Human Rights Commissioner would be able to **intervene in a court or tribunal** that is applying the Charter to put submissions on behalf of the government and the public interest. Community and other groups might also be given leave to intervene.
- Where legislation cannot be interpreted in a way that is consistent with the Charter, the Supreme Court would be able to make a **Declaration of Incompatibility**. This would not strike down the law and Parliament could decide to amend the law or to leave it in place without change.
- Where the circumstances justify it, Parliament would be able to pass a law that **overrides** the rights in the Charter. This would prevent a Declaration of Incompatibility being made in respect of the law for five years. The override could be renewed.

We recommend that the Charter come into force on 1 January 2007, except for those provisions that impose a new obligation upon public authorities. As in the United Kingdom, more time should be given to prepare for this latter change, and this part of the Charter should start on 1 January 2008.

We have reached these conclusions after an intensive process of consultation with the Victorian community. This was the task set for us by the Victorian Government's *Statement of Intent* released in April 2005. Our community discussion paper and summary, which set out the questions that we hoped to answer, were sent in electronic and hard copy form to nearly 23,000 people. In addition, thousands of people accessed our website. By working with

community networks and with the cooperation of many Victorian organisations, we have managed to reach many thousands more people.

The Committee participated in 55 community consultation meetings, information sessions and public forums and 75 consultations with government and other bodies. We talked to people ranging from community groups in Mildura, to Indigenous people in Warrnambool, to the victims of crime in Melbourne and to the Country Women's Association in Gippsland. We have travelled throughout the State to make sure that people from all walks of life have had an opportunity to be involved.

And Victorians have certainly wanted to have their say! Over the last six months, we have received 2524 written submissions from across the community. These submissions, whether received via the internet, written on the back of a postcard or set out in a letter, amount to the highest number of submissions ever received for a process in Australia that has looked at this issue. By comparison, the committee that considered a bill of rights for New South Wales in 2000–2001 received 141 submissions.

Overall, 84 per cent of the people we talked to or received submissions from (or 94 per cent if petitions and the like are included) said that they wanted to see the law changed to better protect their human rights. As should be the case in a democracy, whether or not this now occurs is a matter for the Victorian Government and the Victorian Parliament.

Professor **George Williams** (Committee Chair)

**Rhonda Galbally** AO

**Andrew Gaze**

The Hon Professor **Haddon Storey** QC

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<b>Recommendation 1</b>	<b>18</b>
Victoria should enact a new law to better protect and promote human rights.	
<b>Recommendation 2</b>	<b>22</b>
The new law should be an ordinary Act of Parliament.	
<b>Recommendation 3</b>	<b>23</b>
The new law should be called the Charter of Human Rights and Responsibilities.	
<b>Recommendation 4</b>	<b>24</b>
The Charter of Human Rights and Responsibilities should contain a preamble that emphasises rights, responsibilities and respect and that recognises the special significance of human rights to Indigenous peoples as the traditional owners of the land.	
<b>Recommendation 5</b>	<b>31</b>
The Charter of Human Rights and Responsibilities should protect civil and political rights. The Charter should state that, in protecting these rights, it does not limit or exclude any of the other rights that a person may hold.	
<b>Recommendation 6</b>	<b>32</b>
The starting point for the Charter of Human Rights and Responsibilities should be the civil and political rights contained in the <i>International Covenant on Civil and Political Rights</i> 1966. Where necessary, the language should be modernised in line with the language used in the ACT <i>Human Rights Act</i> 2004 or modified as required for the Victorian context.	
<b>Recommendation 7</b>	<b>46</b>
The following rights from the <i>International Covenant on Civil and Political Rights</i> 1966 should be dealt with in the Charter of Human Rights and Responsibilities as follows:	
<ul style="list-style-type: none"><li>• A provision protecting the right to life should provide that, for the purposes of the Charter, the provision applies from the time of birth.</li><li>• A non-discrimination provision should refer to the grounds of discrimination listed in article 26 of the <i>International Covenant on Civil and Political Rights</i> 1966, as well as to 'other status provided for under the <i>Equal Opportunity Act</i> 1995 (Vic)'. It should also contain a sub-section similar to section 19(2) of the <i>New Zealand Bill of Rights Act</i> 1990, which provides that special measures taken to assist disadvantaged groups do not constitute discrimination.</li><li>• A provision protecting people from being unlawfully deprived of their property.</li><li>• A provision protecting the rights of minorities to enjoy their culture, practise their religion and use their language, which should draw upon the principles of multiculturalism contained in the <i>Multicultural Victoria Act</i> 2004 (Vic).</li></ul>	

Recommendation	Page
<b><i>Recommendation 7 (continued)</i></b>	
<ul style="list-style-type: none"> <li>• Indigenous rights should be protected through the recognition of specific cultural rights. The preamble should also recognise Indigenous rights.</li> <li>• A right to self-determination should not be included in the Charter as a free-standing right, but it should be reflected in the preamble to the Charter.</li> <li>• A right to found a family should not now be included in the Charter.</li> <li>• Other civil and political rights should be included as adapted for the Victorian context.</li> </ul>	
<b><i>Recommendation 8</i></b>	<b>48</b>
The Charter of Human Rights and Responsibilities should state that the rights it protects 'may be subject only to such reasonable limits set by Victorian laws that can be demonstrably justified in a free and democratic society'. This provision should also provide specific guidance on the factors to be taken into account in this balancing process.	
<b><i>Recommendation 9</i></b>	<b>53</b>
The Charter of Human Rights and Responsibilities should provide that human rights belong to all people in Victoria and that only individual persons have human rights.	
<b><i>Recommendation 10</i></b>	<b>57</b>
The Charter of Human Rights and Responsibilities should bind 'public authorities'.	
<b><i>Recommendation 11</i></b>	<b>61</b>
The definition of a 'public authority' should include government departments, statutory authorities, Victoria Police, and local government. It should also extend to all persons or bodies that perform public functions on behalf of the State of Victoria, when they are performing those public functions.	
The definition should not include the Victorian Parliament in regard to proceedings in Parliament, nor should it bind the courts in their development of the common law.	
The Charter should include a power to make regulations that add or remove organisations, or classes of organisations, from the category of public authority.	
<b><i>Recommendation 12</i></b>	<b>64</b>
All 'public authorities' should be required to comply with the Charter of Human Rights and Responsibilities.	
<b><i>Recommendation 13</i></b>	<b>71</b>
For legislative changes and policy and other decisions, the responsible Minister should ensure that a Human Rights Impact Statement is included in Cabinet submissions. The requirement for and details of such a Statement should be set out in the Cabinet Handbook. The Statement should include:	
<ul style="list-style-type: none"> <li>• a statement of the purpose of the Bill, regulation, policy or proposal;</li> </ul>	

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***Recommendation 13 (continued)***

- a statement of its effect upon any of the human rights in the Charter; and
- a statement of any limitation placed upon any human right in the Charter by the Bill, policy or proposal, the importance and purpose of this limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there is any less restrictive means to achieve the purpose.

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***Recommendation 14***

**73**

In regard to each Bill, the Attorney-General should present a Statement of Compatibility to Parliament. The Statement should set out whether or not, in the opinion of the Attorney-General, the Bill is consistent with the Charter. In doing so, the Statement should address the same matters as would be required in respect of a Human Rights Impact Statement. Where appropriate, a member of Parliament introducing a private members Bill should make a Statement of Compatibility in the same form.

For each regulation tabled in Parliament, information should similarly be provided, in an appropriate form, regarding the compatibility of the regulation with the Charter.

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***Recommendation 15***

**75**

The Charter of Human Rights and Responsibilities should include an override clause. The clause should provide that the Victorian Parliament may, in exceptional circumstances, override a Charter right by expressly declaring in the law it is intending to pass that an Act or provision is to operate notwithstanding that it is inconsistent with the Charter.

Where the Victorian Parliament uses this power, the Supreme Court should not be able to issue a Declaration of Incompatibility in respect of that Act or provision for five years after the Act or provision comes into force.

After this time, Parliament should again be able to state that the Act or provision is to continue to operate notwithstanding the Charter. Any subsequent renewals should also operate for five years.

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***Recommendation 16***

**80**

The Scrutiny of Acts and Regulations Committee should be conferred with additional terms of reference to consider and report on matters arising under the Charter of Human Rights and Responsibilities, including questions referred to it by either House of Parliament, whether legislation is compatible with the Charter and consideration of any Declarations of Incompatibility made by a court.

The Committee should be able to report on Bills within ten sitting days of their introduction into Parliament or before their enactment, whichever is the later.

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<b><i>Recommendation 16 (continued)</i></b>	
<p>The Committee should be provided with sufficient resources to ensure that it can provide an appropriate level of advice and support to Parliament. Where possible, the Committee's work with respect to human rights should allow for input and submissions from the public. The Committee should be renamed the 'Human Rights Scrutiny Committee'.</p>	
<b><i>Recommendation 17</i></b>	<b>83</b>
<p>All Victorian courts and tribunals should be required to interpret legislation in a way that is compatible with the Charter. In doing so, courts and tribunals should be directed to take account of the purpose of the legislation. Where relevant, international law and the judgments of foreign and international courts and tribunals should be considered.</p>	
<b><i>Recommendation 18</i></b>	<b>84</b>
<p>In a proceeding before a court or tribunal in which a question of law is raised as to the interpretation of a Victorian law in light of the Charter, the question may be referred by that court or tribunal to the Supreme Court for determination where:</p> <ul style="list-style-type: none"> <li>• the referral occurs before the final determination of the proceeding by the court or tribunal;</li> <li>• one of the parties to the proceeding applies for the matter to be referred; and</li> <li>• the court or tribunal considers it an appropriate matter for determination by the Supreme Court.</li> </ul> <p>Notice of such a referral should be given to the Attorney-General and the Victorian Human Rights Commissioner. Such notice should also be provided where the Supreme Court (other than on a referral) or the County Court is considering a question as to the interpretation of a Victorian law in light of the Charter.</p>	
<b><i>Recommendation 19</i></b>	<b>88</b>
<p>If the Supreme Court is satisfied that an Act, subordinate legislation or provision of either cannot be interpreted in a way that is consistent with the human rights listed in Charter, it may make a Declaration of Incompatibility.</p> <p>Only the Supreme Court should have the power to make a Declaration of Incompatibility.</p> <p>Where a Declaration of Incompatibility is made, it should not affect the validity or continuing operation or enforcement of the Act or subordinate legislation.</p> <p>The Supreme Court should not make a Declaration of Incompatibility unless it is satisfied that a notice has been given to the Attorney-General and the Victorian Human Rights Commissioner that the Court is considering making such an order.</p>	

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<b><i>Recommendation 20</i></b>	<b>88</b>
The Attorney-General and Victorian Human Rights Commissioner should have the right to intervene in any proceeding before any court or tribunal that involves the application or interpretation of the Charter. Other persons should be able to intervene in such matters at the leave of the court or tribunal, subject to such directions and conditions as the court thinks fit.	
<b><i>Recommendation 21</i></b>	<b>89</b>
Where the Supreme Court makes a Declaration of Incompatibility	
<ul style="list-style-type: none"><li>• a copy of the Declaration should be provided to the Attorney-General within seven days;</li><li>• the Attorney-General should arrange for the Declaration to be laid before each House of Parliament on or before the sixth sitting day of that House after receiving the Declaration;</li><li>• the Human Rights Scrutiny Committee should inquire into and report on the Declaration within three months of the declaration having been laid before each House of Parliament; and</li><li>• the Attorney-General should prepare a written response to the Declaration to be presented before each House of Parliament within six months of having first presented the Declaration to Parliament.</li></ul>	
<b><i>Recommendation 22</i></b>	<b>98</b>
The Victorian Government should implement and resource the following human rights education strategies:	
<ul style="list-style-type: none"><li>• Public servants should have access to human rights training and education.</li><li>• Judges and tribunal members should have access to training and education by the Judicial College of Victoria.</li><li>• Parliamentarians and their staff should have access to training and education provided by Parliament.</li><li>• Members of the legal profession should have access to training and education by their legal education providers.</li><li>• Community, business and schools education strategies should be developed by the relevant government departments, the Victorian Human Rights Commissioner, local government and community based organisations.</li></ul>	
<b><i>Recommendation 23</i></b>	<b>108</b>
There should be a Victorian Human Rights Commissioner (a member or Chairperson of the Equal Opportunity Commission Victoria). The Commissioner should have the following functions:	
<ul style="list-style-type: none"><li>• to develop and deliver education programs about human rights and the Charter;</li><li>• to present the Attorney-General with an Annual Report on the operation of the Charter (which should then be tabled in Parliament) which should include consideration of any Acts that have been passed with override clauses and consideration of any Declarations of Incompatibility that have been made;</li></ul>	



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<b><i>Recommendation 23 (continued)</i></b>	
<ul style="list-style-type: none"> <li>• to review the effect of Victorian laws on human rights every four years and report in writing to the Attorney-General on the results of the review (which should then be tabled in Parliament);</li> <li>• where requested, to conduct audits of government departments and other public authorities to determine the consistency of programs and practices with the Charter;</li> <li>• where the Victorian Human Rights Commissioner considers it necessary to do so, to intervene in proceedings that involve the Charter in any court or tribunal in Victoria; and</li> <li>• to undertake systemic reviews of human rights issues, when such an inquiry has been referred to it by the Attorney General.</li> </ul>	
<b><i>Recommendation 24</i></b>	<b>111</b>
<p>A Department of Justice Human Rights Unit should be created that is responsible for:</p> <ul style="list-style-type: none"> <li>• issuing guidance to government departments and agencies to ensure increased awareness of and compliance with the Charter;</li> <li>• the vetting of policy and legislative proposals to ensure compliance with the Charter;</li> <li>• providing assistance to government departments in their preparation of the Human Rights Impact Statements to be provided to Cabinet with policy and other proposals; and</li> <li>• providing assistance to the Attorney-General in the preparation of Statements of Compatibility for new legislation.</li> </ul>	
<b><i>Recommendation 25</i></b>	<b>111</b>
<p>Victorian government departments should include information in their annual report on what they are doing to comply with the Charter.</p>	
<b><i>Recommendation 26</i></b>	<b>112</b>
<p>The Victorian Government should issue policy instructions to departments to develop human rights action plans.</p>	
<b><i>Recommendation 27</i></b>	<b>119</b>
<p>The Charter should not disturb any of the remedies that a person may be entitled to under the existing law.</p>	
<b><i>Recommendation 28</i></b>	<b>119</b>
<p>A public authority should not be considered to have acted unlawfully if it could not have acted differently, in accordance with law.</p>	
<b><i>Recommendation 29</i></b>	<b>123</b>
<p>The range of matters the Ombudsman may consider should be clarified to include Charter rights.</p>	
<b><i>Recommendation 30</i></b>	<b>125</b>
<p>A person who claims that a public authority has acted unlawfully by acting in a way that is incompatible with the Charter should be able to:</p> <ul style="list-style-type: none"> <li>• apply to a court for judicial review of the decision of the public authority to act in the way it did; and</li> </ul>	

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<b><i>Recommendation 30 (continued)</i></b>	
<ul style="list-style-type: none"><li>• apply to a court for a declaration that the act of the public authority was unlawful, where the existing requirements for those proceedings are satisfied.</li></ul>	
<b><i>Recommendation 31</i></b>	<b>128</b>
None of the remedies available in relation to any conduct made unlawful by the Charter should enable the award of damages unless a right to damages was available under the existing law.	
<b><i>Recommendation 32</i></b>	<b>129</b>
The Victorian Government should consider how best to implement appropriate and accessible advocacy support as part of its commitment to the Charter.	
<b><i>Recommendation 33</i></b>	<b>135</b>
The Charter should commence on 1 January 2007, except that those provisions dealing with the duty on public authorities to comply with the Charter (and the consequences of any breach) should commence on 1 January 2008.	
<b><i>Recommendation 34</i></b>	<b>137</b>
The Charter should be reviewed four years after its commencement. The review should include consultation with the public and should consider matters including: <ul style="list-style-type: none"><li>• whether the Charter should also protect human rights contained in other international instruments to which Australia is a party, such as the <i>International Covenant on Economic, Social and Cultural Rights</i>, <i>Convention on the Rights of the Child</i> and <i>Convention on the Elimination of All Forms of Discrimination Against Women</i>;</li><li>• whether, following consultations with Victorian Indigenous communities, a right to self-determination should be included in the Charter, and, if so, the appropriate definition and scope of that right;</li><li>• whether the protection from discrimination provided by the Charter should include additional grounds;</li><li>• whether changes should be made to how government departments are affected by the Charter, such as whether regular audits of their programs for compliance with the Charter should be made mandatory; and</li><li>• whether the remedies available under the Charter should be expanded, especially in light of access to justice considerations.</li></ul>	
<b><i>Recommendation 35</i></b>	<b>138</b>
The Charter should again be reviewed eight years after its commencement. At that time, a decision should be made about whether further reviews are necessary and the timing of those reviews.	

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## Chapter 1

**Does Victoria need a new  
law on human rights?**

### 1.1 Summary

The Human Rights Consultation Committee received 2524 submissions about the protection of human rights in Victoria. 84 per cent of formal submissions (or 94 per cent with petitions and the like) support a change in Victorian law to better protect human rights. Given the community response and the strength of the arguments for reform, the Committee believes that change is warranted and that a new law would better protect and promote human rights in Victoria.

We were moved by the powerful stories many Victorians told about how the law at times fails to protect even their most basic human rights. We accept the view of these people that a new human rights law could provide a more coherent and accessible code of conduct for government, making those who wield power more accountable to the people. The Committee considers that Victoria should enact such a new law to enhance our democracy and make Victoria a better place to live.

Consistent with many of the submissions and the preferred approach of the government, the Committee believes that change in this area cannot occur all at once. The important thing is to make a start in the right direction, with reform that will support further discussion in the community and evolution in the law over time. The best way of achieving this gradual reform is through an ordinary piece of legislation, like those now operating in the Australian Capital Territory, New Zealand, and the United Kingdom.

Over time, the Committee believes that the new law, which we believe should be called the Charter of Human Rights and Responsibilities, will help to build a stronger culture of human rights in Victoria. It would also play an important symbolic and educative role and could give expression to important values such as equality, diversity, respect and inclusion. The Charter would bring into one document the rights that Victorians as a community believe should be respected and observed, based on our common humanity. To capture these ideals, a preamble should be included at the beginning of the Charter. It should refer to both rights and responsibilities and recognise the unique position of Indigenous Victorians.

I write this submission, for the coming generation. A Human Rights Charter gives us the opportunity to develop a vision for how we want to see our future. I write it for my grandson, Tykeim Sol Rashid, who is 2. He is at an age where he will happily sit in a hammock and sing with his grandmother, pick flowers to give to the people he loves, test his physical ability by jumping and skating ... I want him never to be made to feel bad about who he is or his choices about how he lives his life as long as he respects and protects other peoples rights. It is for him and others like him that I am excited about the prospect of a Human Rights Charter for Victoria. I want him to know what his rights are and how he can expect to have them protected. The other side of that is that I want for him to know and respect the rights of others.

**Submission 134: Marg D'Arcy**

## 1.2 Is change needed to better protect human rights?

### 1.2.1 What are human rights?

Human rights allow us to live with dignity and value. They are entitlements that attach to all people. By respecting a person's human rights, we make a statement that we value them as a fellow member of the human race.

Many human rights are well known. The right to vote is one example, as is giving a person a 'fair go' by not unfairly discriminating against them. Freedom from torture or cruel and degrading treatment is another well known human right.

Human rights relate to the way governments operate and help to ensure that people are treated fairly and that governments do not abuse their power.

#### ***International human rights standards that Australia has agreed to meet***

In the aftermath of the Second World War, the United Nations adopted the *Universal Declaration of Human Rights* 1948, which sets out human rights as 'a common standard of achievement for all peoples and all nations'. It says that:

- All human beings are born free and equal in dignity and rights.
- Everyone is entitled to rights and freedoms without discrimination.
- Human rights cannot be taken away, traded or disposed of.
- Human rights are the foundation of freedom, justice and peace in the world.

Australia has since taken part in the drafting and has ratified a number of human rights treaties. The *International Covenant on Civil and Political Rights* 1966 contains rights such as the right to vote, to freedom of speech and to freedom of religion. The *International Covenant on Economic, Social and Cultural Rights* 1966 includes rights to basic living standards, such as access to food, housing, social security, education and health.

Other treaties deal with rights of particular groups, such as the *Convention on the Rights of the Child* 1989 or with particular human rights, such as the *International Convention on the Elimination of all Forms of Racial Discrimination* 1966.

### 1.2.2 Is there community support for a Charter?

The committee received 2524 submissions in a variety of formats. 84 per cent of formal submissions (or 94 per cent with petitions and the like) expressed support for a change in Victorian law to better protect human rights. This view is held across the State in equal measure in city and rural areas and across all sections of the community.

Significantly, the Committee noted that at the 55 community meetings we held across the State, the more people learnt about their system of government, the more they tended to favour change. This was particularly the case in regard to concerns about giving judges too

much power. Many people were reassured to hear that a Charter can be an ordinary Act of Parliament and does not have to be the same as the United States Bill of Rights.

Almost all of the 161 community and other organisations that made a submission supported the idea of better protection for human rights in Victorian law (although it should be noted that they also expressed a wide range of views as to how this should be done, with many arguing for reform that goes beyond what we recommend in this Report). Organisations in favour of change in some form included key legal groups, community organisations from many sectors, local councils, women's agencies, disability groups, groups representing older people and younger people and organisations representing gay, lesbian, bisexual, transgender and intersex communities.

Many faith-based groups also argued that human rights should be better protected in the law, including the Justice and International Mission Unit of the Uniting Church in Victoria and Tasmania, Melbourne Catholic Commission for Justice, Development and Peace, National Council of Jewish Women Victoria and St Luke's Anglicare.

Very few organisations opposed change. They included faith-based groups such as the Australian Christian Lobby, Australian Family Association and the Salt Shakers (Christian Ethics in Action).

The submissions raised many arguments for and against a Charter of Rights in Victoria. Sometimes the arguments were the opposite sides of the same point: for instance, some submissions said the protection of human rights in Victoria was inadequate, while other submissions said the protection of human rights in Victoria was adequate. Other arguments were quite separate. We list and discuss the arguments for and against a Charter in the following pages.

### **1.2.3 Arguments for a Charter**

The vast majority of submissions to the Committee said that change is needed to better protect and promote human rights in Victoria. The main reasons given were:

- The current protection of human rights is inadequate.
- Additional protection is needed for disadvantaged and marginalised people.
- A Charter would deliver practical benefits by setting minimum standards for government.
- A Charter would modernise our democracy and give effect to Australia's human rights obligations.
- A Charter would educate people about their rights and responsibilities.

We discuss these arguments below.

### ***The current protection of human rights is inadequate***

A large number of submissions stated that rights are not adequately protected in Victoria. Some people pointed to gaps in the existing legal protection of human rights.<sup>1</sup> Benjamin Skepper, for example, said: 'A Charter is highly overdue. We have extremely limited Constitutional protection of rights in Australia.'<sup>2</sup> Jonathan Wilkinson gave a few specific rights as examples: 'I believe the protection of every citizen's rights to privacy, marry and form a family, to due process of law and to humane treatment in detention or prison are currently not given enough protection.'<sup>3</sup> The Law Institute of Victoria said that the current laws are not always being applied or respected.<sup>4</sup>

The Australian Lawyers Alliance expressed the views of many when they said:

*The fabric of human rights in Australia resembles more of a patchwork quilt, frayed at the edges, than a secure and comprehensive regime of rights and freedoms.* (Submission 1017)

Human rights are currently protected in Australia by the Australian and Victorian Constitutions, legislation, the common law and international law. For example, the Australian Constitution protects some rights, although generally only against Federal and not State laws. An example of this is section 116 of the Constitution, which contains the right of freedom of religion. The High Court has also implied certain rights from the Constitution.<sup>5</sup>

Federal legislation also protects some human rights, for example anti-discrimination legislation and laws protecting privacy.<sup>6</sup> In addition, the federal Human Rights and Equal Opportunity Commission oversees the protection of the rights in these Acts and has investigatory and reporting powers.

In Victoria, the *Equal Opportunity Act* 1995 prohibits discrimination and sexual harassment. Human rights provisions are also contained in other Victorian legislation, including the *Electoral Act* 2002, the *Racial and Religious Tolerance Act* 2001, the *Information Privacy Act* 2000, the *Freedom of Information Act* 1982, the *Evidence Act* 1958 and the *Crimes Act* 1958.

Human rights are also protected through the common law, which is made by judges in the cases that come before them in court. Examples include the *Mabo* case (which recognised Aboriginal native title) and the *Dietrich* case (which recognised that a trial may be stopped or 'stayed' if a person accused of a serious crime cannot afford a lawyer and the government has refused legal representation). There is also limited protection of rights through international channels.<sup>7</sup>

The Committee agrees that there are gaps in the current protection of rights. Professor Marcia Neave and Professor Spencer Zifcak gave the following examples:

*Many other human rights recognised by international law are not protected by Victorian law. There is, for example, no provision which prevents legislation being enacted to create criminal offences retrospectively, no legislative prohibition on the use of torture or cruel,*

*inhuman or degrading treatment and no legislation protecting freedom of speech. Indeed freedom of speech is what is left over after the censorship laws, defamation, contempt of court, contempt of Parliament, sedition, criminal blasphemy, radio and television programme standards and other minor limitations have been taken into account. (Submission 840)*

Professors Neave and Zifcak also identified gaps in Victorian privacy and equal opportunity legislation. For example, they stated that privacy law relates mainly to ‘information privacy in the public sector and with health information and [does] not protect people from other types of privacy invasion’.<sup>8</sup> Submissions that focussed on deficiencies in the *Equal Opportunity Act* pointed to exceptions to the Act and to its failure to prohibit discrimination against people because they are homeless or poor.<sup>9</sup>

The Committee also notes the recent report of the Victorian Scrutiny of Acts and Regulations Committee (SARC) entitled ‘Discrimination in the Law’,<sup>10</sup> which highlighted provisions in Victorian laws that discriminate or may lead to discrimination.

Some submissions made the additional point that, because human rights protection in Victoria is not comprehensive, deficiencies in the protection of rights are identified and addressed in a ‘reactive and arbitrary’ manner,<sup>11</sup> and obtaining a remedy is unnecessarily complex and difficult.

The Committee considers that human rights protection in Victoria is far from comprehensive and that those rights that are protected are scattered and often hard to find. We agree with the large number of people making submissions who pointed out that a Charter would benefit all Victorians by writing down in one place the basic rights we all hold and expect government to observe.

Change is also called for at a practical level. The current patchwork system is difficult to navigate and is administered by a variety of different government agencies and statutory bodies. The infringement of one human right often involves the infringement of others. A person seeking redress is often forced to deal with multiple bodies with varying levels of interest in their case and with variable outcomes. Moreover, some of the organisations involved (agencies and statutory bodies) lack the power to enforce the human rights they are there to protect.

**Submission 1100: Julian Burnside QC and Georgia King-Siem**

### ***Additional protection is needed for disadvantaged and marginalised people***

The Committee heard powerful stories about the impact that a lack of respect for human rights has in the lives of many Victorians, particularly those who are disadvantaged. These problems often related to civil and political rights, indicating that disadvantaged people have much to gain from a Charter that protects these rights.

For example, people with physical disabilities reported difficulties with access and participation, including barriers to exercising their right to vote.<sup>12</sup> At a forum we attended on this issue,



several peak disability bodies including ACROD (The National Industry Association for Disability Services), the Disability Advisory Council of Victoria, The Australian Federation of Disability Organisations, the Victorian Women with Disabilities Network and Villamanta Legal Service said that the impediments to voting for people with disabilities include physical access to polling booths, difficulties becoming registered to vote and staying registered, the inaccessibility of the voting ballot and privacy issues.<sup>13</sup>

There's one right for people with a disability and one right for 'normal' people.

**Statement by a person with a disability at a forum conducted by the Victorian Council of Social Service and the Federation of Community Legal Centres<sup>14</sup>**

People with intellectual disabilities reported that they are not always treated fairly and with dignity and respect when they have contact with the criminal justice system.<sup>15</sup> A person with an intellectual disability taking part in a consultation told the story of a person with cerebral palsy being detained by the police while walking along the street because the police believed that he was intoxicated. One participant stated: 'We get sick and tired of our rights not being met. We've been fighting for our rights for decades.'<sup>16</sup>

Older people and people with disabilities in the residential care system were identified as being cut off from the civil and political rights that most of us take for granted, such as freedom of movement.<sup>17</sup> Young people also talked a lot about their desire to be heard and to participate in decisions affecting them.<sup>18</sup>

### ***Women in prison***

Women from the Dame Phyllis Frost Centre reported breaches of their basic rights, which they considered to be disproportionate to any reasonable response of our justice system towards a person found guilty of committing a crime.

Women complained of having little confidentiality in the provision of medical services and about 'very personal comments' being made 'in front of a group of male officers', or of being escorted to gynecological appointments by male officers.

One woman visited an Orthopedic Surgeon at hospital. She reported being handcuffed to a waist belt and wearing ankle shackles. The male prison officer remained in the room while she removed the top half of her clothing for examination. To examine her lower back, the surgeon himself had to remove her shoes, socks and trousers and dress her again in front of the officer when he was finished.

The use of strip searches for women when they first enter the prison, when receiving visitors or at random when looking for contraband, was described as dehumanising, humiliating and degrading. One woman said: 'Our dignity as women is taken completely'.

**Submission 1913: Consultation with women at Dame Phyllis Frost Centre conducted by Victorian Council of Social Service and Federation of Community Legal Centres.**

Systemic discrimination was reported in submissions and consultation meetings with members of culturally and linguistically diverse communities. For example, Muslim communities reported racial discrimination and vilification.<sup>19</sup> Participants in an Eritrean community forum expressed fears that the anti-terror laws would unduly impact on the community.<sup>20</sup> People were frustrated that current anti-discrimination law deals with individual complaints and has not effectively tackled ingrained and institutional racism.

Indigenous Australians reported deep-seated racism, discrimination in the provision of essential services, as well as a lack of respect for land rights and cultural identity. Racism was reported in each of the eight Indigenous consultations held throughout the State.

Australia's human rights instruments are currently inadequate in their protection for Indigenous peoples against systemic racism ... A Human Rights Bill would greatly strengthen the position of Victoria's Indigenous peoples if it includes measures which address issues of racial discrimination and racial respect ... By recognising and establishing measures to protect our rights, the proposed human rights law can go a long way in establishing a safe meeting place between our peoples. Lets get 'rights' right and right the wrongs. Then we can begin to establish a just relationship between our peoples and secure a future for all our children.

**Indigenous Human Rights Forum, Aboriginal Advancement League, speech by Muriel Bamblett, Victorian Aboriginal Child Care Agency (Consultation 35)**

Members of gay, lesbian, bisexual, transgender and intersex communities also reported discrimination and vilification. We received a significant number of submissions from members of these communities, all in favour of comprehensive rights protection through a Charter.

Having grown up in the country I experienced first-hand the horrible consequences of homophobia. I don't think a day went by without some vile homophobic taunt being thrown at me. I was the subject of physical abuse and a queer friend of mine killed himself to escape the taunts. He was 15. I have been called sick, evil, selfish and perverted, people have spat at me and told me that I should get AIDS and die. I never felt safe as a queer youth and I don't feel safe all the time as a queer adult.

**Submission 373: D Marshall**

Homeless people stated that their human rights were being violated in a number of ways. In focus groups conducted by the Public Interest Law Clearing House Homeless Persons' Legal Clinic, 80 per cent of participants thought that the current protection of human rights in Victoria is inadequate. In addition, 94 per cent thought that the law needed to be changed to better protect human rights.<sup>21</sup>

### ***Homelessness and human rights***

The Public Interest Law Clearing House Homeless Persons' Legal Clinic conducted focus groups with 106 homeless people in Melbourne. Their findings included:

- *Fundamental rights which are considered to be frequently violated include the right to non-discrimination, the right to privacy, the right to be treated with dignity and respect and the right to liberty, safety and security.*
- *Disturbingly, a significant majority of participants considered that the right to be free from torture and other cruel, inhuman or degrading treatment and punishment was not adequately protected and realised.*
- *The right to liberty, safety and security of person was considered by a substantial majority of participants, 66 per cent, to be inadequately or very inadequately protected. This was particularly the case for people experiencing primary homelessness; that is, people sleeping rough, in cars, or in derelict buildings or squats.*
- *The right to vote was considered to be inadequately protected by almost 50 per cent of participants. This is consistent with recent research demonstrating that at least 75 per cent of eligible homeless people did not vote at the 2002 Victorian State Election.*

**Public Interest Law Clearing House Homeless Person's Legal Clinic (Submission 186)**

A number of people also made the point that, without an instrument to safeguard human rights, the rights of minorities might be neglected in an electoral process that focuses on the majority.<sup>22</sup> As Bianca Jayawardena argued:

*There are certain individuals who are in need of greater protection in certain situations. Minorities, in particular will benefit from such legislation. As a democracy, their rights often go unheard and unprotected, but as a liberal society the government should not ignore their need for protection. (Submission 363)*

The Committee accepts the evidence from many marginalised people that their rights are not always respected. It also supports the view put by many Victorians, from all walks of life, that a Charter could provide valuable additional protection for the most disadvantaged in the community.

### ***Human Rights are important for everyone, especially those who are disadvantaged***

The essential feature of human rights is that all humans should have an equal right to a 'fair go'. At present, not everyone does get a 'fair go', and reform is necessary to better protect their rights. Stronger, more comprehensive and easily accessible protection of human rights would better protect the human rights of people who are disadvantaged as well as everyone else.

**Submission 795: Kess Dovey**

***A Charter would deliver practical benefits by setting minimum standards for government***

Many members of the community told the Committee that the Charter would be a powerful tool in assessing whether human rights protection in Victoria reaches minimum standards.<sup>23</sup> Some submissions made the point that without such a law there is no guarantee that the rights that we currently enjoy will not be taken away in the future,<sup>24</sup> such as hard-won equality rights for women and people with disabilities.

Many people stressed that a new law would enhance government decision-making and would build public confidence in government. For example, Chris White said that a Charter 'would ensure that all legislation passed by Victorian Parliament must accord with basic standards of human rights, including the right to freedom from discrimination'.<sup>25</sup> A participant at a Jewish community consultation said that a new human rights law would be like a virus checker, so that when the government infringes rights the window pops up and then the society and the government have to consider whether the infringement can be justified.<sup>26</sup>

The Victorian Bar made these comments:

*Experience in comparable jurisdictions shows that a Charter of Human Rights which adopts an integrated approach to the processes of policy-making, legislation and court enforcement can significantly enhance the quality of decision-making within the executive government and by the legislature. (Submission 139)*

The Committee agrees that a human rights Charter could be extremely valuable in promoting better government. It would provide a democratic insurance policy for every Victorian by requiring that government laws, policies, decisions and actions take into account fundamental human rights. It would also ensure that, where the government wants to restrict human rights, there is proper debate about whether any proposed measures strike the right balance between the rights of Victorians and the objective that the government is seeking to achieve.

The Committee was mindful of the following comments by the Equal Opportunity Commission Victoria, which describe some of the pitfalls of policy development in the current absence of a human rights framework:

*In the absence of a clearly defined human rights benchmark, identifying, analysing and making decisions on the human rights implications of public policy development and implementation occurs on an ad hoc basis in which:*

- *human rights requirements are neither clear nor fully understood; and*
- *there is an absence of comprehensive assistance for public servants and politicians to consider and comply with their human rights obligations.*

*This not only detracts from the efficiency of the public policy process itself, but also gives*

*rise to a risk of developing policies that have unforeseen human rights implications which then need to be rectified after implementation when they have become a problem rather than addressed in the planning and development phase. (Submission 816)*

### **Better government**

The experience of modern human rights instruments in other jurisdictions is that human rights legislation has improved the quality of government decision-making. As Dr Helen Watchirs, the Australian Capital Territory (ACT) Human Rights and Disability Commissioner, stated in relation to the ACT *Human Rights Act 2004*: 'The biggest impact of the Act has been in influencing the formulation of government policy and new legislation'.<sup>27</sup>

For example, in the first year of operation of the ACT *Human Rights Act*, a number of government departments have begun reviewing their laws, policies and practices for human rights compliance. The ACT Human Rights Commissioner has also completed an audit of the Quamby Youth Detention Centre, which highlighted human rights concerns around the segregation and discipline of detainees and the use of strip searching.<sup>28</sup> The audit has resulted in changes to practices in that facility. Human rights considerations are also central to the design of a new correctional facility in the ACT.

In the United Kingdom, the passage of the *Human Rights Act 1998* has been an impetus for changes to police policy and practices. These changes include the introduction of a number of strategies to attract members of minority communities to the police force.<sup>29</sup> The oath taken by new members of the force has also been amended; they must now promise to serve the Crown 'with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people'.<sup>30</sup>

### **Responding to Terrorism**

One example of where a human rights Charter might contribute to better decision-making by government is in the area of terrorism. The enactment of expansive new counter-terrorism laws has generated community and media debate about the balance between counter-terrorism measures and fundamental freedoms. In submissions, a number of people expressed concern that our current rights were being eroded as a consequence of the 'war on terror'.<sup>31</sup> As the Australian Arabic Council noted: 'The threat of being detained without trial is a throwback to the legal systems many communities left and moved to Australia to avoid.' (Submission 1108)

The Committee considers that a new law on human rights could improve the debate about new terrorism laws in the following ways:

- It could institutionalise the checks and balances that Parliament should apply in its consideration of any further anti-terrorism laws. Giving these safeguards explicit recognition in a human rights instrument would demonstrate to the community that security measures are not about security for security's sake, but are about the achievement of higher community goals.

- It could introduce a sense of proportionality to the debate and provide States with clear parameters within which to co-operate with the Commonwealth on security issues.
- It might also provide comfort to particular communities that they are not being singled out on racial or religious grounds. For communities to feel confident about isolating extremists and speaking out against terrorism, they must feel a part of the broader community and feel safe within that community. A human rights instrument that provides an explicit statement of freedoms and responsibilities could be an important element of this confidence building process.

[L]et us look back on this time and be able to say at least that Victorians took a deep breath, surveyed the situation and declared that human rights are important, that human rights are necessary for any democratic society. For it is with upmost certainty, that when our future generations look back upon this time in our Nations history, Victoria must be the shining example, Victoria will be one of the few voices that has requested that in our fight upon terrorism we do not destroy our society as well.

Submission 377: Alexander Brook

### ***A Charter would modernise our democracy and give effect to our international human rights obligations***

A number of submissions mentioned that a new law would give domestic effect to Australia's international obligations and could serve to connect Victoria with developments in international human rights law that now affect so many other nations.<sup>32</sup> Without it, many fear that Victoria, and Australia more generally, may become increasingly isolated from human rights discussions in the international community.

As The Charter Group noted:

*Our system of democracy, and our country as a whole, may begin to lose credibility, both domestically and internationally, if we continue to bypass the consideration of human rights which is becoming an increasingly significant factor in the democratic system of other nations.* (Submission 842)

Dr Elissa Sutherland argued that the introduction of a human rights law might also boost Melbourne's international standing more generally:

*[T]he Charter would offer Melbourne an opportunity to boost its international and national profile. Melbourne through an adoption of our own Charter of rights will come to be seen as a place of progressive ideals and will attract a wide variety of people to live, work, and do business with those in this city.* (Submission 10)

### ***A Charter would educate people about their rights and responsibilities***

The Committee received many submissions about how a Charter could encourage a human rights culture in Victoria and fulfil an important educative role, both in the community and across government. As Dr Aron Paul Igai said:

*Such a Charter will provide a focus of pride for Victorians and a useful tool in educating young people about human rights and fostering a human rights culture in Australia based around equality and human dignity ... It provides a conceptual framework within which cultural differences can be negotiated without recourse to notions of cultural superiority or inferiority. It recognises the reality of a pluralist society in which groups and individuals must respect each other. (Submission 344)*

Overseas experience indicates the transformative potential of a Charter when it is backed up by education and community participation. For example in Canada, the Centre for Research and Information released a survey that showed 88 per cent community support for that country's Charter (saying that the Charter is a 'good thing for Canada'). The Centre said its polling revealed that 'the charter has become a living symbol of national identity because it defines the very ideal of Canada: a pluralist, inclusive and tolerant country.'<sup>33</sup> This shows how a Charter has the potential to be a powerful symbolic and educative tool for future generations, as well as for people such as new migrants to Victoria.

When I teach my TAFE students about the UNDHR [Universal Declaration of Human Rights] it blows their minds that such a powerful document exists – and that Australia is a signatory to it. Inevitably though the conversation turns to how difficult it is to enforce an international document, at a very grassroots level. However, a Victorian human rights document brings the power and potential of human rights directly to the local community level, where it is most needed. It turns rhetoric into reality in a way that the UNDHR does not.

**Submission 299: Amelia Bassett**

### **1.2.4 Arguments against a Charter**

13 per cent of formal submissions to the Committee said that change is not needed to better protect and promote human rights in Victoria. (A further 3 per cent expressed no clear opinion on this question.) People opposed to a Charter raised the following arguments:

- Our human rights are adequately protected – 'If it ain't broke don't fix it'.
- A Charter would make no practical difference.
- A Charter would give too much power to judges.
- Human rights are not a matter for Parliament.
- A Charter might actually restrict rights.

- A Charter would create a selfish society.
- A law is not the best way to protect and promote rights.
- A Federal Charter rather than a State Charter is needed.

The following paragraphs discuss these arguments.

### ***Our human rights are adequately protected – ‘If it ain’t broke don’t fix it’***

Of those who argued against change, one of the most common reasons given was that human rights are already well protected through our democratic system of government in Victoria and that no change is needed. This is the other side of the argument raised by those who support change on the basis that the current protection of human rights is not adequate.

As Andrew Munden argued:

*Firstly, I ask why is there a desire to have a Charter of Human Rights? I believe that the customs, constitution and laws of the government already cover all of the major human rights issues ... I believe that the Australian system of democracy and government already exhibits very strong capabilities to protect the human rights of all citizens. In other words, if it isn't broken, why bother to try and fix it? (Submission 295)*

The Committee agrees that we live in a robust democracy with a relatively sound record on human rights. However, as pointed out earlier, the Committee has received many submissions attesting to shortcomings in the current protection of human rights and revealing that human rights are not enjoyed by all Victorians. The Committee acknowledges that these breaches are not always in the public consciousness because they are often experienced by members of disadvantaged groups who are unable to stand up for their rights. As one participant in a consultation conducted by the Victorian Council of Social Service stated: ‘People like us aren’t going to complain about it.’<sup>34</sup> It is precisely for this reason that the most vulnerable and most disadvantaged Victorians need appropriate protection.

### ***A Charter would make no practical difference***

Some people making submissions said that a Charter would make little difference. As Bill Muehlenberg of the Australian Family Association argued:

*A Bill of Rights has not prevented human rights abuses in nations that have adopted them. Some of the most oppressive societies on earth, including the former Soviet Union, have had elaborate and exquisite BoRs ... a BoR is no panacea, and can certainly offer no guarantees of a genuine promotion of rights. (Submission 506)*

Others such as the Australian Lawyers’ Alliance disagreed and said a Charter would provide important checks and balances to government action.



*Historically, those who oppose have argued that a Bill of Rights would achieve no useful purpose in a free society... [This] ignores the fact that a primary purpose of a Bill of Rights is to provide a safety net whereby those who wield power within a democratic society are subjected to a code of conduct in accordance with the rule of law which operates to prevent them exercising power in such a way as would infringe the basic rights of that society's citizens. Thus, a Bill of Rights is a powerful tool not only in keeping a society tolerant and democratic, but as an essential adjunct to the institutions of Parliamentary democracy and the common law. (Submission 1017).*

The Committee recognises that for the Charter to make a difference it needs to add something to our existing system. It must be focussed on the basic standards that government can and should meet and provide a means by which ordinary Victorians can hold the government accountable.

We are persuaded by the experience in other countries, and the weight of submissions arguing that a Charter can contribute to better government. For this potential to be realised, the Charter needs to set out how human rights standards are built into government processes for developing policy and legislation. More detail about this is provided in Chapter 4.

### ***A Charter would give too much power to judges***

Some people making submissions to the Committee considered that enacting a Charter would take away power from the Parliament and give unelected judges too much power.<sup>35</sup> As Michael McCrohan argued:

*I believe our rights are best protected through existing common law and the democratic process of Parliament. I am not in favour of turning our courts into undemocratic interpreters of human rights taking the issues out of the debate and control of the Australian people through the ballot box and duly elected representatives. (Submission 419)*

Douglas and Dulcie Anderson also said:

*Our main concern is that a bill of rights would take from the Parliament the decisions concerning major policies and legislative issues and give them to the unelected judges in the courts. We do not agree that unaccountable judges should have this power which is vested in the members of parliament who are elected by the constituents. (Submission 374.)*

Rather than handing over power to judges, as does the United States Bill of Rights, modern human rights laws like that now operating in the United Kingdom do not give judges the power to strike down laws made by Parliament. Instead, judges can be directed to open up debate about how law and policy is made, casting a powerful lens over the day-to-day work of Government. As we set out in later Chapters, the Committee is recommending a model that gives the final say to the Parliament and not the courts. This is very different to places like the United States.

### ***Human rights litigation in the United Kingdom***

Statistical information from the United Kingdom suggests that the introduction of human rights legislation does not need to result in a flurry of court cases. For example, the United Kingdom Department for Constitutional Affairs (DCA) reported that in the first nine months of the *Human Rights Act* 1998 human rights issues were raised in less than 0.5 percent of criminal matters heard in the Crown Court. Even in the High Court, where human rights issues were raised more often, the DCA found that a 'vast majority' of cases that made a human rights point could have been brought anyway on other grounds. As such, the *Human Rights Act* had not resulted in a significant increase in litigation.<sup>36</sup>

Overall, from 2 October 2000 to 13 December 2001, the DCA noted that human rights issues were raised in 297 cases in the United Kingdom. Of these, the claims based on human rights arguments were upheld in 56 cases. No remedy was granted in 233 cases and damages were awarded in just one case.<sup>37</sup>

In Scotland, which has a similar population size to Victoria, a recent article surveying the impact of the United Kingdom *Human Rights Act* in the Scottish courts between May 1999 and August 2003 found that human rights arguments were raised in 'a little over a quarter of 1 per cent of the total criminal courts caseload over the period of the study'.<sup>38</sup> Overall, the authors concluded that 'it seems clear that human rights legislation has had little effect on the volume of business in the courts'.

### ***Human rights are not a matter for Parliament***

A number of submissions said that human rights are given by God and should not be re-invented and limited by man. The Australian Christian Lobby expressed this view:

*The ACL is of the view that inalienable and immutable human rights are ordained by God; they are not given by the decree of collective humanity or a parliament, but are to be found in natural law and the scriptures, heritage and tradition of the Judaeo-Christian faith and the Bible ...*

*Human Rights as proposed by parliamentary decree will not be inalienable and immutable, but may be given to some individuals and groups and taken away from other individuals and groups by the Parliament. When the community agrees to Government establishing a Charter of Human Rights it agrees that it is the Government which gives rights, not God, and that Governments can therefore take them away.*

*This is the first, greatest and gravest overriding error ... A 'Charter of Human Rights' as proposed may in fact only be a reflection of the prevailing culture, and not a true indication of real human rights (as bestowed by God). (Submission 1153)*

The Committee acknowledges that people may have different views about the ultimate source of our human rights. Nevertheless, the law-making capacity of the Parliament is an important part of our democracy and Parliaments around the world have made laws about human rights.

### **A Charter might actually restrict rights**

Another argument put in submissions was that a new law may actually restrict rights. Some said that by defining rights we limit them<sup>39</sup> and that it is preferable to start from the proposition that people have all human rights except those expressly limited or withdrawn by the government through law.<sup>40</sup> The Committee wants to emphasise that the Charter is not intended to restrict or limit any rights already provided for in the law. We have proposed a section for inclusion in the draft Bill attached to this report that prevents the limitation of any existing rights.

### **A Charter would create a selfish society**

Others, such as the Australian Family Association, were concerned that a new law would create a selfish 'rights' culture:

*The enactment of a BoR will further add to the 'rights culture' that is so characteristic of modern Western societies, along with a further erosion of responsibility. Everyone is demanding rights these days, but few are advocating duties and responsibilities, without which rights talk becomes empty blather.* (Submission 506)

The Committee does not accept this argument. There is no evidence from similar jurisdictions that requiring governments to observe human rights automatically makes people selfish. The Charter we are recommending specifically mentions the importance of responsibilities and is aimed at promoting respect for others.

### **A law is not the best way to protect and promote rights**

Some people were concerned that the Charter might have the opposite effect to that intended:

*I believe that Human Rights are central to a society. However, the law is not accessible to a great number of people. By putting Human Rights into the legal system, it can have the reverse effect to what is intended ... Obviously, simply creating a Charter of Human Rights will not protect human rights. It is deeper than this. My fear is that human rights may lose its force by becoming a legal document. I believe in human rights but want it to be more fluid and something which will be the beginning of a process towards justice, rather than within the justice system itself and thus up for interpretation and legalistic debate.*

Submission 126: Name withheld by request

Others expressed the need for reforms not involving a Charter of Human Rights, such as changes to policy and broader government and community initiatives to promote rights.<sup>41</sup> For example, some submissions expressed a preference for amending existing anti-discrimination laws, rather than creating a new rights regime.<sup>42</sup>

The Committee recognises that a Charter is only one piece of the human rights puzzle and that political commitment to observing rights in law-making, policy formulation and practice is

vital for the legislation to have real effect. These issues are discussed in more depth in later Chapters of this report.

### ***A Federal Charter rather than a State Charter is needed***

Some submissions considered that change is needed at the Federal and not at the State level. As Tim Armytage stated:

*To attempt to frame a Charter of Human Rights for an individual State within the Commonwealth will lead to confusion and is a waste of time, money and effort, when the Federal Government could facilitate a uniform Charter for the whole nation.* (Submission 451)

Other people thought a State Charter would be an important step in rights protection and might eventually lead to a Commonwealth Bill of Rights. In Canada, for example, legislation at the provincial level was a initial step towards the Canadian Charter of Rights and Freedoms 1982. Victoria Legal Aid explained:

*As there is no current move towards a federal charter, we support the introduction of a state charter as a first step. There are some good reasons to enact a state charter first. It will provide protection in areas that have practical impact on many people (e.g. education, hospitals and police), and give the community an opportunity to test the impact and operation of a charter.* (Submission 470)

The Committee was not asked to consider the question of a Commonwealth Bill of Rights. However, we see no inconsistency. State and Federal laws on many matters, such as on anti-discrimination, already co-exist (as they do in other federal systems of government). A State human rights law would also be needed even if there were a federal law on the topic because, under the Australian Constitution, the federal law could not apply to many aspects of State government.

## **1.2.5 Committee's view on arguments for and against a Charter**

The Committee considers that the challenges in formulating a new law on human rights identified in the above arguments do not detract from the overarching benefits demonstrated by the arguments in support of change. The Committee agrees with the majority of submissions that the law does need to be changed to better protect human rights. The next section talks in more detail about the form of the Charter we are recommending.

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## **RECOMMENDATION 1**

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Victoria should enact a new law to better protect and promote human rights.

### 1.3 If change is needed, how should the law be changed?

Of the submissions made to the Committee stating that change is necessary to better protect human rights, 96 per cent expressed a preference for some form of Charter of Human Rights.

- 80 per cent indicated the need for some form of Charter of Human Rights, but did not specify the form of the legal change.
- 8 per cent expressed a preference for a Charter of Rights in the form of an Act of Parliament.
- 8 per cent expressed a preference for a Charter of Rights to be entrenched in the Constitution.

In considering how the law should be changed, the Committee is mindful that a substantial majority of the submissions we received stated that a new law on human rights is needed in Victoria. The Committee also notes the preference of the Victorian Government in its *Statement of Intent* that a new human rights law be contained in an ordinary Act of Parliament to ensure that parliamentary sovereignty is preserved. Options considered by the Committee included:

- A non-binding statement;
- constitutional or other entrenchment; and
- an Act of Parliament.

#### 1.3.1 A non-binding statement

At one end of the spectrum, the Committee considered the idea of a non-binding statement of human rights. Such an 'aspirational statement' could be 'intended to remind Parliament of its responsibilities to protect human rights, without challenging its authority or fostering litigation'.<sup>43</sup> A similar form of non-binding statement exists in Queensland.<sup>44</sup>

A non-binding statement would offer little additional human rights protection. As Queensland's experience has demonstrated, it would not provide a mechanism for enforcing human rights.

This option has previously been considered by the Victorian Parliament. In 1987 the Legal and Constitutional Committee recommended the insertion of a non-binding Declaration of Rights and Freedoms into the Victorian Constitution.<sup>45</sup> The Declaration was introduced into Parliament but never became law.

The Committee considers that a non-binding statement is not appropriate for Victoria. The Victorian community has expressed its preference for a formal, legal document to better protect human rights and to promote better government.

### 1.3.2 Constitutional or other entrenchment

At the other end of the spectrum, the Committee considered whether Victoria should enact a Charter as a new part of the Victorian Constitution. A number of submissions considered that placing human rights obligations in the Constitution would have ‘important symbolic value in that it demonstrates the significance accorded to the rights contained in such an instrument’.<sup>46</sup> Others stated that constitutional entrenchment was essential to ensure that human rights are securely protected and cannot be easily removed. As Gustav Lanyi commented:

*An amendment to the Constitution Act 1975 to insert a Charter of Rights (COR) is most desirable. The reason for constitutional entrenchment is to ensure that rights are protected over time, and not subject to the vagaries of Parliamentary politics. Only with such entrenchment could Victorians be assured that neither legislation nor executive action would infringe upon our basic human rights. (Submission 89)*

Other people argued against entrenchment in the Constitution. Some stated that it would be too difficult to change the law,<sup>47</sup> while others were concerned about giving unelected judges the final say in the interpretation of the law.

There were also those, such as the Women’s Rights Action Network Australia, who were interested in entrenching the law in an ordinary Act of Parliament:

*WRANA recommends that a Charter of Rights be legislatively entrenched such that to amend it would require the agreement of two thirds of the Parliament in a Joint Sitting, as is required for amendments to the Constitution Act 1975 (Vic). This should ensure that the Charter may continue to evolve consistent with ongoing community consultations. (Submission 841)*

Many people who expressed a preference for an entrenched law told the Committee that a legislative model should be the first step in a process that eventually leads to a Charter in the Victorian Constitution. This was the experience in Canada, which enacted a legislative Charter in 1960 and a constitutional Charter in 1982. The Committee has no view on whether a Victorian Charter might eventually be included in the Constitution. This would be a matter for the people of Victoria and the Parliament to decide if such a suggestion arises in the future.

The Victorian proposal for a Charter of Human Rights is supported as an initiating phase. There is an immediate need for a statement by governments of a benchmark of expected behaviour for governments, corporations, organisations and all citizens to comply with if we are to call ourselves a civil society.

**Submission 354: Ruth Russell and Margaret Ross**

The Committee notes the stated preference of the Victorian Government for a Charter that preserves the sovereignty of Parliament. In other nations where a human rights law forms part of the Constitution, such as in the United States and Canada, courts can strike down Parliament’s

laws. Many people have told the Committee that they are opposed to such an idea. The Committee agrees. We prefer a model that preserves Parliamentary sovereignty and allows the law to be amended in the ordinary way.

### 1.3.3 An Act of Parliament

The Committee has considered whether enacting a new human rights law as an ordinary Act of Parliament would be appropriate. This form of legal protection received support in submissions. As Darren Lim stated:

*The legislature should have the ultimate responsibility of guaranteeing basic human rights for Victorians, which is why an ordinary act of parliament (as in NZ or the UK) is the best option. This prevents the courts becoming politicised as in the US and respects the supremacy of Parliament.* (Submission 312)

Legislation is preferred by some people because it involves the three arms of government in a conversation about rights, while retaining for the Parliament the ultimate say about which rights the law should protect, how they should be protected and the appropriate limits to human rights.

A number of advantages of the legislative model have been pointed out in submissions. These were well summarised in the submission from Victoria Legal Aid, which listed the following benefits of a legislative model. Such a law:

- *preserves the sovereignty of Parliament, which can ultimately decide whether to make or retain laws that limit or override human rights, subject only to the informed choice of Victorians as expressed at the ballot box;*
- *is relatively easy to enact and amend ... [and] is likely to be acceptable to Victorians;*
- *has been successfully demonstrated in culturally similar jurisdictions (e.g. UK, NZ and ACT);*
- *can give practical protection to human rights by allowing courts to interpret ambiguous legislation;*
- *can give practical protection to human rights by ensuring that public authorities comply with it;*
- *can provide stakeholders with significant opportunities to influence the conduct of Parliament through structured dialogue;*
- *can avoid uncertainty by preserving the validity of inconsistent laws and limiting litigation about breach; and*
- *can foster cultural change to complement the legal change.*

A legislative Charter would have the same legal status as other Acts and would be a flexible document that could be amended over time by the Parliament. The legislative model allows the Charter to evolve and adapt to changing needs, as explained by Justice Kevin Bell of the Supreme Court of Victoria:

*The types of rights protected could be extended, or contracted, through the Parliamentary process, as Victoria's social and political circumstances changed. This would allow for a great deal of flexibility and ensure that the Parliament, and therefore the Victorian community, would be able to shape the future of rights protection in this State.* (Submission 1167)

One potential disadvantage of this model is that future Parliaments would also be free to repeal the law to remove human rights protection. However, the experience in other jurisdictions is that once human rights legislation is enacted, governments do not later wind it back because to do so carries significant political risks. Some people have argued that an ordinary Act of Parliament would therefore provide adequate protection of human rights in Victoria.<sup>48</sup>

The Committee is of the view that a legislative model would serve Victoria well. It would allay the fears of a number of people about giving too much power to unelected judges by preserving the sovereignty of Parliament, while encouraging better government. It would be flexible enough to allow for modifications and additions to the protected rights in line with community views. In adopting an approach similar to that in the ACT, it would also promote a consistent approach to rights protection in Australia. This was considered desirable in a number of submissions, including that of The Justice Project:

*It would be undesirable for Victoria to follow a completely unrelated and separate jurisprudential path to that taken by the ACT, because if and when other states and territories come to consider a Human Rights Charter, it would be helpful if the existing models in Australia were similar in form and content.* (Submission 954)

The Committee has looked closely at the different forms that a change to the law could take. Having considered the submissions, the *Statement of Intent* and lessons learnt from other jurisdictions, the Committee recommends that the Charter be an ordinary Act of Parliament. As we discuss in Chapter 7, the Charter should be the subject of regular reviews to see if it needs to be changed over time.

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## RECOMMENDATION 2

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The new law should be an ordinary Act of Parliament.

### 1.4 What should the new law be called?

The Committee considered a number of options used in other jurisdictions, including 'Human Rights Act' (ACT and United Kingdom), 'Bill of Rights' or 'Bill of Rights Act' (New Zealand, United States, South Africa), 'Charter of Rights and Freedoms' (Canada). We also considered



'Charter of Human Rights and Responsibilities' (2004 Justice Statement) and 'Charter of Human Rights' (Committee's Discussion Paper).

The Committee decided against 'Bill of Rights' because it is concerned that this name might create the impression that the law is similar to the United States' Bill of Rights. The Committee considers that 'Charter' is appealing as it attests to the symbolic as well as the legal significance of the document. The Committee also decided to include a reference to 'responsibilities' in recognition of the views expressed by many people that rights and responsibilities go hand in hand.

[W]henver there is a reference to rights there is automatically a concurrent reference to responsibilities. Individual and collective rights simply cannot exist in the absence of their flipside e.g.:

- each person's right to life is matched by the obligation not to act in a manner that threatens the life of another; and
- one person's or community's right to live free of racial discrimination is paired with ... their identical responsibility not to subject others to racial discrimination.

**Submission 816: Equal Opportunity Commission Victoria**

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### RECOMMENDATION 3

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The new law should be called the Charter of Human Rights and Responsibilities.

#### 1.5 Should the new law have a preamble?

The Committee considers that a preamble is an essential element in the new law on human rights. The preamble serves as an overarching statement of values underpinning the Charter and could be a useful educative and interpretive tool. A number of ideas should be reflected in the preamble:

- human rights are necessary to live lives of dignity and value;
- rights and responsibilities are a foundation of democracy;
- respect for the individual and consideration for others;
- respect for the rule of law;
- respect for diversity; and
- the special significance of human rights for Indigenous peoples.

The Committee believes that the preamble should reflect notions of accessibility, diversity and participation in society by people of all ages. The preamble should also make clear that rights need to be balanced against each other and against community interests as part of a democracy.

The Committee thinks that it is important that the preamble recognise Indigenous peoples. Consistent with the approach taken in the ACT, we recommend that the preamble recognise the special significance that human rights have for Indigenous communities as the first owners of the land.

Although human rights belong to all individuals, they have special significance for Indigenous people – the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.

*Preamble to the ACT Human Rights Act 2004*

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### **RECOMMENDATION 4**

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The Charter of Human Rights and Responsibilities should contain a preamble that emphasises rights, responsibilities and respect and that recognises the special significance of human rights to Indigenous peoples as the traditional owners of the land.



## Chapter 2

**Which rights should  
the Charter protect?**

## 2.1 Summary

The Charter of Human Rights and Responsibilities should protect civil and political rights. As its starting point, the Committee has used those rights contained in the *International Covenant on Civil and Political Rights* 1966. Some of these rights should be included in the Charter, without change. Other rights should be adapted to suit Victoria's circumstances. Some rights should not be included at all.

The Charter should state that, in protecting these rights, it does not limit or exclude any of the other rights a person may hold. The idea that people, as the bearers of human rights, also owe responsibilities should be reflected in the preamble to the Charter. The Charter should also make it clear that rights need to be balanced against the other important interests that arise in a free and democratic society.

The Committee believes that the Charter should include civil and political rights taken from the *International Covenant on Civil and Political Rights* 1966, but not the economic, social and cultural rights contained in the *International Covenant on Economic, Social and Cultural Rights* 1966. However, the level of community support for these latter rights means that they should be considered for inclusion when the Charter is reviewed after four years.

[A] Charter... will enumerate areas in which the government can not interfere with the individual. A Charter will empower the individual by enabling him or her to point to a document which comprehensively states his or her human rights. That document will stand as sure testament to the fact that all persons are entitled to human rights and therefore count. Civil and political rights of the individual are declared and stated for the world to see.

Submission 954: The Justice Project

## 2.2 Which rights?

### 2.2.1 Civil and political rights

95 per cent of submissions to the Committee said that a Charter should protect civil and political rights, such as the right to vote, to expression and to peaceful assembly. For example, Mark Hood made these comments:

*I support a Bill which contains principles such as those listed in the International Covenant on Civil and Political Rights. I advocate the right to a fair trial, the right to not be held in slavery (or detention for asylum seekers), and the right not to be subject to torture or cruelty. Furthermore, I particularly advocate the right to life, and the right to freedom of thought, and freedom of assembly and association. (Submission 301)*

Some submissions focussed on particular civil and political rights, such as freedom of religion:

*As a church body we are especially concerned to see that institutions of government uphold*

*the right to religious freedom. We believe there is a need for it to be clear that people should be able to express and teach their peaceful religious beliefs both in private and in public. We believe that the expression of religious beliefs should be permitted in government controlled facilities and institutions, provided that they do not unduly impinge on the rights of others. However, we recognize that the right to religious freedom is not absolute and should not be used as a shield to justify violations of other basic human rights. Particularly, religious freedom should not allow for cruel and inhuman practices such as female genital mutilation, nor should it allow for people to incite hatred against others.*

Submission 164: Justice & International Mission Unit, Synod of Victoria and Tasmania, Uniting Church In Australia

*Muslims in Victoria have contacted the ICV [Islamic Council of Victoria] expressing their deep concern about suggestions from some prominent figures that the hijab be banned in certain schools. In undertaking this consultation process for the purposes of producing this submission, the ICV notes that the overwhelming majority of Muslim women that were consulted viewed any ban on the wearing of the hijab as a fundamental derogation of their right of freedom of religion... There has been overwhelming feedback from the Muslim community in Victoria that the provisions of Article 18 of the ICCPR be enshrined in a charter on the basis that it will serve to protect the right to wear religious clothing such as the hijab. The ICV places on record its support for the proposition that the right to wear religious clothing should apply to all without discrimination. This includes, for example, the right for people of Jewish faith to wear a yarmulke or people of Sikh faith to wear a turban.*

Submission 1194: Islamic Council of Victoria

The Committee considers that civil and political rights are essential entitlements of all Victorians and should be included in the Charter. While civil and political rights such as the right to be free from torture, to liberty and security of the person and to freedom of movement and association are always important, they have come into sharper focus as governments and broader communities consider the protection of fundamental liberties in light of the threat of terrorism. The Committee considers that a Charter containing civil and political rights would be of assistance in dealing with the tensions and questions that arise in the area of community safety and civil liberties.

### **2.2.2 Economic, social and cultural rights**

41 per cent of submissions wanted the Charter to also include economic, social and cultural rights (ESC rights) such as the right to food, health, housing and education. The Committee noted with interest the wide range of people and organisations who argued strongly in favour of including such rights, including many individuals, legal firms, judges, professional bodies, advocacy organisations from a range of sectors and Indigenous communities from across the State.

People told us that these rights are very important for ordinary Victorians who are concerned about healthcare, education and other basic services. One of the most common arguments expressed in submissions is that human rights are indivisible and that civil and political rights are best secured by ensuring protection for economic, social and cultural rights.

I would also like to see the articulation of economic and social rights because they are often necessary to ensure the attainability of civil and political rights. For instance, while we might articulate the right to liberty and security of the person, it will be somewhat meaningless to a young homeless person who faces a lack of security every night on the streets.

### Submission 134: Marg D'Arcy

Many said that economic, social and cultural rights are the most important rights for disadvantaged people in the community. For example, a number of people making submissions spoke of the need for ESC rights for people with a disability. One person said that these rights are more 'practical and relevant to the lives of people with disabilities',<sup>1</sup> while another made the point that 'much of the marginalisation and disadvantage experienced by people with disabilities (and especially people with intellectual disabilities) arises from social and economic exclusion'.<sup>2</sup>

Some people making submissions pointed to the particular significance of ESC rights for women. These people argued that ESC rights are more often exercised by women as carers in the family and that a Charter that omits these rights in favour of the more 'masculine' civil and political rights effectively discriminates against women.<sup>3</sup> Others, such as the State-wide Steering Committee to Reduce Family Violence noted the link between ESC rights and freedom from domestic violence:

*The Committee wishes to acknowledge however that a woman's right to be free from violence is inherently linked to economic and social rights such as the right to education, the right to work and the right to the highest attainable standard of mental and physical health. Without access to these rights, women's options in responding to family violence and protecting themselves are severely limited. (Submission 1011)*

A number of other arguments were advanced. The Public Advocate made the point that a Charter that protects only civil and political rights may hinder the use of the Charter for education:

*Omitting economic, social and cultural rights creates the possibility that in the minds of the general public, rights will be regarded as limited to those enshrined within the Charter, rather than the whole range covered by international covenants and declarations to which Australia is party. The education process that must accompany the introduction of a charter would be hindered by this omission. (Submission 456)*

ESC rights are contained in the *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR), to which Australia is a party. Unlike the *International Covenant on Civil and Political Rights* 1966 (ICCPR), which requires that nations take steps to give effect to the rights within the Covenant and to ensure that people have an effective remedy for rights violations,<sup>4</sup> the ICESCR provides that States must take steps ‘to the maximum of [their] available resources, with a view to achieving progressively the full realisation’ of the ICESCR rights.<sup>5</sup> This difference reflects the view that ICESCR rights may involve significant resources in order to be fully enjoyed. As such, nations are given greater latitude in their implementation of the rights contained in ICESCR.

ESC rights do not form part of the human rights Charters in New Zealand, Canada or the United Kingdom (although the right to education was incorporated in the United Kingdom Charter from the *European Convention on Human Rights and Fundamental Freedoms* 1950). Neither are they contained in the Australian Capital Territory (ACT) *Human Rights Act* 2004, although the ACT Consultative Committee did recommend their inclusion. While a few nations such as South Africa do protect such rights, there is limited experience on what effect ESC rights may have within a legal system like Victoria’s. The inclusion of ESC rights would make Victoria exceptional amongst the models of human rights protection enacted in similar jurisdictions.

The Committee recommends that ESC rights not now be included in the Charter. The Committee considers that a Charter containing civil and political rights is a significant step along the journey towards the better protection of human rights in Victoria. That journey is in its early days and it should be for future governments to determine, in light of Victoria’s experience with the Charter, whether the protected rights should be expanded to include ESC rights.

In making this recommendation, the Committee is mindful of the strong concerns and arguments regarding ESC rights. The Committee’s view is that the Victorian Government should adopt a formal process of review of the Charter and that this review should include consideration of whether the range of rights protected by the Charter should be expanded to include some or all ESC rights. The idea of a review and matters that should be considered as part of the review are discussed in Chapter 7.

### 2.2.3 Other rights

35 per cent of submissions supporting a Charter also supported the inclusion of other human rights such as those contained in other treaties to which Australia is a party, for example women’s rights as set out in the *Convention on the Elimination of All Forms of Discrimination Against Women* 1979 (CEDAW) and children’s rights as set out in the *Convention on the Rights of the Child* 1989 (CRC).

For example, the Honourable Alastair Nicholson, Danny Sandor and John Tobin said in relation to children's rights:

*The inclusion of such provisions is of practical and symbolic significance. It ensures that the development of legislative and social policy is informed by the special needs of children and in some States, notably South Africa, provides children with the right to enforce their rights within the Courts. Just as importantly, it counters the historical invisibility of children within the law and serves as a powerful reminder of their value and importance within a society.* (Submission 1063)

The Committee recommends that these rights not be included in the Charter at this stage. As noted above, the Committee considers that it is appropriate to take an incremental approach to rights protection and that it is preferable to start with a Charter that applies to all people generally, rather than incorporate rights from more detailed and specific human rights instruments such as CEDAW and CRC.

The Committee recommends that the four year review process include consideration of whether the Charter should be expanded to include other rights such as women's rights and children's rights.

### 2.2.4 Responsibilities

Approximately 1 per cent of all submissions said that a Charter should specify a statement of enforceable responsibilities. As Danna Grills stated:

*Moreover, care should be made not to emphasise 'rights' to the exclusion of 'responsibilities'. Both these are necessary and a focus on rights often leads to judicial challenges whenever I feel that my 'rights' have been breached.* (Submission 329)

Other submissions specifically rejected the idea that a Charter should specify a statement of responsibilities. For example, the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, expressed this view:

*The Unit does not support the inclusion of a specific statement of responsibilities in a Charter of Human Rights, as we believe that the statement of basic human rights carries with it an obligation and responsibility on all members of a society to ensure that all other members of that society have their basic human rights.* (Submission 164)

The Committee agrees that human rights include the idea of responsibilities. Indeed, rights and responsibilities can be seen as the two sides of the same coin because neither can exist without the other. Hence, it is not necessary to include in a Charter separate provisions dealing with responsibilities. However, to emphasise the importance of responsibilities to the protection and enjoyment of rights and to a just and inclusive society, we recommend in Chapter 1 that the concept of responsibilities be included in the Preamble to the Charter.



### 2.2.5 Charter not intended to limit rights

The Committee believes that, at this initial step of better protecting the rights of Victorians, the Charter should only contain civil and political rights. However, these are only some of the rights that Victorians hold under international law and it is important that the Charter not override or limit these other rights, including ESC rights.

The Charter should state that, in protecting civil and political rights, it does not limit or exclude any of the other rights a person may hold. This should be achieved by including in the Charter a provision similar to section 26 of the Canadian Charter of Rights and Freedoms 1982, which states:

*The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.*

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### RECOMMENDATION 5

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The Charter of Human Rights and Responsibilities should protect civil and political rights. The Charter should state that, in protecting these rights, it does not limit or exclude any of the other rights that a person may hold.

### 2.3 Which source of civil and political rights?

The Victorian Government has asked the Committee to determine which civil and political rights should be protected in a Charter for Victoria. In formulating a list of Charter rights, there are a number of human rights instruments that could be used as a starting point. These include the ICCPR, the ACT *Human Rights Act* 2004, the United Kingdom *Human Rights Act* 1998 and the *New Zealand Bill of Rights Act* 1990. Alternatively, the Committee could recommend that Victoria draft a completely new document not based on any of the existing models.

A number of people mentioned the advantages of using the ICCPR as a starting point. Dr Julie Debeljak from Monash University, who attended our expert's roundtable, suggested that it is sensible to model Victoria's law on the ICCPR so that Victorian law is consistent with Australia's international obligations.

The Mallesons Stephen Jaques Human Rights Group made the additional point that the Victorian Government and courts will have the benefit of the substantial international jurisprudence that has built up around the ICCPR rights:

*The further the rights... align with the original ICCPR wording, the more assistance can be gained from the extensive jurisprudence that has developed in relation to the rights contained in the ICCPR. This will aid not only the judiciary where they are required to consider or apply provisions of a Charter, but also the legislature when it is considering the compatibility of legislation, and, just as importantly, the general community. (Submission 807)*

Some people making submissions noted that the ICCPR, drafted in the 1960s, contains some language that is outdated and is not appropriate for a Victorian law. They suggested that if the rights in the Charter are based on the ICCPR, this language needs to be updated. This includes changing language to make provisions gender neutral.

Others thought that it would be beneficial to use the ACT *Human Rights Act 2004*, which adapts the ICCPR, as a starting point to promote a uniform approach to rights protection in Australia. Many people expressed the view that as various state and territory laws act to protect human rights, these laws should be consistent and use the same language to protect the same rights.

The Committee takes the view that the ICCPR is the appropriate starting point for determining which rights should be included in a Victorian Charter. We are mindful that the *Statement of Intent* asks the Committee to ‘focus on the rights in the International Covenant on Civil and Political Rights’ and we note that the ICCPR was the starting point for the other human rights instruments mentioned above. By adopting this approach, the Victorian law would also be consistent with the ACT approach.

The ACT experience is that the ICCPR rights resonate despite cultural or other differences. Being a human being entitles a person to the same basic protections whether they are in the ACT, Victoria, New Zealand or South Africa. The universality of the ICCPR rights has been experienced by those involved in the implementation of the *Human Rights Act 2004* (ACT) in a way that would not have occurred had we attempted to compile some form of ‘ACT-specific’ list of human rights. We now draw heavily on international jurisprudence, literature and commentary in the development of public policy. This opening up of processes to new and different influences has had a profoundly positive effect on public policy.

**Submission 1060: The Honourable Jon Stanhope MLA, Chief Minister of the ACT**

The Committee agrees that some of the language in the ICCPR is no longer appropriate. This issue was noted by the ACT Consultative Committee, which recommended that the rights language be updated in certain cases and adopted a ‘plain language’ approach. The Committee prefers this approach to the *Canadian Charter of Rights and Freedoms 1982* where the rights were, in some cases, substantially reworded. The Committee recommends that the language in the ICCPR should be updated in line with the ACT *Human Rights Act 2004* or modified where required to fit the Victorian context. The modifications to the ICCPR required for a Victorian law are considered more fully in the next section.

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## RECOMMENDATION 6

The starting point for the Charter of Human Rights and Responsibilities should be the civil and political rights contained in the *International Covenant on Civil and Political Rights 1966*. Where

necessary, the language should be modernised in line with the language used in the ACT *Human Rights Act* 2004 or modified as required for the Victorian context.

### 2.4 Specific rights issues

The Committee believes that the ICCPR rights should be included in the Charter, subject to specific recommendations about the rights examined below.

#### 2.4.1 Right to life

Article 6(1) of the ICCPR provides:

*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

The right to life has been described as the 'supreme' human right that is necessary for the enjoyment of all other rights.<sup>6</sup> It is one of few rights in the ICCPR from which States may not derogate, even in times of war or emergency.

The right involves safeguarding and preserving life. However, it has been found not to include as a corollary a right to die with the help of another person.<sup>7</sup> In a few limited cases taking life might not contravene the provision, such as if the act was done in lawful self-defence.

The ACT *Human Rights Act* 2004 contains a right to life provision that updates the language of the ICCPR provision and adds a second subsection. Section 9 reads:

*(1) Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life.*

*(2) This section applies to a person from the time of birth.*

The inclusion of the second subsection in the ACT provision prompted a large amount of discussion in the submissions we received. Some people welcomed the sub-section, saying it gave certainty to the law.

Many other people expressed concern about the provision. Some said that it was making a statement about when life begins and is therefore inappropriate. Others said that the right to life from conception is the principal human right and that without it there is no sense speaking of other rights.<sup>8</sup> The following statement from Sandra Johnson expresses the sentiment of a number of people:

*The first human right is the right to life. I most strongly urge that this right be protected from conception to natural death.* (Submission 514)

The question of whether the right to life extends to the unborn child is a controversial one. The submissions do not reveal any clear common ground but rather that it remains a matter of often heated debate. The Committee notes these views and believes that, in the absence of consensus, the issue should not be resolved through the Charter.

In any event, to include a right to life in the form of the ICCPR would not resolve the issue because it is not explicit on the issue of abortion. It would merely leave the matter to the courts.

The view often taken by courts in other nations is that the right to life protects people from birth and does not prohibit abortion.<sup>9</sup> As such, sub-section (2) in the ACT provision sets out the interpretation of the law that is most often favoured internationally.

The Committee's view is that the Charter should include a provision similar to sub-section (2) in the ACT legislation. In coming to this view, we emphasise that the Charter will expressly preserve all other rights, including any rights that the law gives to the unborn child in other statutes and the common law. We also stress that this provision is not intended to make a statement on when life begins. That question has significant moral and scientific aspects and is not a question that the Charter seeks to answer. Indeed, the key reason for including this clause is to ensure that an outcome is not imposed by the Charter, but is left to political debate and individual judgement.

Nevertheless, the Committee is mindful of the concerns expressed in the community and considers that for the Charter to be effective in promoting broader cultural change, it needs to be acceptable to Victorians generally. As such, the Committee recommends altering the ACT provision along the lines of:

*(1) Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life.*

*(2) For the purposes of this Charter, the right to life is protected from the time of birth.*

The Committee prefers this wording because it emphasises that:

- the limitation in sub-section (2) applies to the interpretation of the Charter only and is not intended to limit rights contained in other laws; and
- while the Charter protects life from the time of birth, it does not make any statement on when life begins.

### **2.4.2 Right to equality**

The need to ensure that human rights are enjoyed without discrimination was one of the strongest messages communicated to the Committee. As discussed in Chapter 1, different communities reported particular concerns: for example, Indigenous communities reported racial discrimination and people with a disability spoke of discrimination in regard to participation and access to services. Age-based discrimination was reported by both the elderly and young people. Protection of women from discrimination based on family responsibilities was also highlighted.<sup>10</sup>

Some people made the point that non-discrimination and equality are not necessarily achieved by treating everyone equally. In some cases, special measures and more favourable treatment are needed to overcome structural barriers to equality faced by marginalised and disadvantaged

members of the community. The Arnold Bloch Leibler Public Interest Law Group made this suggestion:

*ABL recommends that that the Consultation Committee endorses the principle that equality before the law does not mean absolute equality, namely equal treatment without regard to the individual. Rather, it means relative equality ... the principle of treating equally what is equal and unequally what is unequal. (Submission 1053)*

Given the strong message from the community, the Committee believes that the Charter should contain a broad prohibition of inappropriate discrimination.

Article 26 of the ICCPR is one of the cornerstones of the ICCPR and of national human rights instruments. It states:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The provision prohibits direct discrimination: that is, a law or policy that expressly treats people differently on the basis of a particular characteristic. It also prohibits discrimination that is indirect: for example, an apparently general law or policy that, in its effect, impacts differently on different groups.

Article 26 has been interpreted to prohibit 'discrimination in law or in fact in any field regulated and protected by public authorities'.<sup>11</sup> This means that a government must not discriminate in regard to any human rights, not just those contained in the ICCPR. This includes protecting people from discrimination in areas that affect other rights such as economic, social and cultural rights.

In coming to a view on the most appropriate non-discrimination provision for Victoria, the Committee is mindful of the need for consistency with the Victorian *Equal Opportunity Act* 1995. That Act currently prohibits discrimination on a broad range of grounds including age, breastfeeding, gender identity, impairment, industrial activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex, sexual orientation or personal association with someone who has any of the above attributes.

The Committee considers that rather than list all of these grounds in the Charter, it is preferable that the provision contain a shorter list of grounds based on those in the ICCPR. The list should not include discrimination on the ground of property as this is not one of the prohibited grounds of discrimination under the *Equal Opportunity Act*. (A separate property right is recommended by the Committee, as explained in the following section.) The Charter provision

should expressly refer to the following grounds taken from the *Equal Opportunity Act*, which the Committee considers are important omissions from the ICCPR list: age, sexual orientation, gender identity and impairment.

The Committee considers that a list ending with the open-ended phrase 'or other status' might be difficult for government and service providers to interpret in their daily work. The Committee prefers the wording 'or other status provided for under the *Equal Opportunity Act 1995*'. This formulation gives certainty to the list of prohibited grounds of discrimination, is broad in its coverage and would ensure that the Charter remains consistent with the *Equal Opportunity Act* as the grounds in that Act are amended over time.

The Committee also recommends that the equality provision contain a sub-section to recognise that special measures may be required to achieve equality for some groups in the community. The sub-section should state that such measures are not unlawful under the Charter. The Committee recommends a provision similar to section 19(2) of the *New Zealand Bill of Rights Act 1990*, which states:

*Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.*

The Committee further recommends that as part of the four year review of the Charter, consideration be given to whether additional grounds of discrimination should be added to the provision.

### 2.4.3 Property rights

Some people making submissions to the Committee mentioned that that the Charter should contain rights relating to property. For example, Luke William Martin considered that the Charter should state:

*No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* (Submission 303)

The Committee was also interested in the submission of Dr Simon Evans from the University of Melbourne. He argued for a property right that 'ensures that the institution of property is recognised, protects against arbitrary deprivation, and acknowledges the reality that Victoria is a market economy'. (Submission 471)

The Committee notes that property rights are contained in a number of international instruments. For example, the ICCPR prohibits discrimination on the ground of property.<sup>12</sup> In Australia, the Federal Constitution contains a property right dealing with deprivation of property. It states that in making laws the Federal Parliament may only acquire property if the acquisition is made on 'just terms'.<sup>13</sup> This guarantee does not apply to property taken under state law.

The Committee agrees with Dr Evans that it is appropriate to include in the Charter a provision providing safeguards in relation to the deprivation of property by the State. People should not be deprived of their property except where this is expressly provided for in the law. The Committee does not, however, consider it appropriate to provide for an open-ended right to compensation for property deprivation.

The Committee recommends that the following provision be included in the Charter:

*A person must not be deprived of his or her property other than in accordance with law.*

### 2.4.4 Self-determination

Self-determination, in the sense of a right to control your own destiny, is a human right with relevance to many groups in the Victorian community, including people with a disability and older people. It has particular significance for Indigenous communities. The Committee gave consideration to whether a right to self-determination should be included in the Charter, especially for the purpose of recognising Indigenous rights.

Many submissions argued in favour of Indigenous-specific rights. For example, the Social Concerns Committee of the Deepdene Uniting Church said:

*While there may be difficulties in framing appropriate measures to uphold and protect the rights of Australia's Indigenous people, we believe that their situation warrants special consideration. As Australia's first people, their place is unique but given two hundred years of dispossession, colonisation, removal of children from families and current disadvantages, we would urge that recognition be given to the fact that they have special long standing rights as well as special needs. (Submission 322)*

Indigenous peak bodies emphasised self-determination as a crucial right for Indigenous Australians in their submissions and discussions with the Committee. They argued that respecting self determination and building capacity within Indigenous communities are critical principles that will lead to positive outcomes. For example, Reconciliation Victoria said:

*A Charter of Rights founded in justice should be based on (1) recognition of Indigenous rights (2) recognition of the rights to self-determination of Indigenous peoples, which is defined by the United Nations as the right to '...freely determine their political status and freely pursue their economic, social and cultural development.' (Submission 1112)*

The Committee also received a petition from 278 groups and individuals, specifically addressing Indigenous issues. The petition included a call for self-determination to be included in the Charter.

The term 'self-determination' was heard less often in consultations with individual Indigenous communities. People had different views about its meaning. Some thought that only a Treaty with Indigenous peoples would result in concrete benefits for their communities.

Indigenous communities expressed a number of ideas under the heading of self-determination. For example, the Yorta Yorta Nation said that self-determination involves Indigenous communities taking control of their future and deciding how they will deal with issues facing them.<sup>14</sup> Submissions also referred to the effective participation of Indigenous communities in public life and in decision-making for the community. This may include determining governance arrangements within the existing State framework.<sup>15</sup>

Some submissions referred to specific benefits of self-determination for Indigenous communities. For example, Muriel Bamblett stated that 'a comparison of life expectancy statistics shows that Indigenous peoples who have treaties and various self-determining rights have far better health outcomes.'<sup>16</sup> The Victorian Aboriginal Child Placement Principle was given as an example of existing good practice that is consistent with Indigenous self-determination.<sup>17</sup>

The Committee notes that Aboriginal Affairs Victoria is currently undertaking a substantial consultation process with Indigenous communities across Victoria with regard to future representative arrangements, following the abolition of the Aboriginal and Torres Strait Islander Commission. The Committee is also mindful of the recently released report concerning the Victorian implementation of recommendations regarding Indigenous deaths in custody. The key recommendations include the need to develop a set of standards to increase effective Indigenous participation, a recommendation consistent with the notion of self-determination for Indigenous communities.<sup>18</sup>

### ***Self-Determination: What does it mean?***

The Equal Opportunity Commission Victoria suggested that self-determination incorporates an entitlement to:

- respect for distinct cultural values and diversity;
- recognition of the political identity of Indigenous nations and peoples, their representatives and institutions;
- respect for Indigenous peoples' connection with and relationship to land;
- ensuring that Indigenous peoples themselves actually have, feel and understand that they have choices about their way of life;
- respect for and promotion of Indigenous participation and control; and
- Indigenous representation and participation in our democratic processes'.

### **Submission 816**

Self-determination is a concept long debated in international law. Historically, it has meant a right to succession (or separation) for minorities under colonial control or the right of a State to be free from external domination.<sup>19</sup> More recently, it has come to be understood as a right of



peoples within a State to participation in the political process. Self-determination has been recognised as ‘an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights’.<sup>20</sup> It was for this reason that it was placed as the first article in the ICCPR.

An international treaty body has said that nations should ‘ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent’.<sup>21</sup> To fulfil its obligations under the ICCPR, Australia has been called upon to ‘take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources’.<sup>22</sup>

The United Nations Draft Declaration on the Rights of Indigenous Peoples refers to the right to self-determination.<sup>23</sup> The declaration contains a number of related provisions including the right of Indigenous peoples to participate in decision-making via their chosen representatives and to develop their own decision-making institutions.<sup>24</sup> It should be noted that this declaration is a draft and does not have any formal status.

Self-determination was not included in the human rights instruments enacted recently in the ACT, New Zealand, or the United Kingdom (although New Zealand does have a Treaty with its Indigenous peoples). The Committee notes that there is a lack of consensus both domestically and internationally on what the right of self-determination comprises beyond the idea that it involves participation in decision-making.

The Committee is concerned that, in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences. The Committee wants to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities’ understanding of the term. This is not something that can be achieved in a Charter that must be general in its terms and operate across all of the varied communities in Victoria.

Accordingly, the Committee recommends that the Charter not include a right to self-determination. However, as we set out below, we do recommend the inclusion of specific cultural rights for Indigenous peoples. We accept the view of Indigenous scholar Professor Larissa Behrendt that the rights of Indigenous peoples are generally best advanced through laws that are applicable to everyone in the community.<sup>25</sup>

As discussed in Chapter 1, the Committee also believes that the specific recognition of the rights of Indigenous peoples should form part of the preamble to the Charter. This could mean that self-determination principles underpin policy decisions relating to Indigenous peoples. It may also ensure that the other rights in the Charter are applied equally and fairly to Indigenous peoples.

In addition, the Committee recommends that the four year review discussed in Chapter 7 include a requirement that the Victorian Government conduct consultations with Victorian Indigenous communities to assess whether self-determination should be included in the Charter and, if so, the appropriate definition and scope of that right.

### 2.4.5 Cultural rights

The Committee considers that the Charter should contain specific cultural rights for minority groups, recognising that it is particularly important in Victoria's multicultural society to ensure that cultural heritage and cultural practices are respected and protected.

Article 27 of the ICCPR contains the following provision:

*In those [nation] States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

Article 27 'is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole'.<sup>26</sup> It confers rights on individuals who belong to minority groups 'who share in common a culture, a religion and/or a language'.<sup>27</sup> Since the right depends upon the ability of the group to maintain its culture, language or religion, the provision may require 'positive measures ... to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group'.<sup>28</sup>

The Committee considers that the cultural rights provision in the Charter should be based upon the wording in article 27 of the ICCPR. In addition, the Committee notes that section 4 of the *Multicultural Victoria Act 2004* enshrines in law a number of important principles of multiculturalism. The Committee considers that it is appropriate to reflect these principles in the cultural rights provision. This will help to ensure that mutual respect and understanding is encouraged and that government promotes and preserves diversity and cultural heritage within the context of shared laws, values, aspirations and responsibilities.

The Committee also considers that the right to culture should specifically recognise the right of Indigenous peoples to enjoy their own culture, profess and practise their own religion and use and enjoy their own language.

The Committee noted in an Indigenous forum held in Melbourne<sup>29</sup> that a number of Victorian Traditional Owner Groups have written a Statement to the Victorian Government which provides: 'Traditional Owners have traditional and human rights and responsibilities for protecting their cultural heritage in their country.' The Statement refers to customary rights in relation to land, cultural heritage, natural resources, forests and national parks, traditional hunting, gathering and fishing activities and water resources.

Providing explicitly for an Indigenous right to culture is consistent with the views of a large proportion of Indigenous and non-Indigenous people who stressed the importance of cultural rights for Indigenous peoples. This would also be consistent with Australia's international human rights obligations. It would reflect article 27 of the ICCPR, which has already been interpreted by the United Nations Human Rights Committee as extending to cultural rights of Indigenous peoples, such as the relationship of Indigenous peoples to their lands and waters.<sup>30</sup>

[W]e believe that there is a corresponding need for greater protection of Aboriginal cultural interests and a commitment to processes of cultural restoration. Disconnection from culture was cited in the latest Department of Human Services report of Inquiries into Child Deaths as a critical issue facing Aboriginal children and families. We therefore believe protection, restoration and promotion of culture is essential for human rights and addressing disadvantage.

### **Submission 1176: Victorian Aboriginal Child Care Agency**

The right to take part in cultural life is essential for all young people, as it is for all community members. It is important that the ability to participate in all forms of cultural life are recognised, not just the right to participate in dominant cultural spheres ... A greater recognition of Indigenous culture can be an important element in giving students the skills and knowledge they need to 'walk in two worlds'.

### **Submission 956: Youth Affairs Council of Victoria**

## **2.4.6 Right to found a family**

A number of submissions to the Committee argued that the right to found a family is a fundamental right that must be protected in the Charter. For example, the Melbourne Sexuality Law Reform Committee made these comments:

*Our Committee believes that a right to found a family could help to ensure that the rights of same-sex couples in respect of access to adoption and reproductive technologies are adequately protected by law ... Many LGBT [lesbian, gay, bisexual, transgender] people live in long-term relationships and seek to found families. There is no biological or sociological reason to suggest that a same-sex couple is any less capable than an opposite-sex couple to raise children and found a family. (Submission 165)*

The right to found a family is contained in article 23(2) of the ICCPR and is coupled with the right to marry (which for many years has been a Federal matter and would not be included within the Charter). The provision states:

*The right of men and women of marriageable age to marry and to found a family shall be recognised.*

This right was not included in the ACT *Human Rights Act* 2004. However, it is contained in the United Kingdom *Human Rights Act* 1998, which recognises the right to found a family 'according to the national laws governing the exercise of this right'.<sup>31</sup>

The Committee considers the right to found a family to be an essential civil and political right that people would expect to see in a human rights instrument. However, the Committee is mindful that the Victorian Law Reform Commission is currently undertaking a reference on assisted reproduction and adoption. This has involved the release of interim position papers and significant community consultation. The results of this reference will have implications for the right to found a family for single people and for same-sex couples in areas such as access to assisted reproductive technologies, recognition of legal parentage and rights to adoption. The Victorian Law Reform Commission has stated in its latest position paper that it anticipates tabling its final report in Parliament during 2006.

The Committee does not wish to pre-empt the results of this comprehensive process and therefore does not make a recommendation to include the right to found a family in the Charter. The Committee does, however, recommend that consideration be given to whether the Charter should be expanded to include the right to found a family as part of the four year review process.

### 2.5 Adapting civil and political rights to the Victorian context

Apart from changes to the ICCPR rights referred to already in this Chapter and the modernising of language consistent with provisions in the ACT *Human Rights Act 2004*, the Committee considers that other rights in the ICCPR should either be modified or not included in the Charter. For example, some modifications or exclusions are necessary because the matters are regulated by Federal law, rather than State law. In other cases, the changes are necessary to ensure consistency with existing Victorian laws.

The following paragraphs list the modified or excluded rights and the reason for the proposed modification or exclusion.

**Right to life:** ICCPR articles 6(2)–6(6) are not included in the Charter. Articles 6(2), (4), (5) and (6) concern countries that have not abolished the death penalty and are not relevant in Australia. Article 6(3) speaks of obligations under the *Convention on the Prevention and Punishment of the Crime of Genocide* 1948. The Committee considers that, as a stand-alone human rights law for Victoria, the Charter should generally express rights without qualifying material such as references to international treaties.

**Protection from torture, cruel, inhuman or degrading treatment:** The Charter modifies article 7 of the ICCPR by providing that a person must not be 'subjected to medical or scientific experimentation or treatment without his or her *full, free and informed* consent.' Other Victorian laws concerning medical consent stress that consent must be both voluntary and that the person must have been given sufficient information for an informed decision to be made.<sup>32</sup> The Committee considers that this modification (adding the words *and informed*) is desirable to ensure that the provision is consistent with existing Victorian law.

**Freedom from forced work:** The Charter does not include ICCPR article 8(3)(c)(ii) which says that work is not considered to be forced or compulsory labour if it is military service or national service required to be performed by conscientious objectors. The Committee notes that military service and national service are generally Commonwealth matters and as such this provision is not appropriate for a State Charter.

**Right to liberty and security of the person:** The Charter modifies ICCPR article 9(2) by providing that a person who is arrested *or detained* must be told of the reason for the arrest or detention. ICCPR article 9 also contains a right to compensation for anyone who has been unlawfully arrested or detained. Consistent with the Committee's recommendations concerning damages in Chapter 5, the Committee does not consider that this compensation provision should be included in the Charter as it may amount to a right to damages. The Committee also notes that unlawful detention may give rise to a claim for damages under existing tort law.

**Humane treatment when deprived of liberty:** The Charter modifies ICCPR article 10(2)(a) by requiring that accused persons be segregated from people who have been convicted, except where reasonably necessary. In addition, the Charter does not include the part of ICCPR article 10(3), which states: 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. The Committee considers that this is not an appropriate provision for inclusion in the Charter as the prison system may have other aims apart from the reform and rehabilitation of offenders and this remains a matter for public debate.

**Children in the criminal process:** The Charter provision does not include the part of ICCPR article 10(3) that states: 'Juvenile offenders shall be segregated from adults.' The Committee decided not to include this provision on the basis that the current system for the punishment of young offenders in Victoria represents best practice. The Committee was concerned that the inclusion of the provision may have the unintended consequence of requiring the automatic removal of offenders, who were under 18 when the crimes were committed, to adult prisons when they turn 18. However, the Committee stresses that, as a general principle, the segregation of young offenders from convicted adults is a fundamental human right.

**Freedom of movement:** The Charter modifies ICCPR article 12 by adding an exception regarding people subject to specific court orders restricting movement. An example might be some Intervention Orders.

**Expulsion of non-nationals:** Article 13 of the ICCPR is not included in the Charter. It specifies conditions that must be met before non-nationals can be expelled from the territory. This provision is not relevant to a State Charter.

**Right to a fair hearing:** The Charter contains a modified form of ICCPR article 14(1) which concerns the exclusion of the press and the public from a trial. The Charter provision includes an additional sub-section to allow exclusion where 'an Act or the rules of the court or tribunal

permit the exclusion'. The Committee considers that this addition is required to ensure that the Charter is consistent with existing Victorian law. The Charter provision also modifies the ICCPR provision by permitting the suppression of all or part of a judgment where the court considers that there are special circumstances which make it reasonably necessary to do so.

**Rights in criminal proceedings:** The Charter provision modifies ICCPR article 14(3) in a number of important respects. First, the Committee has modified the provision to reflect the fact that some people charged with a criminal offence will need, and are entitled to, specialised communication tools and technology in order to understand the nature and reason for the criminal charge and to participate in the judicial process. Secondly, the Committee has adapted the sub-sections dealing with the provision of legal assistance to include references to the Victorian *Legal Aid Act* 1978 to ensure consistency with current Victorian law. In addition, the Charter provision qualifies the rights of a criminal accused in relation to the attendance and examination of witnesses by including the words 'unless otherwise provided by law'. The Committee considers that this qualification is necessary to ensure that the special rules in relation to the cross-examination of children or of victims of sexual assault would continue to apply.

**Compensation for wrongful conviction:** Article 14(6) of the ICCPR is not included in the Charter. It provides for the right to compensation in certain circumstances where a person has been wrongly convicted and punished for a crime. Like the right to compensation for unlawful detention, the Committee considers that this provision should not be included in the Charter as it may amount to a right to damages. We note that wrongful conviction may also give rise to a cause of action under existing tort law.

**Freedom of thought, conscience, religion and belief:** The Charter does not contain article 18(4) of the ICCPR, which concerns the liberty of parents and guardians to 'ensure the religious and moral education of their children in conformity with their own convictions'. The Committee has omitted this provision as it is concerned that it may have the unintended consequence of leading to an enforceable right to education when the Committee has decided that economic, social and cultural rights should not be included in the Charter at this first stage.

**Freedom of expression:** The Charter includes the specific limitation to the freedom of expression contained in ICCPR article 19(3). The Committee considers that this provision is important in recognising that a person's freedom of expression may be limited having regard to such matters as the rights or reputation of others, the protection of national security or public health. The Committee considers that it is important to make this limitation explicit to avoid situations such as occurred in Canada, where freedom of expression in tobacco advertising was upheld by the courts, even though it was contrary to the interests of public health.

**Propaganda for war and advocacy of national, racial or religious hatred:** ICCPR article 20(1), which prohibits war propaganda, is not included in the Charter. The Committee considers that the provision was primarily included in the ICCPR as a response to the experience of World War II and is less relevant to a modern Victorian Charter. ICCPR article 20(2), which prohibits advocacy of national, racial or religious hatred that incites discrimination, hostility or violence, has also been omitted because it does not express a human right per se, but is rather a direction to government. In addition, the *Victorian Racial and Religious Tolerance Act 2001* deals with such matters.

**Peaceful assembly and freedom of association:** The Charter incorporates ICCPR articles 21 and 22(1), which includes the right to form and join trade unions. The Charter does not contain article 22(3) of the ICCPR which refers to Australia's obligations under International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise. As mentioned earlier, the Committee prefers a Charter that is a stand-alone document containing core human rights, rather than a Charter that also contains qualifying material based on international treaty obligations.

**Protection of families and children:** The Charter incorporates ICCPR articles 23(1) and 24(1). The Committee has modified the wording of article 23(1) to read 'Families are the fundamental group unit of society' rather than 'The family is the natural and fundamental group unit of society'. The Committee considers that use of the term 'Families' is appropriate as it recognises that families can take many and varied forms, all of which are worthy of protection. The Committee has not included the article 23 provisions concerning marriage, nor have we included the article 24 provision concerning children's right to a nationality as these are essentially Commonwealth matters. In addition, the Committee has not included the article 24 provisions concerning the right to birth registration and to a name. While these rights were more relevant in the post- World War II context in which the ICCPR was drafted, they are less relevant for inclusion in a modern Victorian Charter and are covered by other Victorian laws.

**Taking part in public life:** The ICCPR article 25 has been modified to restrict the right to vote and to occupy public office to eligible persons. The Charter also stresses that in order to participate in public life, people need both the opportunity and access. The Charter contains an additional sub-section, which provides that people have the right to participate in public decisions that affect their lives. This right was stressed by Indigenous communities, young people and people with disability.

**Right to utilise natural wealth and resources:** ICCPR article 47 has also not been included in the Charter. This provision concerns the inherent right of all peoples to enjoy and utilise their natural wealth and resources. The Committee has decided not to include this as an express right because of the difficulties internationally found in the interpretation of the term 'peoples' and because the Charter is concerned with individual rights rather than rights attaching to groups.

**Specific limitations of rights:** A number of provisions in the ICCPR contain specific limitation clauses. Apart from the limitations to the freedom of expression explained above, the specific limitations are not included in the Charter as the Committee considers that it is preferable to rely on a single general limitation clause. This is discussed in the following section.

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## RECOMMENDATION 7

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The following rights from the *International Covenant on Civil and Political Rights* 1966 should be dealt with in the Charter of Human Rights and Responsibilities as follows:

- A provision protecting the right to life should provide that, for the purposes of the Charter, the provision applies from the time of birth.
- A non-discrimination provision should refer to the grounds of discrimination listed in article 26 of the *International Covenant on Civil and Political Rights* 1966, as well as to 'other status provided for under the *Equal Opportunity Act* 1995 (Vic)'. It should also contain a sub-section similar to section 19(2) of the *New Zealand Bill of Rights Act* 1990 which provides that special measures taken to assist disadvantaged groups, do not constitute discrimination.
- A provision protecting people from being unlawfully deprived of their property.
- A provision protecting the rights of minorities to enjoy their culture, practise their religion and use their language, which should draw upon the principles of multiculturalism contained in the *Multicultural Victoria Act* 2004 (Vic).
- Indigenous rights should be protected through the recognition of specific cultural rights. The preamble should also recognise Indigenous rights.
- A right to self-determination should not be included in the Charter as a free-standing right, but it should be reflected in the preamble to the Charter.
- A right to found a family should not now be included in the Charter.
- Other civil and political rights should be included, as adapted for the Victorian context.

### 2.6 How should the rights be balanced?

The Committee believes that human rights should not generally be seen as absolute. Rights need to be balanced against each other and other competing public interests.

The balancing of rights can happen through an express limitation on a clause-by-clause basis (as in the ICCPR) or through a general limitation clause (as is the case in the ACT, Canada, New Zealand and South Africa).

The ICCPR contains specific express limitation clauses. For example, the right to freedom of expression (Article 19) is subject to restrictions such as defamation laws. While this approach can provide more certainty for the listed exceptions, it does not capture the broader balancing process.



Many submissions acknowledged the need for the human rights contained in the Charter to be subject to limitations set out in a general limitation clause. As the Office of the Public Advocate stated:

*The Public Advocate stresses that as well as outlining the rights to be protected and promoted, a charter of human rights must set the parameters for the restriction or denial of rights ... the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse.* (Submission 456)

Section 28 of the ACT *Human Rights Act 2004* provides one form of limitation clause:

*Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.*

This is consistent with provisions in the human rights instruments in New Zealand and Canada. The provision embodies what is known as the 'proportionality test'. The Canadian Supreme Court has stated that in order for a limitation on a right to be reasonable and demonstrably justified, two key conditions must be met:

- The objective that the rights-limiting law is trying to fulfil must be of 'sufficient importance to warrant overriding a constitutionally protected right or freedom'. The objective must 'relate to concerns which are pressing and substantial'.
- The means chosen to achieve the objective must be reasonable and demonstrably justified. This involves considering whether the means adopted are 'designed to meet the objective in question', whether they impair rights or freedoms as little as possible and whether there is proportionality between the effects of the measures and the objective which the rights-limiting law is seeking to achieve.<sup>33</sup>

In considering what is most appropriate for Victoria, the Committee found useful the comments of New Zealand practitioners at the academic round-table, who said that the unstructured New Zealand provision (and by implication the ACT and Canadian provisions) can be difficult to interpret and apply on a day-to-day basis.

The Committee wants to make sure that the Charter, which will more often be interpreted within government than by the courts, is as easy as possible to apply. As such, a more certain form of guidance about the limitations on rights is needed. The South African Bill of Rights 1996 specifically sets out the matters to be taken into account in deciding if a limitation is reasonable and justifiable.

The Committee has drawn on this example and recommends that the limitation clause be drafted as follows:

*Human rights may be subject only to such reasonable limits set by Victorian laws that can be demonstrably justified in a free and democratic society taking into account all relevant factors, including:*

- *the nature of the right;*
- *the importance of the purpose of the limitation;*
- *the nature and extent of the limitation;*
- *the relation between the limitation and its purpose; and*
- *less restrictive means to achieve the purpose.*

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### **RECOMMENDATION 8**

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The Charter of Human Rights and Responsibilities should state that the rights it protects 'may be subject only to such reasonable limits set by Victorian laws that can be demonstrably justified in a free and democratic society'. This provision should also provide specific guidance on the factors to be taken into account in this balancing process.



**Chapter 3**  
**Who should the  
Charter apply to?**

### 3.1 Summary

Human rights belong to all human beings, so the Charter of Human Rights and Responsibilities should cover all people in Victoria, regardless of whether or not they are citizens.

The Charter should bind public authorities, creating an obligation upon the Victorian Government and local councils to observe the rights in the Charter. However, the Charter should not bind the Victorian Parliament with respect to proceedings in Parliament, nor can it bind the courts in their development of the common law.

Because many public functions are now delivered by the private sector, the Charter should sometimes bind private organisations. However, it should only apply to private organisations when they are performing public functions on behalf of the Victorian Government (that is, when they are acting as 'public authorities').

The Charter should not create new obligations between individuals or organisations. It should only extend to the relationship between people and government and those acting on behalf of government. Sometimes the Charter will have some effect upon the relationship between individuals when government has chosen to regulate those relationships.

### 3.2 Who has human rights?

Australia's Human Rights and Equal Opportunity Commission has said that human rights are for 'everybody, everywhere, all the time'.<sup>1</sup> Our entitlement to human rights comes not from being a particular type of person, but rather from just being a human being.

If we take this as a starting point, the answer to the question of who has human rights seems quite simple: we all have human rights. However, in different parts of the world, law-makers have taken different paths when deciding who should have legally enforceable rights under human rights legislation. For example, in some countries corporations as well as individuals are able to bring human rights cases. Some countries also give all people in their country the same freedoms and protections, whilst others treat citizens and non-citizens differently in regard to particular human rights.

#### 3.2.1 Rights as human beings or citizens?

The clear majority of people making submissions to the Committee or taking part in consultation meetings who talked about this issue said that the Charter should apply to all people in Victoria. Most people felt that human rights should apply to everyone because of their humanity, not just people who had been born in Australia or had become citizens.

It is important that, as a Charter of Human Rights, lack of citizenship does not exclude some people from access to the guarantees provided for under the proposed law.

**Submission 1020: World Vision Australia**

The Committee's view is that all people, regardless of immigration or other status such as their race or religion, should be protected under the Charter.

It is a matter of common sense that human rights protections will apply in different ways, according to which right is in question. For example, no person, whether citizen, resident or visitor, should be subjected to cruel and degrading treatment. On the other hand, the Charter should not give tourists the right to vote. As we set out in Chapter 2, the Charter will allow for these types of distinctions by ensuring that the rights are not absolute and that they can be limited where it is reasonable to do so.

### 3.2.2 Individual and group rights

Some people were worried that cultural background might be used to decide who has or does not have human rights. Others thought that human rights should belong to groups of people, particularly in regard to cultural rights. This would mean that groups of people could enforce rights not just as a series of individuals but also as communities.

People see their rights in different ways. In a consultation with the Ministerial Advisory Council for Cultural and Linguistic Diversity, the Committee was told that for many people, family and community rights are very real and may be more important than individual rights in the way people think about themselves and their connections with society. For example, the right to self-determination for Indigenous Australians can be important both as an individual and community right.

Group rights provide a new way of looking at rights to which very few western-style human rights laws have responded. Other nations, like the United Kingdom, tend not to protect rights at the level of groups and attach rights only to individuals. Although the Committee recognises that many people see their rights as having a communal aspect, we note that generally human rights are seen as attached to individuals.

Therefore, the Committee believes that the Charter should only confer rights upon individuals. This will not prevent protection of the right to practice culture. As discussed in Chapter 2, cultural rights based on Article 27 of the *International Covenant on Civil and Political Rights* should be included in the Charter.

### 3.2.3 Rights for corporations?

Traditionally, human rights law has focused on the relationship between governments and people. However, when thinking about who holds human rights, the idea of corporations having rights also needs to be considered.

Dr Andrew Butler from New Zealand, who attended the Committee's expert's roundtable, made the point that a lot of the freedoms we enjoy are through corporations, such as the right to a free press. He suggested that there might be important reasons to include corporations

as being protected under some rights. Others stated that the negatives of allowing corporations to benefit from rights outweigh the positives. Conceptually, some people feel that human rights should be restricted to humans because the human dignity which is the source of human rights can only be found in humans, not corporations.

The Committee found the submission of Professor Marcia Neave and Professor Spencer Zifcak to be useful in considering this issue:

*We have given thoughtful consideration to the question of who should be regarded as possessing human rights. On balance, we are of the view that only individuals possess human rights. It is a conceptual error to think that corporate entities have 'human' rights. We do not doubt that corporate entities should be entitled to a diverse array of economic entitlements and market-related freedoms. These, however, are conceptually and categorically distinct from human rights which have their foundation in the desire of all peoples to recognise, preserve and strengthen respect for individual human dignity and autonomy. (Submission 840).*

Or as Doug Pollard stated:

*Breaches of human rights are rarely clear-cut it is usually a case of balancing one person's rights against another's, but it is very important for the law to be quite clear that it deals with HUMAN rights: companies, for example, are not human individuals and do not in themselves have rights, though an individual manager or employee does have rights. (Submission 39)*

Overseas experience demonstrates that, unless human rights legislation clearly states that it gives rights only to individuals, corporations may be able to use human rights laws to promote their commercial interests. As the Cancer Council of Victoria said:

*[C]are needs to be taken in the drafting of any legislation to ensure that it does not inadvertently give rise to new rights or opportunities for other legal persons. Unless the language is clear, courts may interpret the legislation as creating corporate rights. It is almost certain that if the language is at all unclear, corporations will encourage them to do so. (Submission 473)*

For example, in Canada, the United States and in Europe, courts have found that the right of free speech extends to commercial speech. In Canada, the Supreme Court ruled that tobacco laws governing advertising and health warnings were inconsistent with the right of freedom of expression in the *Canadian Charter of Rights and Freedoms* 1982.<sup>2</sup>

The Committee recognises the need to avoid unintended consequences arising from the Charter. We are also mindful that human rights legislation should not interfere with the legitimate regulation of commercial activity by government, especially where that regulation is aimed at improving matters such as public health, consumer protection and the environment. We also accept the argument put by the Cancer Council of Victoria that care needs to be taken in the drafting of the Charter to make sure that corporate rights cannot be implied. Accordingly,

the Committee accepts that the Charter should be explicit about who does and does not have human rights under the legislation.

In the South African and New Zealand Bills of Rights, rights extend to corporations recognised as ‘other legal persons’, but only so far as practicable taking into account the nature of the right. This allows the Courts to determine on a case-by-case basis which rights apply to corporations (for example freedom of expression for media organisations) and which do not (such as freedom from torture). However, this approach opens up uncertainty as to the application of the law.

The Committee prefers the approach adopted by the Australian Capital Territory (ACT) *Human Rights Act 2004*, which includes a statement that the legislation confers rights only on individuals. This approach will provide certainty without losing important rights such as a free press. Journalists and other people will still be able to assert their right to freedom of expression.

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### RECOMMENDATION 9

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The Charter of Human Rights and Responsibilities should provide that human rights belong to all people in Victoria and that only individual persons have human rights.

## 3.3 Who should be bound by the Charter?

### 3.3.1 Rights between people and government

Throughout our consultation, the Committee stressed that we are only looking at the idea of establishing rights between government and the people. Our job was not to examine the idea of establishing new rights or changing existing rights between individuals or between individuals and companies. However, where government has regulated the rights that lie between individuals by statute it may be that those relationships are somewhat affected by the Charter.

The many existing laws that regulate relationships between individuals in Victoria include the *Equal Opportunity Act 1995* and the *Racial and Religious Tolerance Act 2001*. We did receive some submissions that talked about these and other laws. While we note that there is some strong feeling in the community about such matters, both positive and negative, we make no recommendations about these or other laws. They lie outside the task set for us.

### 3.3.2 Government and the idea of a ‘public authority’

One of the most important questions for the operation of the Charter is: if the government is to be bound by the Charter, what then is ‘the government’? Some human rights laws, such as in the United Kingdom, bind government in its dealings with the community by defining government and its component parts as being ‘public authorities’.

Other systems, such as in the Australian Capital Territory, have not included a definition of government or of a public authority. While section 29 of the ACT *Human Rights Act 2004* says

that it ‘applies to all Territory laws’ it is silent on whether this exhausts the scope of its application. The lack of a clear definition in the ACT legislation has been criticised. For example, as Dan Meagher of Deakin Law School stated:

*If parliamentary sovereignty is taken seriously within the government’s preferred rights framework, then in my view two points emerge from the application ambiguity problem in the ACT ... First, the Bill of Rights must make as clear as possible those persons and bodies to whom it applies. The sovereignty of Parliament in this regard – that is, the extent to which it wishes to provide rights protection – cannot be preserved and promoted by the courts (or other public officials and bodies) and private (legal) persons without this kind of clear textual guidance. (Submission 489)*

The Committee’s view is that it is important to bring as much precision as possible to the area by first, defining what is or is not a public authority and secondly, making it clear that the Charter only binds public authorities.

People and organisations providing important public services should not be left uncertain about whether they must protect fundamental human rights under the Charter; nor should the people receiving those services be left in doubt about whether or not their rights are protected. The Committee does not want to create ambiguities that the courts may need to resolve. This view is also consistent with the *Statement of Intent*, which expresses a clear preference for Parliament to have the last say in regard to rights protection. That goal can be achieved by setting out how far the Charter will extend with as much clarity as possible.

### **3.3.3 ‘Public authority’**

Modern governance is complex and often interacts with the private sector, (including for-profit companies as well as not-for-profit or community based organisations). Capturing all modern governance arrangements in the public sector with a simple definition creates some challenges. There are a number of options that could be applied to define a ‘public authority’. One option is to include only designated government departments and statutory agencies.

People making submissions and taking part in consultations were concerned that such a narrow definition would exclude significant amounts of public activity given the large amount of outsourcing or delegation of government services that has occurred in recent decades.

The views of women who have experienced domestic and family violence reflected the views of many people:

*WHW [Women’s Health West] also regards the corporate or private sector as part of the community with a particular responsibility to promote and protect human rights ... This is all the more important given the number of private sector agencies from which the public sector purchases services for disadvantaged groups (e.g. private prisons, care services for people*



*who are elderly or have a disability), the impact of privatisation of infrastructure and essential services such as public transport and utilities, and the interaction between the public and private sectors in key areas such as Workcover.* (Submission 476)

People also feared that a too narrow definition could create an incentive to contract out services to avoid compliance. However, it is important to remember that governments cannot so easily evade their responsibility to safeguard the human rights contained in instruments such as the *International Covenant on Civil and Political Rights* 1966 by delegating their task to private bodies. Where government relies upon private organisations to perform essential public functions, such as the running of prisons, it still retains responsibility for those functions.

While this idea of a non-delegable duty can apply in regard to things like prisons and health services, it is less clear cut in other areas of public activity. There is legitimate community concern that a narrow definition of 'public authority' might lead to inequity in rights protection.

Another option would be to list all relevant public authorities in a schedule to the Charter, either as individual bodies or as classes of organisations. However, the danger of listing agencies is that the flexibility required to cover future governance arrangements can be lost. If the list was a short one, it would also be contrary to the aim in the *Statement of Intent* to improve standards of governance and promote a culture of human rights across the spectrum of public activity.

To capture this intention, private sector organisations (both for-profit and not-for-profit) undertaking a public function on behalf of the Victorian government could be bound by the Charter in addition to those entities expressly included in a list, for example, government Departments, statutory authorities, Victoria Police and local councils. This was the preferred option amongst many community members participating in the consultation.

The Victorian Council of Social Service stated that:

*Acknowledging the increasing role of private and community sector organisations in the delivery of Government and essential services in Victoria, VCOSS recommends that the measures ... apply to such private and community sector organisations through their inclusion as conditions of Government contracts.* (Submission 1014)

The Victorian Institute of Forensic Mental Health concurred:

*[A]ny Charter should apply to public and private providers of government services and the same consequences for breaches of human rights should exist for both public and private service provision.* (Submission 1932)

Some people thought that human rights obligations should rest with the private sector even when they are not performing public functions. Dr Ben Saul from the University of New South Wales argued that:

*If the objective of human rights law is the protection of human dignity, it is logical that remedies be available for violations of human rights whether committed by public or private actors. (Submission 1096)*

The Committee believes that the focus of the Charter should be on the obligations of government to the community, with government defined through the idea of a 'public authority'. The Charter ought to bind a private sector organisation only when it is acting on behalf of government in performing a public function or duty. This is a similar approach to that now taken in the United Kingdom.

Such a definition would require government departments to inform contractors of their obligations under the Charter. The risk is that businesses or organisations engaged in government work may be resistant to what may be perceived as an additional layer of regulation. However, with education and training there should be no reason why a private sector provider of a public service could not operate within human rights principles when delivering that service.

We note from their submission that the Committee for Melbourne<sup>3</sup> has already recognised and is promoting human rights principles as part of a 'Global Compact' with the United Nations. This Compact encourages private companies to protect and promote an even wider range of human rights than would be contained in the Charter. We are also aware that Victorian companies operating overseas may have to be aware of and comply with human rights laws in the countries where they operate. In this way, complying with human rights is now seen by many companies as good business practice.

The first principle of the Global Compact is for companies to 'support and respect the protection of international human rights within their sphere of influence'. The second is to 'make sure that they are not complicit in human rights abuses'.<sup>4</sup>

It is already a common feature of government contracts and funding agreements that organisations be required to act lawfully in regard to occupational health and safety, equal opportunity and similar obligations. Requiring compliance with human rights standards would be a natural progression in this process of ensuring the best possible outcomes for the people of Victoria, irrespective of which organisation is carrying out the public or government function.

In the United Kingdom, while it is possible for government departments to include human rights protections in contracts with service providers, there is no legal obligation to do so. However, the United Kingdom Audit Commission has produced a contracting checklist for use by public authorities and has advised that:

*A good practice public body will adopt a pro-active approach to protecting service users' convention rights when contracting out the provision of its services. Some authorities are beginning to build human rights concerns into their risk management systems ... The contracts secured will be better tailored to the needs of the individual and, in particular, will seek to protect their Convention rights. <sup>5</sup>*

This form of management is intended to reduce the likelihood that the private organisation avoids liability for human rights breaches while the contracting government department remains liable.

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### RECOMMENDATION 10

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The Charter of Human Rights and Responsibilities should bind 'public authorities'.

#### 3.4 How should 'public authority' be defined?

The Committee prefers a definition of a public authority that captures the range of ways that public functions are carried out in Victoria. This is for reasons of certainty, equity and comprehensiveness, and reflects accepted practice in New Zealand and the United Kingdom.

Section 3 of the *New Zealand Bill of Rights Act 1990* states:

*This Bill of Rights applies only to acts done*

*(a) By the legislative, executive, or judicial branches of the government of New Zealand; or*

*(b) 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.*

This definition focuses on the function being performed. New Zealand commentators argue that this is working well in covering a range of government functions without inappropriately intruding into the private sector.<sup>6</sup>

The United Kingdom *Human Rights Act 1998* states in section 6(3) that a 'public authority' includes:

*(a) a court or tribunal, and*

*(b) any person certain of whose functions are functions of a public nature,*

*but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.*

Section 6(5) further states: *'In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private'.*

The United Kingdom Parliament was given a limited exclusion from this definition to avoid compelling it to amend legislation which the courts have declared incompatible with the *European Convention on Human Rights and Fundamental Freedoms 1950*. The same exclusion should be made under the Victorian Charter to ensure that it reflects the continuing sovereignty of the Victorian Parliament.

Even in countries like the United Kingdom where there is express guidance on the definition of a public authority, there is still room for disagreement as to the bodies to which it applies.

In effect, the United Kingdom legislation creates two categories of public authorities. The first are 'core' public authorities, such as the central and local government and the courts, which must act compatibly with the list of human rights in all they do. They must meet human rights standards both as institutions and as service providers.

The second category covers entities such as corporations that are bound by the *Human Rights Act* 1998 only when performing 'functions of a public nature'. For example, a private security firm would be required to comply with human rights in its running of a prison, but not in providing security to a supermarket. These bodies have been termed 'hybrid' or 'functional' public authorities.

The Victorian community told us that it is important that the definition of public authority be given a wide meaning that includes those who exercise 'hybrid' or devolved public power. The question then becomes: which test to apply?

During 2003 and 2004, the Joint Committee on Human Rights of the British Parliament undertook an inquiry into the meaning of public authority under the *Human Rights Act* 1998. The inquiry looked at a number of court cases where the definition of a public authority had been considered. In the lower courts, the approach has been to look at the relationship between the government and the private organisation. This includes looking at how 'enmeshed' the relationship was, as well as the nature of the function performed. In contrast, the House of Lords focussed primarily on the nature of the function being performed.

The United Kingdom Joint Committee preferred the 'functional' approach taken by the House of Lords<sup>7</sup> as compared to the approach taken by the lower courts. It concluded that 'there is a fundamental problem not with the design of the law, but with its inconsistent and restrictive application by the courts'.<sup>8</sup>

The UK Home Secretary, when debating this issue in Parliament, pointed out that public functions are evolving over time so that it is vital that the test of a public function for these 'hybrid' or 'functional' bodies relate to the 'substance and nature of the act, not to the form and legal personality'.<sup>9</sup> In other words, the best test is to look at what is being done, not who is doing it.

The 'functional test' first asks: is the activity a public function? If the answer is yes, then the next question becomes: is the activity being undertaken on behalf of the Victorian Government? For example:

A private transport company could be bound by the Charter when transporting prisoners between a court and a prison, but not when it transports livestock.

A charity delivering services to people with disabilities under a contract or service agreement for the Victorian Government could be bound by the Charter when delivering those services, but not when it is running a charity shop to raise funds.

A fully privatised utility would not be bound by the Charter when it delivers electricity as it is not doing so on behalf of the Victorian Government.

It is important to remember that some organisations, such as independent, non-government schools although not bound as public authorities, are already regulated by government by way of standards for registration. These standards should comply with Charter rights, because they form part of Victorian law and policy, all of which will be measured against the Charter.

### 3.4.1 Should the courts be a 'public authority'?

In the United Kingdom and New Zealand, the courts are bound to protect human rights, both as institutions and in the functions they perform. In these and other nations, this has led courts to develop the common law in its application to relations between private individuals, where there is no government involvement to pay greater heed to human rights. This is sometimes called a 'horizontal effect'. It gives judges a framework through which they can apply human rights across the broad range of decisions they make.

However, the inclusion of the courts as a 'public authority' may create challenges in Australia's federal system, which according to the High Court has one unified common law. As the Australian Human Rights Centre at the University of New South Wales pointed out:

*[T]he prospects of a Charter of Human Rights having an indirect horizontal effect in Victoria are limited. Following the decisions of the High Court of Australia in *Lipohar v The Queen*<sup>10</sup> and *Esso Australia v The Commissioner of Taxation*,<sup>11</sup> the current position... is that there is one unified common law of Australia, which is not susceptible to direct influence by legislation in any one State. (Submission 1080)*

This means that, while the Victorian courts may be bound by the Charter as institutions, there is a limited capacity for them to be required to apply the rights in the development of the common law. This is because no one State can change the 'unified common law' of Australia. If Victoria attempted to do so, there is a real risk that the High Court would strike down part of the Charter as being inconsistent with the Australian Constitution.

The Committee believes that the courts should be bound by the Charter in carrying out their normal functions as institutions, such as in hiring staff and the like, but should not be compelled to apply the common law in compliance with the Charter. The courts may still find the Charter useful in their development of the common law, as they do a range of other values and principles.

### 3.4.2 Should local government be a 'public authority'?

The Committee believes that the Victorian Charter should apply to both State and local government, but is mindful that local government should not be overburdened with compliance costs.

As The Charter Group stated in their submission:

*All levels of government have a responsibility to ensure our human rights are protected and promoted, and local government is no exception and indeed can provide leadership on this when other levels of government fail to protect rights. (Submission 842)*

Local Government plays a unique role in Victoria. As decision makers, as providers of services and as drivers of community development and participation, local councils have been described as the level of government with which people often have closest contact.

It is local governments, rather than federal or State Governments, which are instrumental in establishing a sense of community and providing a democratic forum whereby local people of diverse backgrounds can participate in political debates and be heard. Local government determines the immediate environment in which we live our daily lives. It is the first level of government and the one at which citizens gain their most direct experience of representative democracy and participation.

### **Submission 947: Victorian Local Governance Association**

Throughout the consultation, the Committee was reminded of excellent examples of human rights principles implemented by local government. Councils throughout Victoria have established initiatives that promote local democracy, citizen rights and community wellbeing.

The Committee was keen to hear from councils about whether they thought local government should be bound by the Charter and met councils throughout metropolitan, regional and rural Victoria. The Committee also attended a roundtable organised by the Municipal Association of Victoria. Meetings were also held with the Victorian Local Governance Association. Submissions were received from many more local councils.

When asked whether local government should be bound by the Charter, some councils said yes and others said no. All stressed the importance of not creating a financial burden on local government as this would be counter-productive to building a human rights culture because it could divert resources away from service delivery.

The Committee notes the view expressed by the Municipal Association of Victoria 'that there is no urgent need to improve human rights protection at this time'. It went on to say

*It has been argued that the promotion of human rights can strengthen communities and assist in the development of individuals' capacity to participate within communities. On this basis the recognition and protection of human rights is generally supported by the local government sector in Victoria.*

The Municipal Association of Victoria also reported that:

*All councils that have communicated with the MAV have indicated a willingness for local government [to] play a role in protecting human rights, particularly in promoting human rights*

*at the local level. There is a clear need to ensure that any responsibilities given to local government are adequately resourced considering the limited revenue raising capacity of councils. (Submission 811)*

The Committee takes the view that existing reporting mechanisms should be utilised to ensure that local councils are fulfilling their obligations under the Charter rather than creating additional layers of accountability. The Committee would not like to see resources of local government diverted from service provision. However, we agree with people attending the Indigenous consultation meeting in Warrnambool that ‘any general standards in a Human Rights Act need to be enforceable at the local government level’.

We agree that simplicity is the key to making sure local government can engage with the Charter. As Mayor David Vendy of the City of Ballarat suggested ‘it is better to have a common standard across local government’.<sup>12</sup>

The Committee also notes the danger identified at the Municipal Association of Victoria roundtable that the Charter might only get ‘picked up in social documents. It needs to go across all aspects of local government’. The roundtable suggested that to ensure both comprehensiveness and flexibility, local councils could build their human rights strategies into local plans. It was felt this would provide for practical application within local government without being too prescriptive.

It is important to remember that Charter rights such as the right to a fair hearing can apply to civil matters, and so local councils will be mindful to avoid delays in decision making, for example in planning matters. The right to equality will also be of significance to local government. In this regard the Committee is confident that the Charter will give added impetus to the good work already being done by local government to deliver services and to work in ways that promote a culture of human rights.

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### **RECOMMENDATION 11**

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The definition of a ‘public authority’ should include government departments, statutory authorities, Victoria Police, and local government. It should also extend to all persons or bodies that perform public functions on behalf of the State of Victoria, when they are performing those public functions.

The definition should not include the Victorian Parliament in regard to proceedings in Parliament, nor should it bind the courts in their development of the common law.

The Charter should include a power to make regulations that add or remove organisations, or classes of organisations, from the category of public authority.

### 3.5 What should be the duties of ‘public authorities’?

The *Statement of Intent* stresses the importance of developing a human rights culture within government. One way to make that commitment effective is to include in the Charter an obligation on public authorities to implement human rights standards. This could mean that all legislation, policies and practices would be covered by the Charter.

There may be concern that adopting a human rights framework in policy making and service delivery will lead to delay and make departments risk averse. However, other countries routinely include human rights considerations in the day-to-day work of government and the policy making process has survived intact. Based upon the experience in other jurisdictions, it is clear that policy making and services can be improved by such arrangements.

In the United Kingdom, the Lord Chancellor’s Department found that after two years of the *Human Rights Act 1998*, public decision-making had improved by harnessing it to a clear set of fundamental standards. The ACT is also reporting positive incremental change in how government undertakes its work, including the delivery of human services, after only one year of operation of the ACT *Human Rights Act 2004*.

There are some signs that the government is becoming increasingly conscious of the Act in developing new Bills, and that the courts are aware of the Act in interpreting legislation. We may also be witnessing the beginnings of a cultural change in the ACT government bureaucracy towards accepting the place of human rights in policy development.

**Submission 2520: Gabrielle McKinnon, Regulatory Institutions Network, Australian National University<sup>13</sup>**

Submissions to the Committee indicated strong support for human rights standards being incorporated into the development and delivery of government policy. There was also strong support for an obligation to be placed on all public authorities, including government departments, agencies and enterprises, to consider the Charter generally in their practices and procedures.

Robert Wade, a client of the Homeless Persons’ Legal Clinic, said a Charter would:

*make me feel safe in the knowledge that we as humans are having a major input into the daily decisions that government makes ... Ensure that the actual Charter is being run and respected, by all agencies, officials, advocates and everyone associated with it. (Submission 212)*

People attending community consultation meetings stated that all activities of government should be covered by any Victorian Charter. As most community members have contact with government through day-to-day decision-making and service delivery, they expect that human rights standards should be met by all people carrying out a public function. Community members have also stressed the need for public servants to be given training and education on human rights.



The ACT *Human Rights Act 2004* does not clearly set out any such duty. Section 29 only states that the Act 'applies to all Territory laws'. It is arguable that public bodies operating under Territory laws are bound. It has been stated by Jon Stanhope, Chief Minister of the ACT, and Elizabeth Kelly, Acting Chief Executive of the ACT Department of Justice and Community Safety, that, in effect, the legislation creates a duty on all public officials to act consistently with human rights, so far as it is possible to do so. However, Dr Simon Evans and Dr Carolyn Evans from the University of Melbourne suggested in their submission<sup>14</sup> that the lack of clarity in this area may lead to conflicting views being taken by different departments and may require the issue to be settled by the courts.

This contrasts with the United Kingdom's *Human Rights Act 1998*, under which public authorities are expressly required to act compatibly with Convention rights. Section 6 of the Act states:

*(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

*(2) Subsection (1) does not apply to an act if –*

*as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*

*in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*

The Committee considers that including a duty in such clear terms is preferable to the course taken in the ACT, which leaves room for debate and lacks clarity. Based on the lessons learnt from other jurisdictions, the Committee believes that the Charter should be as explicit as possible regarding the duties imposed on public authorities. This would provide clear direction to public authorities, assist senior public servants in their efforts to promote a human rights culture within their departments and give life to human rights standards for everyone engaged in public service in Victoria.

A duty to comply with human rights would impose new checks and balances on how government undertakes its work. The Committee believes that human rights standards are both necessary and desirable, are consistent with good practice in service delivery and help to build trust in our public services. For example, policies and practices should be fair and non-discriminatory, participatory and empowering, holistic, transparent and accountable.<sup>15</sup>

However, the Committee recognises that the changes required should not be too excessive or burdensome. The inclusion of a duty to comply with human rights would require a preparation period for public authorities to allow them to undertake analysis and review of their practices and policies and to make any necessary changes before the duty comes into effect. In the

United Kingdom, a two year lead-in period was allowed for this preparation. This period was necessary given the size of government across the United Kingdom. As we recommend in Chapter 7, an eighteen month preparation period would be appropriate for Victoria.

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**RECOMMENDATION 12**

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All 'public authorities' should be required to comply with the Charter of Human Rights and Responsibilities.



**Chapter 4**  
**Institutions**  
**of Government**

### 4.1 Summary

Each of our main institutions of government – the executive, Parliament and the courts – has a vital role to play in protecting the human rights of the Victorian people.

The executive, which includes all government ministers and their departments, has an important function in ensuring that human rights issues are considered in the development and implementation of government policy and legislation. Government departments can play a key role in the early identification of issues before Cabinet makes decisions that may give rise to human rights concerns.

The community has told us that all new law and policy should be considered in light of fundamental human rights. The Committee believes that a specialist unit in the Department of Justice could assist in advising government departments on the human rights implications of policy and legislative proposals. The unit would also undertake expert vetting of all legislation to assess its compatibility with the Charter of Human Rights and Responsibilities.

To assist Cabinet in its consideration of the human rights implications of the policy and legislative proposals that come before it, departments should be required to prepare Human Rights Impact Statements when proposing new policy and legislation. These are statements that identify and analyse the human rights impacts of policy and legislative proposals.

The Committee believes that when a new Bill is presented to Parliament, the Attorney-General should provide a statement to Parliament indicating an opinion on whether the Bill is compatible with the Charter. However, to preserve Parliamentary sovereignty, the Committee believes that Parliament should still be able to pass laws even if no Statement of Compatibility has been made or, in exceptional circumstances, by use of an express override clause that allows Parliament to expressly declare that the law will operate even though it is incompatible with the Charter.

Parliamentary committees also play an important role in facilitating broader parliamentary and public debate of proposed laws, and can further assist the Parliament in assessing the human rights implications of new laws. The Committee believes that it is appropriate for Parliament's Scrutiny of Acts and Regulations Committee, renamed as the Human Rights Scrutiny Committee, to further examine Bills for human rights compliance.

The Charter should require the courts to interpret legislation in a way that is compatible with human rights and, without enabling them to strike down legislation, should allow them to declare certain laws to be incompatible with the Charter. The effect of a Declaration of Incompatibility would be to require further consideration of the issue by the executive and Parliament, and for Parliament to formally respond either by changing the law or deciding that the law will remain the same. This process would mean that Parliament retains the final say on legislation.

This model would be based on the idea of ‘dialogue’ between the community and the different arms of government. It would ensure that human rights are considered at the various levels of government, including in policy development, Cabinet decision-making, legislative drafting, parliamentary debate and judicial interpretation.

### **4.2 All arms of government have a role to play**

There was general recognition in submissions to the Committee that all institutions of government, in particular Parliament, the courts and the executive, have a role to play in protecting and promoting human rights.<sup>1</sup>

In their joint submission, the Victorian Council of Social Service and the Federation of Community Legal Centres (Victoria) stressed both the practical and symbolic importance of embedding human rights in all parts of government:

*The government has the responsibility to provide leadership, and institutions of government should be seen to be taking the first step towards better protecting human rights. The government is seen as powerful and there is much symbolic value in the government coming out as the leader on this issue.* (Submission 1942)

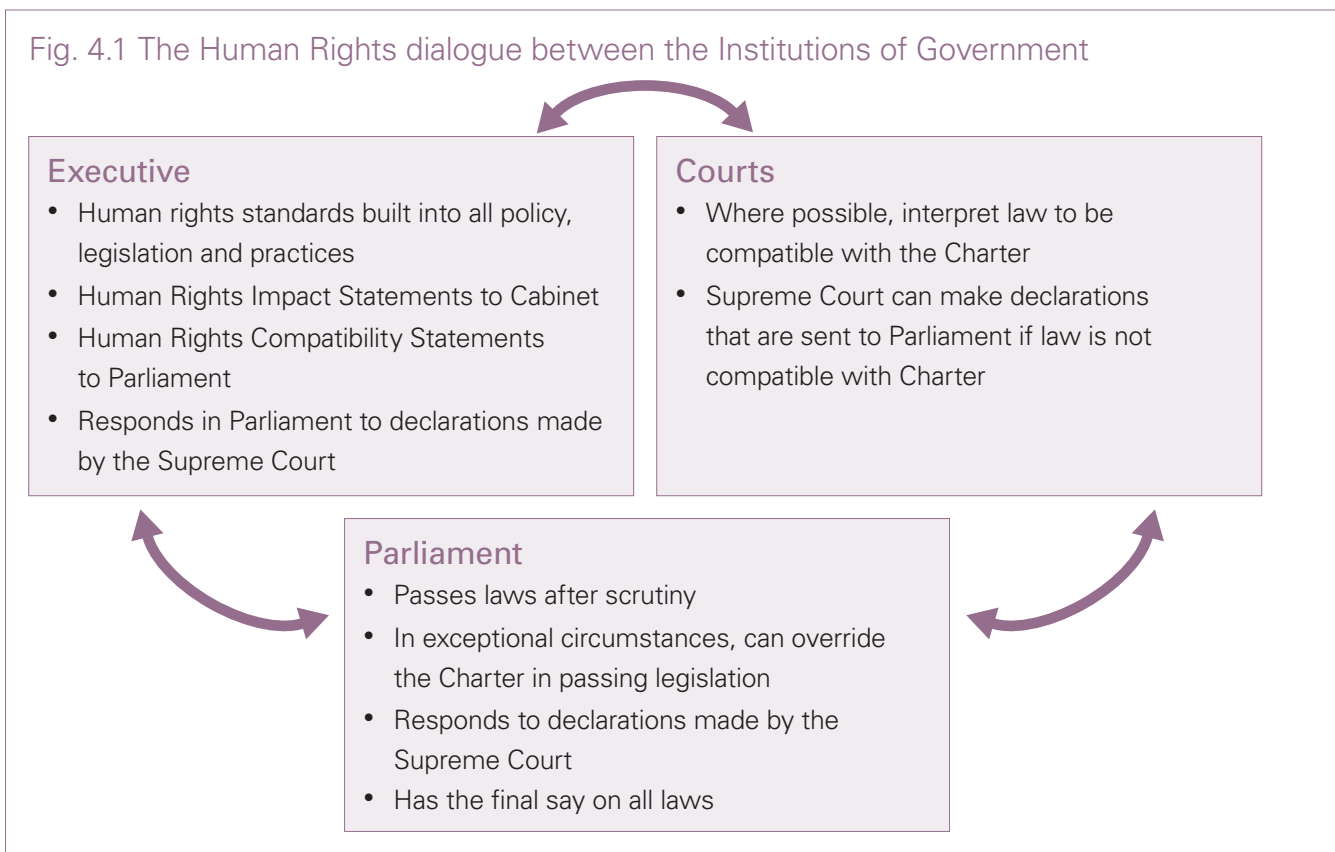
While this chapter focuses on the three main institutions of our democratic system, the Committee recognises that there may be other government institutions that would have a role in protecting and promoting human rights. In particular, the Committee acknowledges the important role that local government would play in the promotion and implementation of the Charter within the community. The role of local councils is addressed in Chapter 3.

The Committee also acknowledges the role of existing government bodies in protecting and promoting human rights. Organisations such as the Equal Opportunity Commission Victoria, the Privacy Commissioner and the Ombudsman may have particular roles in monitoring and enforcing the Charter. The Committee also believes that there would be a role for a Victorian Human Rights Commissioner under the Charter. These issues are discussed in Chapter 6.

In focusing on the three main institutions of government, the Committee recognises the importance of developing a model where each institution has an important and identifiable role in protecting human rights, but is also engaged in a meaningful dialogue with the other two arms of government to ensure that the best human rights outcomes are achieved.

The Committee believes that by infusing human rights considerations at all levels of government, and in the policy and law making process, there is a greater prospect of preventing laws and policies which are incompatible with human rights.

Fig. 4.1 The Human Rights dialogue between the Institutions of Government



### 4.3 What should be the role of the executive?

Submissions to the Committee expressed a range of views as to the role to be played by the executive in protecting human rights, including:

- having a robust pre-legislative scrutiny function to ensure that all new legislation is compliant with the Charter;
- the preparation of a Human Rights Impact Statement to be considered by Cabinet in regard to proposed policy and legislation;
- requiring that the relevant minister or the Attorney-General make a Statement of Compatibility in respect of new legislation introduced in Parliament, stating whether a Bill is consistent with human rights; and
- ensuring that all government departments comply with the Charter in respect of all of their activities, including their policies, decisions, practices and service delivery functions, and that departments report annually their human rights performance in respect of their functions.

#### 4.3.1 Ensuring legislation and policy meet Charter standards

The *Statement of Intent* indicates that the Victorian Government is supportive of procedures in the United Kingdom, New Zealand and the Australian Capital Territory (ACT) whereby legislation introduced into Parliament is certified as complying with the nation’s human rights

obligations. As the *Statement* asserts, this can ensure that ministers and their departments consider the impact of proposed legislation and policies on human rights before they become law or come into operation.

There was strong support in the submissions for a process that ensures that new legislation is compatible with the Charter. In particular, it was argued that all government departments should have to consider the impact on human rights of any new policies or legislation and that such a process should commence at the earliest stages of a policy exercise. This would ensure that human rights compatibility remained a key theme throughout policy development and the legislative drafting process, and that any human rights issues could be addressed at the earliest opportunity.<sup>2</sup> As Marg D'Arcy explained:

*That means that all government agencies, departments and organisations should be required to consider the impact on human rights of any new policies or legislation which is introduced.* (Submission 134).

There are two interrelated ways in which policy and legislation can be scrutinised in light of human rights. The first is vetting legislation for compatibility before it enters Parliament. The other is policy analysis within a human rights framework. The latter is a broader exercise and can include formal mechanisms such as Cabinet submissions. Experience from other countries shows that vetting legislation and framing policy within human rights can work well together to form a comprehensive approach to better governance.

### 4.3.2 Vetting legislation

Many people suggested that legislative vetting ensures that the executive is actively engaged in the process of interpreting and refining the scope of the broadly-stated Charter rights. Dr Julie Debeljak<sup>3</sup> from Monash University said that:

*Such assessments by the policy-driven arm of government are a vital contribution to the inter-institutional dialogue about Charter rights, and can influence the legislative and judicial understandings of particular Charter issues.*

Another benefit of vetting legislation identified by Dr Debeljak is that it helps legislative drafters to find ways of accomplishing important objectives in a manner that is more likely to protect human rights, while minimising disruption in attaining the policy goal.

Ensuring legislation meets Charter standards would involve the establishment of a unit to provide additional expertise on legislative vetting. There was discussion in the submissions about where best to locate such a team within the government: more detail about this debate can be found in Chapter 5. The Committee's view is that the ACT model should be followed by establishing a Human Rights Unit in the Department of Justice. It should be recognised that all departments will still play a role in the process. In particular, each department will need

to work closely with the Unit on all policies and legislation where human rights issues arise. By centralising the Unit within the one agency, there is a greater likelihood of developing a common whole-of-government approach to legislative vetting.

The ultimate purpose of legislative vetting is to prepare the Statement of Compatibility to be presented by the Attorney-General to Parliament. This is further discussed below.

### 4.3.3 Human Rights Impact Statements

Not all government decisions end up as legislation introduced into Parliament. A significant amount of government work is undertaken through subordinate legislation (such as regulations) and policy. Rules such as prison regulations are an example. Privacy systems, multicultural strategies, and protocols between departments are further examples of government policy in action. Funding programs for services are also a form of policy.

Some submissions suggested that there would be important benefits in formally examining policy to make sure it met human rights standards. This view was supported by the Victorian Bar:

*A Victorian Charter would also provide direct benefits in guiding the formulation of new policy proposals. Each proposal would need to be examined to see whether rights were adequately protected and whether any proposed curtailment of rights was consistent with international standards and represented a reasonably proportionate means of achieving a legitimate goal. (Submission 139)*

It was also suggested that one way for government departments to consider human rights in their policy formulation processes is to require them to prepare statements that identify and analyse the human rights impacts of their policy proposals. These human rights impact statements could form part of the policy development process.

The idea of human rights impact statements for policy proposals and subordinate legislation was explored in depth in the submission by Dr Simon Evans and Dr Carolyn Evans from the University of Melbourne. They suggest that a human rights impact statement should:

- identify the problem or issues which may give rise to the need for action;
- identify the desired objectives of the action;
- identify the policy instruments that might be employed to achieve the desired objectives;
- include an assessment of the human rights impact of each option;
- identify the extent of the consultation with those who would be affected by the proposed action and summarise their views;
- identify and give reasons supporting a recommended option; and
- describe a strategy to implement and review the recommended option.<sup>4</sup>



Their suggestion of human rights impact statements, along the lines of existing regulatory impact statements, has the following advantages:

*They are a logical extension of the existing commitment to evidence based policy making. They do not disrupt existing institutional responsibilities and competencies. They are designed to cultivate a practice of human rights and interpretation and analysis in the executive.*  
Submission 507: Dr Simon Evans and Dr Carolyn Evans, University of Melbourne.

Submissions from Professors Marcia Neave and Spencer Zifcak, The Charter Group and Kess Dovey<sup>5</sup> also recommended that Cabinet submissions be accompanied by a 'Human Rights Effects Statement' which identifies any areas where human rights concerns may arise from the proposed policy.

The Committee can see other advantages of impact statements in terms of a whole-of-government approach. Responsibility for preparing impact statements should rest with the department or agency that is making the proposal. This helps to ensure that human rights considerations are built into the policy making process at an early stage. It also helps to make sure that human rights scrutiny does not become the exclusive domain of the Department of Justice.

The Committee considers that a Human Rights Impact Statement should be included in Cabinet submissions for new Bills, policies and other major proposals so that Cabinet is aware of the human rights implications of its decisions. The requirement for and details of such a Statement should not be set out in the Charter, but in the Cabinet Handbook that deals with such matters.

The Committee believes that requiring Human Rights Impact Statements as part of Cabinet submissions will mean that government will be more likely to take active steps to fulfil its human rights obligations and deliver policy outcomes more consistent with human rights principles.

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### **RECOMMENDATION 13**

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For legislative changes and policy and other decisions, the responsible Minister should ensure that a Human Rights Impact Statement is included in Cabinet submissions. The requirement for and details of such a Statement should be set out in the Cabinet Handbook. The Statement should include:

- a statement of the purpose of the Bill, regulation, policy or proposal;
- a statement of its effect upon any of the human rights in the Charter; and
- a statement of any limitation placed upon any human right in the Charter by the Bill, policy or proposal, the importance and purpose of this limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there is any less restrictive means to achieve the purpose.

#### 4.3.4 Statements of Compatibility

There was strong support amongst the submissions for the pre-legislative scrutiny process to culminate in a statement to the Parliament on the compatibility of new legislation with the Charter.<sup>6</sup>

The *Statement of Intent* indicates that the Victorian Government is attracted to procedures whereby legislation being introduced into Parliament is certified as complying or not complying with the jurisdiction's human rights obligations.

##### ***Human rights compatibility statements in other countries***

*United Kingdom:* The Minister introducing legislation into Parliament is required to make a statement either that the proposed law is compatible or that no statement of compatibility can be made but that the government nevertheless intends to proceed with the law.

*New Zealand:* The Attorney-General makes a statement where the legislation is incompatible. The Parliament can still pass the law. The advice from the Crown Law Office is now made available on the internet.

*ACT:* The Attorney-General must present a compatibility statement to the Legislative Assembly. It must state whether the Bill is consistent with the human rights contained in the Act, and if not, how it is inconsistent.

While some submissions stated that the responsibility for making such a compatibility statement should be with the Minister in charge of the Bill,<sup>7</sup> most submissions that addressed this point preferred that the Attorney-General be given the role. The reasons provided for this preference were often similar to those set out by the Equal Opportunity Commission Victoria:

*There is merit in compatibility statements being made by the Attorney-General rather than auspicing [sic] Ministers as this builds a safeguard into the Charter machinery. Ministers and their departments would retain responsibility and autonomy for making decisions and choosing legislative options that complied with human rights, but the specific question of compatibility would then be reviewed by the Attorney-General.* (Submission 816).

Several submissions from individuals and from bodies such as the Law Institute of Victoria and The Charter Group recommended that, when making a compatibility statement, the Attorney-General should also provide reasons why the Bill is or is not considered to be compatible with the Charter.<sup>8</sup>

The Committee is persuaded by the submissions, the Government's *Statement of Intent*, and the practice in the United Kingdom, New Zealand and the ACT, that there is a role for the Attorney-General to provide a statement to the Parliament indicating an opinion as to whether the Bill is compatible with the Charter. This statement should be provided at the time the Bill is introduced, before the second reading speech on the Bill.

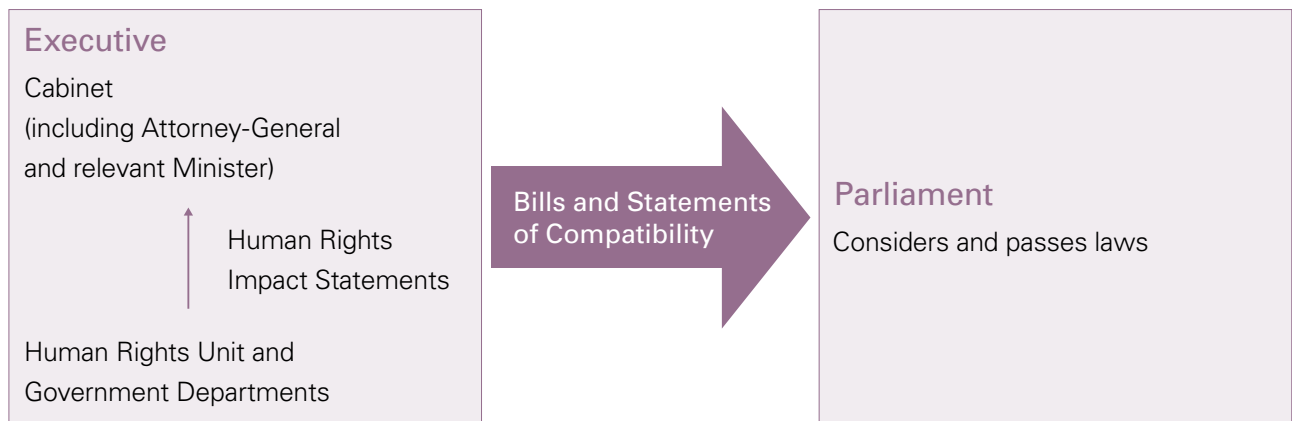
In the case of the compatibility of private members Bills, the Committee believes that, wherever appropriate, the member introducing the Bill should make a statement indicating compatibility or incompatibility. It is not possible to be more precise about when this should occur and a common sense approach should be adopted.

The Committee also believes that, for each regulation tabled in Parliament, information in an appropriate form regarding the compatibility of the regulation with the Charter, should also be presented to Parliament. This could be based on existing practice and should not be overly burdensome. Existing systems such as Regulatory Impact Statements might be used to achieve this task.

The Committee agrees that the effectiveness of having compatibility statements would be enhanced by having reasons accompanying the statement. The ACT's initial practice of one-line compatibility statements provided by the Attorney-General does not provide sufficient information to Parliament. The Committee considers that compatibility statements should deal with similar matters as set out in section 4.3.3 above in regard to Human Rights Impact Statements.

An overview of the role of the various agencies in the executive under the Committee's recommended model is set out in Figure 4.2.

Fig. 4.2 The Role of the Executive



### RECOMMENDATION 14

In regard to each Bill, the Attorney-General should present a Statement of Compatibility to Parliament. The Statement should set out whether or not, in the opinion of the Attorney-General, the Bill is consistent with the Charter. In doing so, the Statement should address the same matters as would be required in respect of a Human Rights Impact Statement.

Where appropriate, a member of Parliament introducing a private members Bill should make a Statement of Compatibility in the same form.

For each regulation tabled in Parliament, information should similarly be provided, in an appropriate form, regarding the compatibility of the regulation with the Charter.

### **4.4 What should be the role of Parliament?**

#### **4.4.1 Parliamentary sovereignty**

Parliament is the elected arm of government and is able to make laws that apply to all people in Victoria. As the elected institution, it is often said that Parliament has the ultimate authority or sovereignty in deciding what the law in Victoria should be. It is important to ensure that Parliament is properly informed of the human rights issues associated with any new laws which it is debating.

Submissions to the Committee recognised that the initial role of Parliament in protecting human rights would be to legislate for the introduction of a human rights Charter.<sup>9</sup> Of course, as a sovereign institution, Parliament could in the future also amend or even repeal the Charter.

Several suggestions were made in submissions to ensure that the courts maintain their traditional role as part of the checks and balances in our system, but that Parliament retain the ultimate power to enact laws that may be inconsistent with the Charter.

The Victorian Bar suggested that Parliament retain the right to enact legislation that is incompatible with the Charter, provided that it expressly acknowledges that it is doing so. In the ACT, New Zealand and the United Kingdom, Parliament can pass such a law and it will have effect even though it does not meet Charter standards.

The Committee is persuaded by these and other submissions, the *Statement of Intent* and the models that have been developed in other nations of the need to preserve the ultimate sovereignty of Parliament as the elected institution. To achieve this outcome, the Committee recommends that the Charter includes a provision which retains Parliament's power to pass laws that are not compatible with the Charter.

The Committee also recommends that Parliament be able to pass legislation even though no compatibility statement is made at the time a Bill is introduced, and even though no express declaration to use the override clause (see 4.4.2 below) is made.

#### **4.4.2 Override clause**

The Victorian Privacy Commissioner, Paul Chadwick (Submission 1171), suggested that courts should be able to strike down legislation that is incompatible with Charter rights, but that Parliament have the power to respond by re-enacting the law and providing justification as to why it is doing so. This would not meet the clear preference expressed in the *Statement of*

*Intent* that courts be prevented from striking down legislation. However, it does raise the idea of an override clause.

There is an override clause in the *Canadian Charter of Human Rights and Freedoms* 1982. Section 33 allows Parliament to expressly declare that an Act shall operate notwithstanding an incompatibility with the Charter. This clause has rarely been used.

In Canada, the override on a piece of legislation has effect for five years. This means that a court cannot strike down that law for that five year period. It is important to remember that Canada's Charter has constitutional status and so courts have strike-down powers. We do not recommend that power in Victoria.

The Committee can see value in having an override clause that can be used in exceptional circumstances and that is time-limited. The consequence of using this override power would be that the Supreme Court would not be able to issue a Declaration of Incompatibility (see 4.5.3 below) for five years and the interpretive clause would not apply to that Act or provision for the same period. After five years, Parliament should again be required to state that the relevant Act or provision is to continue to operate notwithstanding the Charter. This and any subsequent renewals should each operate for five years.

The Committee considers that the Parliament should only be able to use the override clause in exceptional circumstances. The Committee considers that the *International Covenant on Civil and Political Rights* 1966 is useful in setting out the circumstances when an override might apply, for example during a public emergency.<sup>10</sup>

The Committee is 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.

When using the override clause, the Parliament should be required to state which Acts or parts of an Act are to override the Charter and which specific Charter rights the Act overrides.

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### **RECOMMENDATION 15**

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The Charter of Human Rights and Responsibilities should include an override clause. The clause should provide that the Victorian Parliament may, in exceptional circumstances, override a Charter right by expressly declaring in the law it is intending to pass that an Act or provision is to operate notwithstanding that it is inconsistent with the Charter.

Where the Victorian Parliament uses this power, the Supreme Court should not be able to issue a Declaration of Incompatibility in respect of that Act or provision for five years after the Act or provision comes into force.

After this time, Parliament should again be able to state that the Act or provision is to continue to operate notwithstanding the Charter. Any subsequent renewals should also operate for five years.

### 4.4.3 Parliamentary committees

Parliamentary committees play an important role in facilitating broader parliamentary and public debate about proposed laws and can further assist the Parliament in assessing the human rights implications of new laws.

The *Statement of Intent* expresses the Victorian Government's support for the procedures in the United Kingdom, New Zealand and the ACT. It also says that any model must operate within the existing Victorian constitutional framework.

The Committee received many submissions that stated that once new legislation is introduced into Parliament, a parliamentary committee should scrutinise the legislation and report on its compatibility with the Charter. It was recognised that such a committee can facilitate a more robust debate by providing a clear statement to Parliament about a Bill's consistency with the Charter.<sup>11</sup> The Australian Human Rights Centre said that such a committee could contribute to a deeper and more considered form of deliberation on the rights implications of all Bills. (Submission 1080).

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

The Committee agrees. The substantive question is whether a special human rights committee is needed or whether the current SARC should be given additional functions.

#### ***Current role of the Scrutiny of Acts and Regulations Committee***

The SARC is an all-party Committee of both Houses of the Victorian Parliament. It has nine members (supported by four secretariat staff) and considers and reports on any regulation and Bill introduced into the Victorian Parliament. The Committee is required to consider whether any new legislation:

- trespasses unduly upon rights or freedoms;
- makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
- makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions; or
- unduly requires or authorises acts or practices which have an adverse effect on personal privacy.

According to the SARC, in considering whether a provision unduly trespasses on rights or freedoms, they are guided primarily by a number of generic common law rights and freedoms, such as whether the provision abridges the privilege against self-incrimination, whether it creates an offence with a reverse onus of proof, whether it infringes the right to vote, a person's right to privacy, or the presumption against retrospective legislation.<sup>12</sup>

Many submissions said that the scrutiny role should be undertaken by the SARC. Groups as diverse as the Equal Opportunity Commission Victoria, the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church of Australia, Victoria Legal Aid, Mallesons Stephens Jaques Human Rights Group, the Australian Centre for Human Rights and the Public Interest Law Clearing House took this view.<sup>13</sup>

*The Scrutiny of Acts and Regulations Committee of the Victorian Parliament (SARC) should have the power and function of reviewing all proposed legislation, including subordinate legislation, with reference to the rights contained in the Charter. The Scrutiny of Acts and Regulations Committee (SARC) should be required to issue a detailed statement of any provisions which fail to comply with the Charter and to make recommendations for the rectification of non-compliance in drafting. These recommendations should be returned to both Houses of Parliament for further consideration and response. Submission 959: Federation of Community Legal Centres*

Some submissions said that it would not be reasonable to expect that, in addition to its existing dual role of scrutiny of Bills and Regulations, the SARC could also take on the additional workload of a Charter rights scrutiny function. Accordingly, some suggested that a separate human rights committee should be established to scrutinise proposed legislation and report to Parliament. Such a Committee exists in the United Kingdom.

*A parliamentary Human Rights Committee should be established to scrutinise new legislation and advise upon its compatibility with the rights and freedoms contained in the Charter...It would be unreasonable to expect that SARC could undertake its existing functions as well as the onerous tasks imposed by the requirement to consider the compatibility of legislation with a Charter. It is for that reason, among others, that a new, dedicated committee would be required. Submission 840: Professor Marcia Neave and Professor Spencer Zifcak.*

### ***The United Kingdom Joint Committee on Human Rights (JCHR)***

The United Kingdom Joint Committee on Human Rights (JCHR) is a committee of the House of Lords and the House of Commons. It has a maximum of 12 members appointed by each House. The Committee is required to consider and report on matters relating to human rights in the United Kingdom and on any ministerial response to a Declaration of Incompatibility made by a court. The Committee adheres to two key principles: comprehensively scrutinising all government Bills and seeking detailed evidence from government on the human rights compatibility of Bills before arriving at final views on them.

The Committee also undertakes non-legislative work, which has included: inquiring into proposals to establish a human rights commission, monitoring the implementation of the *Human Rights Act 1998* and conducting inquiries on specific human rights issues.<sup>14</sup>

Another option suggested in submissions was creating a second parliamentary scrutiny committee so that there is a Scrutiny of Bills Committee and a Scrutiny of Regulations Committee, each with their own human rights scrutiny function and each having access to specialist external legal experts.<sup>15</sup>

According to experts from Canada, Dr James Kelly and Dr Janet Hiebert, it is important to be aware that a parliamentary scrutiny committee will be comprised of members from differing political parties and that members will need to distinguish the task of identifying possible rights violations from that of making judgements about the merits of the underlying policy. They state that the role of the committee should not be viewed as having to 'solve' the question of whether a Bill imposes an unwarranted restriction on rights, but to provide a framework to facilitate broader parliamentary and public debate on the justifications for the proposed legislation.<sup>16</sup> The Committee agrees with this view.

A number of issues come into play regardless of which Committee is involved. Any Committee would need to have adequate time to consider Bills, an adequate number of members of Parliament from all parties to make up the committee and sufficient staff to make sure the committee could perform its role.

*While the terms of reference and the definition of rights is an important aspect of committee performance, many more prosaic factors also influence the effectiveness of committees. A well-resourced committee, whose personnel are genuinely committed to human rights protection and which is given adequate time to perform its functions, is likely to be more effective.* Submission 507: Dr Simon Evans and Dr Carolyn Evans, University of Melbourne.

The Committee was pleased to receive a cross-party submission from the SARC on how best to protect and promote human rights. The SARC pointed out that any form of Charter scrutiny, inquiry and reporting functions would have resource implications.

*This would be the case whether The Scrutiny of Acts and Regulations Committee (SARC) was required to report on every Bill or every ministerial compatibility statement accompanying a Bill, or just to report only on those Bills with statements that identify 'incompatibility'. In either scenario, the Committee assumes that it will have a discretion to report on any Bill, if it believes that the Bill raises human rights issues, notwithstanding the fact that a minister or the Attorney-General has made a compatibility statement.* (Submission 22).

The SARC also submitted that if the Courts have the power to declare legislation incompatible with the Charter, a parliamentary committee should have the power to conduct an inquiry regarding the 'incompatible laws'.<sup>17</sup> The Committee supports this proposal because it gives Parliament further information with which to consider how to respond to any Declaration of Incompatibility.



Several submissions indicated that the scrutiny process to be conducted by a parliamentary committee should be open to the public, allowing for wider community consultation, input and debate before a Bill becomes law.<sup>18</sup>

*The scrutiny process should be public and informed by relevant opinion from interested members of the community. In this way, the wider community gains a further opportunity to engage in discussion about a Bill before it becomes law.* Submission 820: FKA Children's Services

Other suggestions made to facilitate effective scrutiny included:

- government and opposition parties entering into an agreement that the government of the day will not have a majority of members on the scrutiny committee, thus ensuring the committee's independence from the government;
- appointing a non-parliamentary expert chair (for example, a retired judge, an eminent academic, or a former head of a human rights organisation) to the committee, to assist the committee and to reduce the possibilities for partisanship; and
- if the position of Victorian Human Rights Commissioner is created, appointing the Commissioner as an external, independent member of the committee.<sup>19</sup>

The Committee strongly supports the principle of further scrutiny of legislation once it has been introduced into Parliament and considers that such scrutiny could be undertaken by an all-party parliamentary Committee. We also believe that such a parliamentary committee would play an important role in considering subordinate or delegated legislation.

Where the Attorney-General or relevant minister is unable to make a statement that the new legislation is compatible with the Charter, there may be a need for a more in-depth inquiry by a parliamentary committee to assess the human rights implication of such an Act. The Committee also believes that there is a role for a parliamentary committee to consider legislation that is the subject of a declaration of incompatibility issued by the courts.

The Committee recognises that some legislation is introduced and passed by Parliament within a short time frame. The Committee believes that the opportunity to cast a Charter lens over such legislation should not be lost, but nor should the Bill be delayed. The Committee believes that a good way to balance this would be to allow the SARC to scrutinise Bills within ten sitting days of their introduction into Parliament or before their enactment, whichever is the later.

The Committee also believes that the SARC should have the capacity to conduct other inquiries related to human rights issues upon receiving a reference from either House of Parliament.

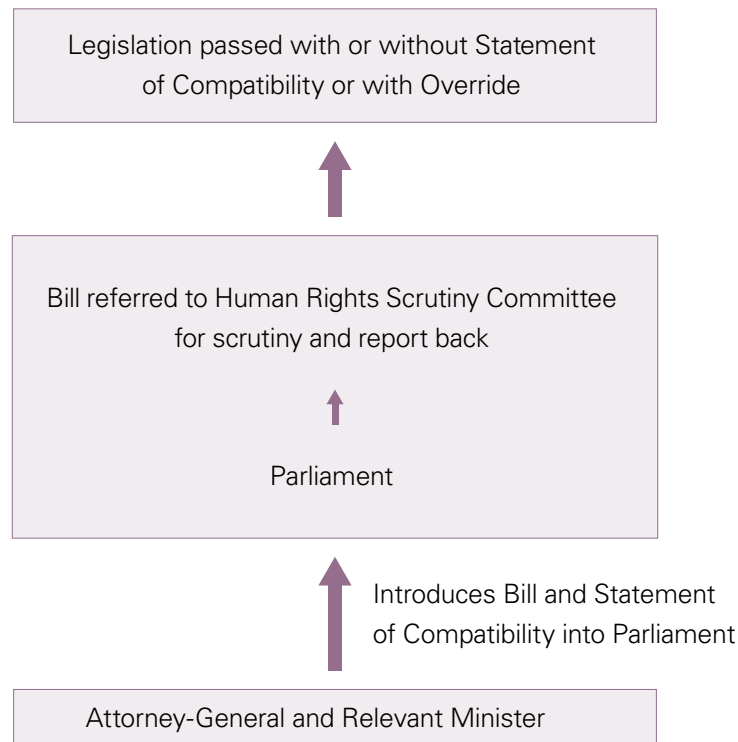
The Committee was persuaded by the submissions that recommended that this further scrutiny function be carried out by the existing SARC and that such inquiries allow for public input and participation. However, the Committee specifically notes concerns expressed by

the SARC regarding the need for adequate resourcing to properly fulfil its scrutiny function. Like the United Kingdom body, the SARC would also need support in the form of an ongoing external advisor who is an expert in human rights and possibly specific one-off advice in regard to particular inquiries.

With these important changes to the SARC, the Committee suggests that it should be renamed in a way that reflects its new human rights scrutiny function as the 'Human Rights Scrutiny Committee'.

An overview of the role of Parliament and the Parliamentary Scrutiny Committee under the Committee's recommended model is provided in Figure 4.3.

Fig. 4.3 The Role of Parliament



## RECOMMENDATION 16

The Scrutiny of Acts and Regulations Committee should be conferred with additional terms of reference to consider and report on matters arising under the Charter of Human Rights and Responsibilities, including questions referred to it by either House of Parliament, whether legislation is compatible with the Charter and consideration of any Declarations of Incompatibility made by a court.

The Committee should be able to report on Bills within ten sitting days of their introduction into Parliament or before their enactment, whichever is the later.

The Committee should be provided with sufficient resources to ensure that it can provide an appropriate level of advice and support to Parliament. Where possible, the Committee's work with respect to human rights should allow for input and submissions from the public.

The Committee should be renamed the 'Human Rights Scrutiny Committee'.

### 4.5 What should be the role of the courts?

The courts are independent from Parliament and the executive and traditionally have an important role to play in a democratic society by interpreting laws made by Parliament in hearings and deciding on disputes between parties.

Many submissions to the Committee said that the courts have an important role to play in the protection and development of human rights. In particular, there was recognition of the courts' role in monitoring the actions of government and that such a role can be especially important under a human rights framework.<sup>20</sup>

The Public Advocate Julian Gardner<sup>21</sup> expressed concerns that, without dialogue with the courts, Parliament would be held to account only through the election process. The Public Advocate says that this is not a sufficient measure of accountability. Relying on this method, minority groups with limited economic and political power, such as people with disabilities, would be dependent upon the majority for the protection of their rights. That the act of voting is itself problematic for people with a range of disabilities highlights the danger of relying solely upon this accountability measure.

In many submissions, the courts were seen as playing a vital role for people who are vulnerable or at a disadvantage in holding Parliament accountable for protecting human rights. As one person who is homeless wrote: 'the protection and clarification of rights and responsibilities should be up to the courts'.<sup>22</sup>

Submissions canvassed a range of roles for the courts. These included:

- having an interpretive power whereby existing legislation would be interpreted in a manner consistent with the Charter;
- having the power to strike down legislation on the basis that it is inconsistent with the Charter;
- dialogue with government regarding legislation that is found to be incompatible with the Charter; and
- having a role in considering individual complaints and providing redress to aggrieved individuals.

The last point is discussed in Chapter 6.

### 4.5.1 Interpreting legislation

Many submissions said that the most important role for the courts was in their capacity as interpreters of legislation passed by Parliament. In the context of protecting human rights, this role was expressed as a duty to interpret laws in a manner that is consistent with the rights protected in the Charter. Submissions from groups including the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church of Australia, Melbourne Sexuality Law Reform Committee, Melbourne University Law Students Society, World Vision Australia and the Homeless Persons' Legal Clinic all stressed the importance of this role.

The Castan Centre for Human Rights Law explained that this interpretive role is consistent with the preservation of parliamentary sovereignty. The Centre said it ensures that the final say on the law remains in the hands of Parliament while allowing a court to act, where appropriate, to remove any ambiguity that might lead to violations of the Charter. An interpretive provision assumes that the State Government would only seek to deliberately legislate in violation of the Charter through a statement of incompatibility issued by the Attorney-General at the time of a Bill being introduced to the Parliament. It can prevent the Charter being violated accidentally through ambiguous wording or misapplication by a government body.<sup>23</sup>

Section 30 of the ACT *Human Rights Act 2004* states: 'In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.' The ACT model also indicates that the courts are to take account, at the same time, of the purpose of the law. The phrase 'working out the meaning of a Territory law' means:

- (a) *resolving an ambiguous or obscure provision of the law; or*
- (b) *confirming or displacing the apparent meaning of the law; or*
- (c) *finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or*
- (d) *finding the meaning of the law in any other case.*

Section 3 of the United Kingdom *Human Rights Act 1998* states: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

The Charter Group suggested that, in defining the phrase 'working out the meaning of a law', a similar provision to that in the ACT should be adopted.<sup>24</sup> The Committee supports the ACT approach. However, the Committee also believes that the provision could be worded more simply so that it would read: 'So far as it is possible to do so, consistently with its purpose, a Victorian law must be read and given effect to in a way that is compatible with human rights.'

By making this plain, the courts would be provided with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose

of the legislation in question. This is consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured. In the United Kingdom House of Lords decision in *Ghaidan v Ghodin-Mendoza*, Lord Nicholls of Birkenhead said:

*The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must ... 'go with the grain of the legislation'.<sup>25</sup>*

Or as Lord Rodger of Earlsferry stated:

*It does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen.<sup>26</sup>*

The Committee believes that the courts will be assisted in this interpretive role by considering relevant international law and the judgments of foreign and international courts and tribunals. This is consistent with the *ACT Human Rights Act 2004* and will help to build up a uniform approach to questions of interpretation.

There may be cases where a lower court or tribunal requires guidance on an interpretive question. The Committee sees value in allowing such matters to be referred to a single judge of the Supreme Court for consideration, but only for interpretive questions where the lower court or tribunal considers that it would be an appropriate matter for determination by the Supreme Court. Such a question should, at any stage before the final determination of the proceeding, be able to be referred by the court or tribunal in which the matter has been raised to the Supreme Court for determination, on an application of one of the parties. Questions of interpretation could be heard by a single Judge of the Supreme Court sitting alone in the Trial Division of the Supreme Court.

The Committee believes that, where a referral to the Supreme Court takes place, formal notice of such a referral should be given to the Attorney-General and to the Victorian Human Rights Commissioner. Such notice should also be provided where the Supreme Court itself or the County Court (as the major trial court in Victoria) is considering a question which raises the interpretation of a Victorian law in light of the Charter.

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### **RECOMMENDATION 17**

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All Victorian courts and tribunals should be required to interpret legislation in a way that is compatible with the Charter. In doing so, courts and tribunals should be directed to take account of the purpose of the legislation. Where relevant, international law and the judgments of foreign and international courts and tribunals should be considered.

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## RECOMMENDATION 18

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In a proceeding before a court or tribunal in which a question of law is raised as to the interpretation of a Victorian law in light of the Charter, the question may be referred by that court or tribunal to the Supreme Court for determination where:

- the referral occurs before the final determination of the proceeding by the court or tribunal;
- one of the parties to the proceeding applies for the matter to be referred; and
- the court or tribunal considers it an appropriate matter for determination by the Supreme Court.

Notice of such a referral should be given to the Attorney-General and the Victorian Human Rights Commissioner. Such notice should also be provided where the Supreme Court (other than on a referral) or the County Court is considering a question as to the interpretation of a Victorian law in light of the Charter.

### 4.5.2 Should courts be allowed to strike down laws?

Several submissions strongly argued that courts should have the power to strike down legislation considered to be in breach of the Charter.<sup>27</sup> Others supported the Canadian model where the Supreme Court can take such an action, but Parliament is, in turn, able to override the Charter to preserve or re-enact the law.<sup>28</sup>

However, the Canadian model is a constitutional one and the Committee has already discussed its reasons for preferring a legislative model in Chapter 1. The Committee believes the best option is to follow the practice in the United Kingdom, the ACT and New Zealand where Courts cannot strike down primary legislation.

Other submissions said that such a strike down power should be confined to delegated or subordinate legislation.<sup>29</sup> It was argued that this is consistent with preserving the sovereignty of parliament because delegated legislation has been made by the executive and not by Parliament.<sup>30</sup>

*The Charter should confirm that delegated legislation found to be incompatible with human rights is able to be struck down/declared invalid, except where the human rights incompatibility is clearly required or permitted by the relevant enabling enactment.* Submission 816: Equal Opportunity Commission Victoria.

The Committee believes that the best course is not to make a distinction between Acts of Parliament and subordinate legislation. Subordinate legislation should be subject to the same judicial scrutiny as other legislation, without being able to be struck down for inconsistency with the Charter. It is arguable whether such a power is required in any event. In the normal course, subordinate legislation can be struck down by a court because it is not consistent with

the Act authorising the making of the rule. This may be more likely to occur in cases where the Act has been interpreted in light of the Charter.

### 4.5.3 Declarations of Incompatibility

Many submissions expressed support for the courts having the power to make a Declaration of Incompatibility where the court is unable to interpret legislation in a way that is consistent with the Charter. It was pointed out that this is a good compromise between the power of declaring legislation invalid and allowing government institutions to simply ignore the Charter. It preserves the sovereignty of Parliament, yet still encourages dialogue between the courts, Parliament and the executive.<sup>31</sup>

*The existence of non-binding 'declarations of incompatibility' and a 'reasonable limits clause' ensures that although the Human Rights Act creates a system where the three arms of government and the community all participate in a 'dialogue' over human rights, to use the words of the Charlesworth Committee, the dialogue is not 'opened ended' and the legislature is assigned the 'last say' in relation to human rights issues.* Submission 114: Paul McGrath

*In terms of dialogue, the arms of government are locked into a continuing dialogue that no arm can once and for all determine. The initial views of the executive and legislature do not trump because the judiciary can review their actions. Conversely, the judicial view does not necessarily trump, given the number of representative response mechanisms.* Submission 839: Dr Julie Debeljak, Monash University

Several submissions referred favourably to the ACT model, stating that it promotes institutional dialogue and ensures that rights which are highlighted in a declaration of incompatibility cannot be ignored by Parliament:

*The ACT model encourages such a dialogue, whereby the Supreme Court can issue declarations of incompatibility where legislation is found to be inconsistent with the Human Rights Charter...The intention behind the model is to create a dialogue so the Parliament is obliged to participate in a conversation about human rights, recognising its duty to the community to explain its actions.* Submission 446: Victorian Gay and Lesbian Rights Lobby

A feature of the ACT system is that declarations are not binding on the parties to the proceedings in the sense that the Declarations of Incompatibility do not detract from the operation of the law. The law still applies to the parties, even if it is incompatible with the Charter. There were a small number of submissions which said this meant that Declarations of Incompatibility lack real effect:

*We consider that a declaration of incompatibility ... does not go far enough. If a Charter of Human Rights is to be effective, there should be some meaningful consequence in the event of inconsistency with the Charter.* Submission 139: Victorian Bar

In the United Kingdom, superior courts are able to make a declaration that legislation is incompatible with the Act. Like the ACT, a Declaration of Incompatibility does not affect the validity or continuing operation or enforcement of the legislation. In the United Kingdom, if such a declaration is made, the government has the power to make a remedial order, using a fast-track procedure involving the executive to amend the legislation if there are compelling reasons to do so.

Declarations of Incompatibility have been used infrequently in the United Kingdom. Since the *Human Rights Act* 1998 came into force, there have been 17 Declarations of Incompatibility, of which ten have become final in accordance with the Act.<sup>32</sup>

### ***Examples of a Declaration of Incompatibility in the United Kingdom***

The case of *R (H) v Mental Health Review Tribunal (North and East London Region)* concerned a man who sought discharge from hospital, following his detention under the *Mental Health Act* 1983. The Court of Appeal issued a declaration of incompatibility because the legislation breached the right to liberty insofar as the patient had to prove that he should be released.

Parliament then amended the law to bring it into line with the *European Convention on Human Rights and Fundamental Freedoms* 1950 in regards to the right to liberty. The burden of proof to show that a patient is still suffering from a mental health disorder and should continue to be detained now rests with the service provider.

*R (on the application of Wilkinson) v Inland Revenue Commissioners* concerned a law which provided a Widows Bereavement Allowance to widows but not to widowers. The Court of Appeal issued a Declaration of Incompatibility on the basis of the discriminatory nature of the provision. However, by the time of the judgement the Parliament had already repealed the relevant section.

The Committee recognises the limitations of such Declarations of Incompatibility in providing individual relief. However, we were persuaded by those submissions that expressed support for such a process. The Committee sees Declarations of Incompatibility as important to the effectiveness of the Charter. They are a channel through which the dialogue between the courts and the Parliament takes place. While Declarations of Incompatibility have been used infrequently in the United Kingdom, they are significant both as a trigger for parliamentary re-consideration and as a means of holding the executive to account.

### **4.5.4 Who should make a Declaration?**

Several submissions in support of Declarations of Incompatibility gave consideration to which courts should have this power. It was recognised that there is a tension between access to justice and making sure that declarations have the necessary authority.<sup>33</sup>

The Equal Opportunity Commission Victoria, whilst supporting that all courts be invested with a power to make declarations, also recommended a number of other provisions to enhance accessibility to human rights outcomes for disadvantaged parties, including:



- authorising the Equal Opportunity Commission Victoria to seek declaratory judgments where to do so would facilitate performance of its functions in relation to advocating for, promoting and protecting human rights;
- that the Charter contain provisions which insulate individuals from personally bearing the costs of proceedings where the State is appealing a proceeding in which a declaration of incompatibility has been made; and
- that the Charter contain a mechanism permitting direct applications to the courts for declarations of incompatibility without needing to wait for an individual case to raise the issue in question.<sup>34</sup>

There was strong support in several submissions for the power to issue a Declaration of Incompatibility to be invested only in the Supreme Court of Victoria.<sup>35</sup>

*Access to justice would be served by allowing any court or tribunal to issued declarations... Despite the force of these arguments, I submit that the novelty and importance of the power to issue a declaration of incompatibility are such that only a justice of the Supreme Court should have it. (Submission 1167: Justice Kevin Bell)*

One submission stated that the power should also be held by the President of the Victorian Civil and Administrative Tribunal (VCAT), given that the President must also be a Supreme Court justice.<sup>36</sup>

To address the important question of access, it was also suggested that all courts have the power to send a case to the Supreme Court in appropriate cases where a Declaration of Incompatibility may arise.<sup>37</sup>

The Committee is persuaded that, for Declarations of Incompatibility to have appropriate authority, they need to issue only from Victoria's superior and most authoritative court, the Supreme Court. In order to make this process as accessible as possible, the Charter should include a mechanism to refer a question of law on interpretation to the Supreme Court directly from a lower court or tribunal. It will also be necessary to defer the final decision on the case until the Supreme Court has made a decision on the Declaration of Incompatibility. A declaration should be able to be made regardless of whether the law was made before or after the Charter commenced.

Because a Declaration of Incompatibility is so important, the Committee believes that the public interest would be served by requiring that, when the Supreme Court is considering whether to make a Declaration of Incompatibility, the Attorney-General and the Victorian Human Rights Commissioner have the right to join the proceedings.

The Charter should also recognise the existing rule that other people, such as non-government bodes, may also seek to intervene in such cases to assist the court.

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## RECOMMENDATION 19

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If the Victorian Supreme Court is satisfied that an Act, subordinate legislation or provision of either cannot be interpreted in a way that is consistent with the human rights listed in Charter, it may make a Declaration of Incompatibility.

Only the Supreme Court should have the power to make a Declaration of Incompatibility.

Where a Declaration of Incompatibility is made, it should not affect the validity or continuing operation or enforcement of the Act or subordinate legislation.

The Supreme Court should not make a Declaration of Incompatibility unless it is satisfied that a notice has been given to the Attorney-General and the Victorian Human Rights Commissioner that the Court is considering making such an order.

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## RECOMMENDATION 20

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The Attorney-General and Victorian Human Rights Commissioner should have the right to intervene in any proceeding before any court or tribunal that involves the application or interpretation of the Charter. Other persons should be able to intervene in such matters at the leave of the court or tribunal, subject to such directions and conditions as the court thinks fit.

### 4.5.5 Effect of a Declaration

The consensus amongst those people making submissions who considered this issue was that such a declaration should not invalidate the legislation, but should require the legislation to be referred back to Parliament either for the incompatibility to be removed or for the Parliament to decide that the legislation should operate even with the incompatibility.<sup>38</sup> This is consistent with the approach in the United Kingdom and the ACT.

In the United Kingdom, when such a declaration is made, the government has the power to make a remedial order, using a fast-track procedure to amend the legislation if there are compelling reasons to do so.

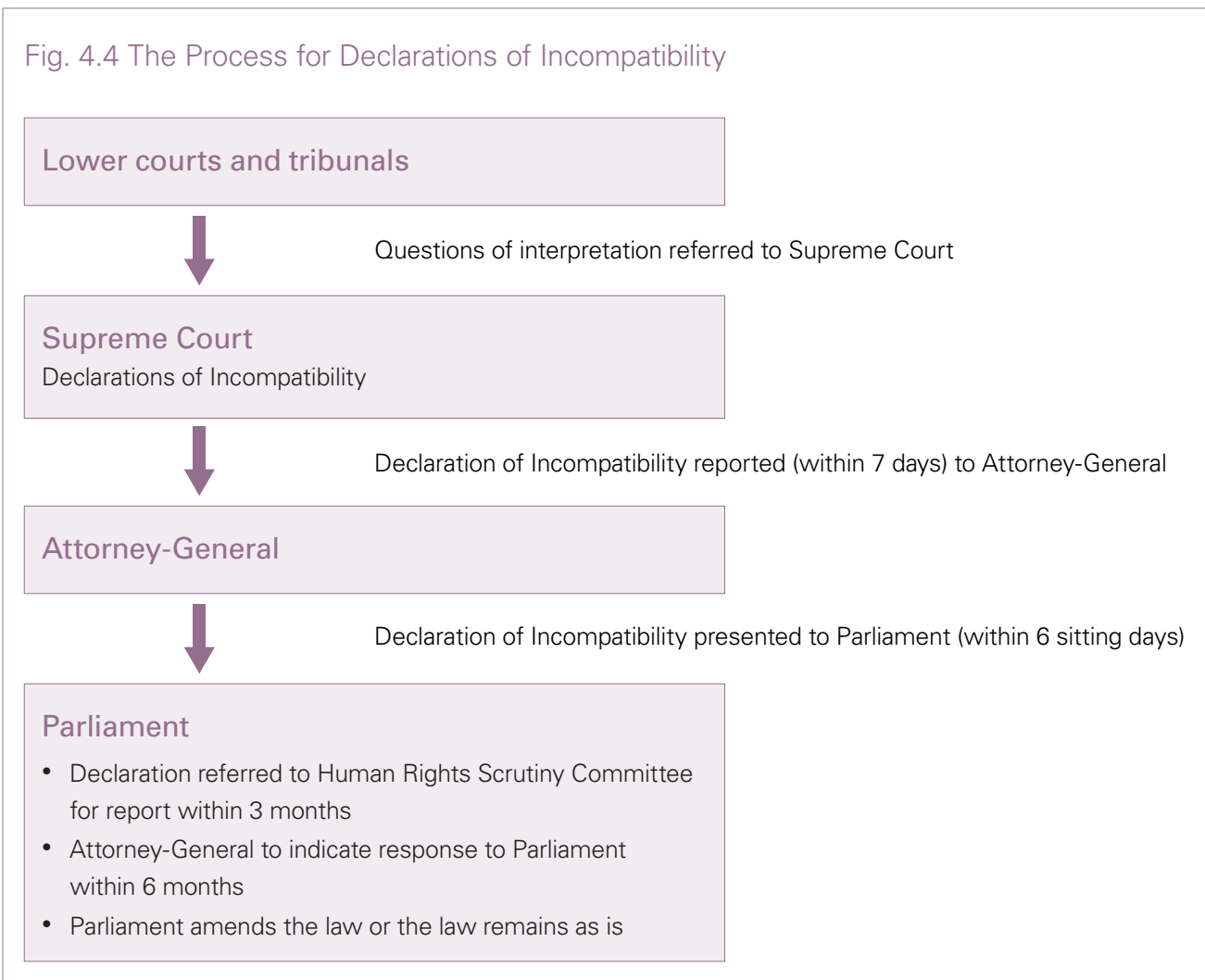
In the ACT, once a copy of the declaration is given to the Attorney-General, he or she must present a copy of the declaration to the Parliament within six sitting days. The Attorney-General must provide a written response to the declaration within six months of receiving it.

Several submissions emphasised the importance of a timely response from Parliament to Declarations of Incompatibility made by the court.<sup>39</sup>

*It may therefore be necessary to put a time limit on the process ... to ensure that The Scrutiny of Acts and Regulations Committee (SARC) or the Attorney-General are not permitted to delay the process indefinitely. (Submission 795: Kes Dovey)*

The Committee agrees that there should not be undue delay in Parliament dealing with a Declaration of Incompatibility. The Committee is of the view that the Attorney-General should present the Declaration of Incompatibility to Parliament within six sitting days of receiving the declaration. The Committee also believes that it is important for the declaration to be referred to the Human Rights Scrutiny Committee, which should inquire and report on the declaration within three months. The Attorney-General should then be required to present a written response to the declaration to Parliament within six months of the declaration being tabled in Parliament.

An overview of the process for Declarations of Incompatibility under the Committee’s recommended model is provided in Figure 4.4.



### RECOMMENDATION 21

Where the Supreme Court makes a Declaration of Incompatibility

- a copy of the Declaration should be provided to the Attorney-General within seven days;

- the Attorney-General should arrange for the Declaration to be laid before each House of Parliament on or before the sixth sitting day of that House after receiving the Declaration;
- the Human Rights Scrutiny Committee should inquire into and report on the Declaration within three months of the Declaration having been laid before each House of Parliament; and
- the Attorney-General should prepare a written response to the Declaration to be presented before each House of Parliament within six months of having first presented the Declaration to Parliament.



**Chapter 5**  
**Building a Human  
Rights culture**

## 5.1 Summary

Many of the rights and freedoms in the Charter of Human Rights and Responsibilities are not new. However, while some of these rights and freedoms can be found in Victorian law, many people do not know they exist. In other cases, people assumed that the law protected a far wider range of rights, such as a general right to freedom of speech, than are actually protected. These misconceptions show how education about human rights and our democracy must be a vital part of the introduction and operation of the Charter.

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.

Like the human rights laws that operate in nations such as the United Kingdom, the Charter should have as its central objective the promotion of respect in the community for the rights of others, as well as an appreciation of people's responsibilities as members of Victorian society. While the Charter should not impose new obligations upon private individuals or businesses, it should seek to contribute to the development of a better framework for government decision-making.

For this to be achieved, some institutional changes are required to ensure independent monitoring of progress and to promote respect for human rights across government. Learning from experience in places like the Australian Capital Territory (ACT), these changes should include the creation of the position of Victorian Human Rights Commissioner and the establishment of a Human Rights Unit in the Department of Justice. Among other things, these bodies would provide information on how the Charter is working and assist government departments and other public authorities to plan and put human rights into practice.

The Commissioner would also form partnerships with the public sector for activities such as auditing legislation and policy for compliance with the Charter. These types of cooperative activities would make a significant contribution to the development of a culture of human rights in Victoria.

## 5.2 Human rights education

### 5.2.1 The need for education

One of the strongest themes running through the submissions and in our consultations was the need for education about human rights in order for the Charter to be effective.

Without education, any notion of a Charter of Human Rights will fail because the community would not be aware of the importance of respecting such rights.

**Submission 346: Nicholas Brian**

A number of people said that there is currently a low level of understanding in the community about how even the most fundamental human rights relate to their everyday lives. For example, Alison Duggan noted:

*There needs to be a concerted education campaign in schools and the broader community to ensure that Victorians are aware of their rights and responsibilities as citizens. It is deeply concerning that many citizens currently are not aware of what rights they do and do not have and, more disturbingly, seem complacent because they confuse the rights of Australians with the US Bill of Rights. (Submission 90)*

The group Working Against Sexual Harassment said:

*Currently the community does not understand the breadth of issues that the UN Declaration of Human Rights affords us. It is incumbent on the government to develop a process that would engage the community at various levels so that they understand what human rights are, understand what a breach of human rights might be, support those defending human rights breaches [and] support the penalties of those breaching human rights (Submission 71).*

Some people made the point that human rights education needs to encourage a shift in our thinking so that we treat everyone in the community as truly equal.

There needs to be wider education about the different groups in our community, people need to understand that essentially all of us are the same regardless of where we come from or how we choose to live our lives. When this understanding is achieved and believed in then the path will be paved for a community in which people are not abused based on their race, sexual preference, religion, social status or anything else. For individual human rights to be protected, we as a community need to view each other as completely equal to ourselves.

**Submission 317: Simon Muiznieks**

### 5.2.2 Education in schools

Particular emphasis was given in many submissions to the importance of human rights education in schools as a strategy for fostering a human rights culture. Some people made the point that educating children can also help to inform their parents and other family members as well.

In order to create a human rights culture within Victoria we believe that Human Rights should be taught as a compulsory unit within both the Primary and Secondary School Systems. This will ensure that as the children of today become the responsible adults of tomorrow, there will be a greater awareness of the issues surrounding human rights in Victoria, in Australia and at the international level.

### **Submission 335: National Council of Jewish Women, Victoria**

Examples of good practice in promoting human rights awareness in schools already exist in Victoria. For example, the Department of Education and Training has produced a booklet entitled 'Ideas for Human Rights Education'.<sup>1</sup> It contains numerous suggestions for classroom activities and lessons, ideas to help ensure that schools are 'human rights friendly' environments and suggestions for ways that schools can get involved in partnerships with the community to promote human rights.

These strategies would be made more effective by having a Charter that sets out some of the most important rights of the people of Victoria.

A human rights teaching programme in Nova Scotia, Canada showed a very positive impact on pupil behaviour, values and attitudes. Researchers found:

- Children showed higher self-esteem and felt valued.
- Children perceived greater levels of peer and teacher support.
- Children were more optimistic about their future.
- Teaching children's rights necessitated more democratic, egalitarian teaching styles.
- A 'contagion' effect – learning about one's own rights results in support for the rights of others, including adults and teachers.<sup>2</sup>

Some people made the additional point that teaching young people about human rights needs to extend beyond the school environment. One young person said:

*Youth are the future "they hold the key". Go through TAFE, Centrelink and sporting clubs to connect with youth that aren't in the education system. Submission 577: Name withheld on request*

### **5.2.3 Education for business**

A number of submissions indicated the need for education for businesses. This will be particularly important where any business becomes a public authority under the Charter in carrying out a public function on behalf of government.

The Equal Opportunity Commission Victoria currently conducts training for business to eliminate discrimination and harassment in the workplace.<sup>3</sup> Human rights training would be a logical extension of this function.



### 5.2.4 General community education

There was widespread agreement in submissions that the community generally has a key role to play in fostering a human rights culture and that community based education will be critical in this regard. There was very strong support for strategies to raise community awareness, for publicity campaigns through communities and the media, and for continued public debate and consultation on human rights issues.

*The success of the Charter will depend largely on its acceptance. All members of the community need to have an understanding of what human rights are and why it is important to protect them. We need to support non-government organisations, local government and other important social institutions to participate in debates about protecting human rights.*

Submission 840: Professor Marcia Neave and Professor Spencer Zifcak

The Committee agrees that it is vital for the Charter to be understood and 'owned' by all Victorians. The Committee would like to see the Charter eventually enjoy a degree of community acceptance that some human rights laws enjoy overseas. For example, the Centre for Research and Information in Canada found that 'Canadians are deeply attached to the Charter of Rights and Freedoms. In recent years, nine out of ten surveyed have said the Charter is important to their sense of national identity. The Charter is seen as important to Canadian identity by more people than is the national anthem or the flag'.<sup>4</sup>

Some submissions emphasised the importance of engaging with local community groups such as churches, scouts and local ethnic community groups and working with community leaders. The Law Institute of Victoria proposed a range of strategies for human rights education, including:

*... a designated webpage with information on the Human Rights Charter, public seminars, school education programs, community training workshops, specialist forums on corrective and mental health services, etc. Government could also use sponsorship of a sporting club, continuing the LIV's link between human rights and Australian Rules Football, similar to the Transport Accident Commission's sponsorship of football clubs, to continue the promotion of human rights messages in the broader community. (Submission 128)*

People stressed that community education materials need to be relevant and accessible for ordinary people and not written in legalese.

*Community education and consultation processes and materials should be interesting, relevant and innovative and the language used should relate as directly as possible to the concerns of ordinary Victorians. Submission 984: Ethnic Communities Council of Victoria*

The Public Interest Law Clearing House made the point that community education should be particularly directed towards those who are most vulnerable to rights abuses:

*It is particularly important that rights based education campaigns are directed towards those who are most vulnerable and disadvantaged, including, young people, people experiencing homelessness, indigenous people, aged people and people from cultural and linguistically diverse backgrounds. (Submission 1043)*

They suggested the following human rights education strategies, including some that would be centred around places where disadvantaged people might tend to go:

- *The provision of information and education at legal aid and community legal centres;*
- *The provision of information and education at welfare agencies and community centres and council offices;*
- *Information about human rights in public spaces including on public transport, arts precincts and other public venues; and*
- *Developing human rights awareness in schools and tertiary institutions. (Submission 1043)*

### **5.2.5 Training for judges, tribunal members and the legal profession**

Some people thought that training for judges and tribunal members would be important to ensure that they are equipped to apply the new framework to Victorian laws and understand international human rights law. Dr Julie Debeljak of Monash University suggested that Victoria should take the lead from the experience in the United Kingdom:

*Victoria should undertake extensive training of the judiciary and quasi-judicial bodies (including administrative tribunals) before any Charter comes into force, and its approach could be modelled on the British experience. Extensive training was undertaken for the judiciary by the British Judicial Studies Board. (Submission 839)*

Professors Marcia Neave and Spencer Zifcak also referred to the United Kingdom experience and suggested that the Judicial College of Victoria could be used for this purpose in Victoria:

*To equip judges and tribunal members to undertake this task, the Judicial College of Victoria should provide judicial education on international and comparative human rights law. In Britain every judge and magistrate was offered the opportunity for such comprehensive and relevant training. (Submission 840)*

People also said that training for the legal profession needs to be made available so that lawyers will understand human rights principles and will be able to identify when human rights considerations are relevant to cases on which they are working.<sup>5</sup>

### 5.2.6 Education for government and members of Parliament

Many submissions identified education within government as a key requirement for the effective operation of the Charter.

The Charter would impose an obligation on all public servants to observe Charter rights. This means that government departments would need to adapt their procedures to ensure that human rights are considered as part of policy and legislative proposals. Departments would also need to consider whether their current laws, policies and practices should be modified in light of the Charter. Training would need to be provided, particularly to those on the 'front-line' of human rights protection, such as the police, corrections officers and child protection workers.

As Justice Kevin Bell of the Supreme Court of Victoria said:

*The staff of government departments and agencies should be required to attend training seminars on human rights. These seminars should explain the impact of the new Human Rights Act and should facilitate discussion between the participants as to how respect for human rights might be enhanced within the relevant department or agency. The seminars should be compulsory training and should be provided for new staff when they take up employment with the department or agency. (Submission 1167)*

The importance of government training is also borne out by the experiences in other jurisdictions. In the ACT, for example, the Department of Justice has set up a small Human Rights Unit that has produced a plain-language guide to the *Human Rights Act*, as well as guidelines for public servants. In the United Kingdom, the Department for Constitutional Affairs has produced helpful guidance documents for citizens, public authorities, civil servants and the private and community sectors.<sup>6</sup>

The Committee believes that information and training should be made available beyond the government to members of Parliament and their staff. They need to be well-equipped to play their role in Parliament and in public debate on the protection of human rights under the Charter and, importantly, in assessing what limitations may properly be placed upon the rights under the Charter. The role of Parliament and its committees, such as the Human Rights Scrutiny Committee is especially important.

### 5.2.7 The Committee's view on education

The Committee agrees that broad-based community, government and judicial education strategies are critical for ensuring that the Charter achieves its objectives of enhancing human rights for every Victorian. We believe that wide-ranging human rights education and promotion is an important investment for the community and our democracy.

Education strategies in schools, business and in the general community are vitally important for promoting a culture of respect for rights in Victoria. We recognise that good practices and programs currently exist within Victoria, such as those conducted by the Equal Opportunity Commission Victoria and in schools and other educational institutions. The Committee suggests that the Equal Opportunity Commission Victoria, through the position of a Victorian Human Rights Commissioner, should play an important role in delivering broader human rights education and training in the community. Education programs should also be undertaken through local government and community based organisations.

The Committee believes that training for judges and tribunal members is essential. We consider that the Judicial College of Victoria would be the best body to undertake such training.

Further training should also be made available for the legal profession generally and for parliamentarians. This should be provided by bodies such as legal education providers, universities and legal professional associations, and by Parliament itself. The Committee also recognises the importance of implementing a comprehensive program of training for public servants alongside the Charter.

The Committee acknowledges that education strategies require resources and that it is for the government to make decisions regarding such matters. However, the Committee considers that both an initial and ongoing investment in education will be needed if the Charter is to achieve its potential.

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### **RECOMMENDATION 22**

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The Victorian Government should implement and resource the following human rights education strategies:

- Public servants should have access to human rights training and education.
- Judges and tribunal members should have access to training and education by the Judicial College of Victoria.
- Parliamentarians and their staff should have access to training and education provided by Parliament.
- Members of the legal profession should have access to training and education by their legal education providers.
- Community, business and schools education strategies should be developed by the relevant government departments, the Victorian Human Rights Commissioner, local government and community based organisations.

### 5.3 Other strategies

People identified other useful and imaginative strategies for promoting a human rights culture within the community. Ideas for specific local projects included: organising local discussion groups and forums, local human rights watchdog committees (similar to neighbourhood watch committees), collecting case study examples of human rights abuses and creating community assistance programs for victims of human rights abuses. In addition, the idea of community human rights festivals and celebrations of human rights were seen as a further role for local communities in fostering a human rights culture.<sup>7</sup>

A number of people considered that Victoria should have a *'Human Rights Day'*. One person participating in a consultation with people who are homeless thought that this would allow us:

*'to celebrate human rights in the same way as we celebrate a horse race'*. Submission 186:  
Public Interest Law Clearing House Homeless Person's Legal Clinic

The community is critical in developing a human rights culture and promoting a change to attitudes. The community will need to take part and implement reforms and conduct programs and collect data on human rights issues including breaches. The community should contribute through testimony and story telling and ensure that future generations carry on a culture of respect for human rights.

**Submission 297: Maria Psihogios-Billington**

Some submissions also said that community organisations could promote a human rights culture in their work by drafting their own human rights charters. For example, the Campaspe Primary Care Partnership has a Consumer Charter of Rights and Responsibilities that sets out the rights of consumers under a number of headings: respect for privacy, choice, communication and information provision, democracy, health promotion, feedback and grievance processes, access, responsive service delivery and consumer responsibilities.

The Hume City Council also has a Social Justice Charter incorporating a Citizens Bill of Rights.<sup>8</sup> The Charter is regularly updated through a process of community consultation, grounded in principles of human rights education. As the community builds its knowledge of human rights, the Hume Charter evolves to better reflect community views. The Council says of its Charter:

*The Social Justice Charter provides the policy framework and action plans through which Hume City Council strives to build a just and inclusive city. The aims of the Charter are to promote an active citizenry, strengthen community wellbeing and reduce the causes of disadvantage.*<sup>9</sup>

The Hume Charter is a good example of how local government can develop their own distinctive place within the State-wide Charter. This is consistent with the important role for local government we set out in Chapter 3.

A small number of submissions also expressed support for human rights audits of community agencies and organisations to ensure that they operate from a human rights framework, address barriers to accessing services for particular groups, and address individual and systemic infringements. As the Disability Advisory Council of Victoria noted:

*Community based auditing is a very useful way to promote human rights. Disability Rights Promotion International provides an excellent model of auditing human rights. It skills people with a disability to audit their local communities. It promotes an understanding of human rights and a means to report individual and systemic infringements. (Submission 782)*

Some people also said that a human rights culture could be encouraged by tying government funding to certain human rights indicators. As Adam Pickvance said:

*The wider community and Non Government Organisations (NGOs) must take on an obligation to broaden our understanding of human rights. This requires strong and clear leadership from government, combined with appropriate levels of financial and departmental resources. Funding contracts from government to Non Government Organisations (NGOs) and business should be altered to include a human rights compliance clause and have measurable outcomes in human rights education and awareness as well as policies and practices. Funding should be tied to satisfactory levels of compliance with human rights laws and practices. (Submission 469)*

Although it is beyond the scope of this report to make specific recommendations on these matters, the Committee considers that they are beneficial strategies and encourages the government and other bodies involved in the promotion of and education about human rights to give further consideration to them.

### **5.4 A Victorian human rights commissioner**

Many people thought that the Charter would be well served by having an expanded role for the Equal Opportunity Commission Victoria; in particular, by expanding it into a more comprehensive human rights body. Women's Health West summed up the views of many when they said:

*The introduction of a Charter of Human Rights is the first stage in creating a human rights dialogue leading to the development of a culture of consideration of our human rights in all policies, practices, laws and behaviours. It is crucial that adequate resources are available to translate those rights into reality. This includes the establishment of a Commission with the power to enforce the Charter. (Submission 476)*

Other people making submissions agreed, saying that Victoria needed to establish:

*...an independent statutory authority responsible for promoting respect for human rights; the establishment of a Commission to conduct inquiries into matters of public policy regarding human rights questions and public education and training for public servants.*

Submission 297: Maria Psihogios-Billington

### 5.4.1 Lessons from other jurisdictions

When the ACT introduced its *Human Rights Act* 2004, it created the position of Discrimination and Human Rights Commissioner and established the Human Rights Office. The Commissioner has specific functions under the legislation that include:

- reviewing the effect of ACT laws on human rights and reporting in writing to the Attorney-General (the report is then tabled in the Legislative Assembly);
- providing human rights education; and
- advising the Attorney-General on anything relevant to the operation of the Act.<sup>10</sup>

The ACT Commissioner does not have power to handle complaints about human rights breaches, but can deal with discrimination complaints.

From March 2006, the ACT Human Rights Office will merge with the Community and Health Services Complaints Commission to create the new positions of President and Commissioners for Children and Young People, and Disability and Community Services.

In New Zealand, the Human Rights Commission has the primary functions of:

- advocating and promoting respect for human rights in New Zealand;
- advocating and promoting understanding and appreciation of human rights in New Zealand; and
- encouraging the maintenance and development of harmonious relations between individuals and among groups in New Zealand society.

Like the ACT, the New Zealand Human Rights Commission does not handle human rights complaints, but does accept discrimination complaints. The Commission can initiate education and publicity programs and activities. It can also issue guidelines to encourage good human rights practices. The Commission has recently prepared an Action Plan for Human Rights that identified what must be done over a five year period to ensure that human rights are better recognised, protected and respected.

When the United Kingdom passed its *Human Rights Act* in 1998 it did not establish a human rights commission. This has since been recognised as a problem in developing a human rights culture in that country. A report from the Joint Committee on Human Rights of the British

Parliament found that an independent human rights commission would 'be the most effective way of achieving the shared aim of bringing about a culture of respect for human rights'.<sup>11</sup>

Following further community consultation, the United Kingdom Government has decided to establish a Commission for Equality and Human Rights, which will merge a number of existing anti-discrimination agencies. The Commission will have the power to conduct inquiries into matters of public policy on questions of human rights and to make recommendations for change. It will provide guidance and advice to public authorities so that their work respects and promotes human rights. It will also publish a regular 'state of the nation' report to track progress towards equality and the better protection of human rights. This is the type of sustainable, integrated human rights body the Committee would like to see eventually operating in Victoria.

### 5.4.2 The Equal Opportunity Commission Victoria

Here in Victoria, the Equal Opportunity Commission Victoria currently investigates individual discrimination complaints and complaints about racial or religious vilification. However, human rights issues beyond discrimination and vilification do not fall within its role. In addition, its powers to look at issues that affect a significant group of people are limited, so that it cannot easily instigate an investigation or seek to remedy anti-discriminatory practices that extend beyond the individual.

The Equal Opportunity Commission Victoria undertakes human rights education, particularly on anti-discrimination law, as part of its work. The Commission can also be given specific research and reporting tasks by the Attorney-General, but cannot initiate reviews of legislation or government practice.

The Committee is mindful that the *Equal Opportunity Act 1995* is currently being reviewed and that a separate consultation process is underway in regard to that review. This may result in changes to the governance structure of the Equal Opportunity Commission Victoria and may permit the Commission to have a greater role in the review of systemic discrimination. Rather than pre-empting that review, the Committee has limited its recommendations to changes it considers necessary in the immediate term if the Charter is introduced into Victoria. In particular, we do not recommend the expansion of the Commission's complaint handling functions beyond their current scope.

The Committee is attracted to the model adopted in the ACT, where the Discrimination and Human Rights Commissioner's role has a strong focus on education, monitoring and reporting but where the Commissioner still has the capacity to intervene in important human rights cases.

The Committee considers that a position called the Victorian Human Rights Commissioner should be created. It should be part of the Equal Opportunity Commission Victoria, as a



member or Chairperson of that body or as a set of functions that form part of a reconstituted Commission. The Commissioner would maintain the momentum towards the better protection of human rights and is likely to have a lasting impact on the development of a human rights culture in Victoria.

The Committee has looked at the lessons learnt from other places and believes that establishing the role of Victoria Human Rights Commissioner could be an important step in the transition of the Equal Opportunity Commission Victoria from an anti-discrimination body to a modern human rights body with a mandate to promote human rights across the whole Victorian community. The role of a Human Rights Commissioner is discussed in greater detail in the next sections.

We note that the Equal Opportunity Commission Victoria currently does not have Commissioners in its structure. Instead, it has a part time Chairperson. The detail of any organisational review would be best left to the Commission itself and government. However the Committee thinks the establishment of a Human Rights Commissioner in Victoria would be an important part of the Charter where the Commissioner is integrated into whatever new governance structure may be adopted. For ease of reference we have called this position 'Commissioner', but an alternative name could apply. What is most important are the functions the Charter would establish.

### 5.4.3 Reporting on human rights

Regular reports on the operation of the Charter are commonplace in other nations. People taking part in the consultations expected this type of reporting to be an important way of monitoring both the successes of and any problems raised by the Charter.

*Research should be carried out to monitor the impact of the introduction of the Human Rights Charter, particularly with regard to attitudes and behaviour of public services (health, legal, housing etc) and public attitudes.* Submission 436: Ruth McNair

When asked what should happen after the Charter was introduced, the Deepdene Uniting Church told us of the need for:

*An independent body for review of the application of the laws; this body will need to evolve over time so periodical review should be inbuilt into its operation.* Submission 322: Social Concerns Committee Deepdene Uniting Church

In the ACT, the Human Rights and Discrimination Commissioner makes annual reports to the Attorney General on the operation of their Human Rights Act. The Commissioner can also review the effect of ACT laws on human rights and report this to the Attorney-General.

The Committee thinks it is important that the Victorian Human Rights Commissioner independently monitors the implementation of the Charter and its ongoing operation across government and in the courts and the community. Such reports are needed because they

help to identify systemic problems which need more intensive work and may give rise to amendments to the Charter over time. As suggested by World Vision Australia:

*A regular supply of information is critical to the evaluation of progress in establishing a rights culture. To this end, a body such as the Equal Opportunity Commission should be charged with creating an annual 'State of Human Rights In Victoria Report', including the auditing of government bodies for compliance in terms of policies and practices and a process of community consultation. (Submission 1020)*

The scope of the report envisaged by World Vision Australia may be more expansive than what can be practically realised in the early days of the Charter. However, it is worth establishing the principle of an annual report that sets out how well the government and community is doing in regards to respecting and promoting human rights. These annual reports should be delivered to the Attorney-General and then tabled in Parliament so that they are publicly available.

### 5.4.4 Systemic review

The limitations of a case-by-case approach to human rights were repeatedly mentioned in submissions. While most people agreed that individuals should have a remedy if their rights are breached, many also stressed that systemic change is what really counts. This is particularly the case for disadvantaged communities.

Equal Opportunity Commission Victoria reported:

*Levels of discrimination and harassment remain relatively constant – and research demonstrates these are only a sample of what actually occurs. Entrenched forms of systemic discrimination continue to impact on the lives of (for example):*

- *Indigenous Victorians who have a lower life expectancy and poorer health and education levels than any other group in our community;*
- *Victorians living with a disability, many of whom are denied access to employment or experience restrictions on their liberty without appropriate monitoring;*
- *Victorian women who continue to experience pay inequity and unacceptable levels of harassment and violence in the workplace and general community; and*
- *gay, lesbian and transgender Victorians who continue to be subject to public acts of aggression, harassment and violence. (Submission 816)*

The Committee was particularly struck by the reports of systemic discrimination suffered by Indigenous Victorians. At every consultation meeting with Indigenous people across Victoria, reports of ongoing racism were made. Many Indigenous people told stories of being denied housing by private landlords and real estate agents on a routine basis. Others spoke of being denied service in pubs and clubs and in the provision of health and other services.

One participant in an Indigenous forum in Warrnambool told the Committee that the biggest issue in his lifetime is racism. He said:

*We need legal protection from that. It is the biggest problem and a deep-seated problem.*  
(Consultation meeting 14)

Another person in Lake Tyers mentioned what he saw as discrimination in the provision of communications. Another person told of how very few buses come into the town and the nearest public bus stop is 15 kilometres away. The group stated that rural infrastructure should be inclusive of all communities. (Consultation meeting 30)

Women's organisations also highlighted the need to tackle systemic problems:

*A shift away from an individual complaints mechanism to a systemic approach that recognises that human rights abuses are found within a broader social context, and most often involves group based-harm. It is no coincidence that the 'group' is often the most vulnerable groups within the community. In the context of sexual harassment on the workplace, this group are women.* Submission 71: Working Against Sexual Harassment (WASH)

The Committee can see real value in a Victorian Human Rights Commissioner undertaking a broad analysis of Victorian laws and how they operate in the context of human rights. The experience in New Zealand shows that this does not replace the scrutiny function of the Parliament, but can complement it. While such a power is unlikely to be used frequently, it could help to inform government about the systemic issues that impact on people's day to day experience of human rights.

The Committee believes that the Victorian Human Rights Commissioner should be able to undertake systemic review, when such an inquiry has been referred to the Commissioner by the Attorney-General.

Equal Opportunity Commission Victoria has existing powers to undertake systemic enquiries on discrimination issues when asked to by the Attorney General. The Committee thinks the Victorian Human Rights Commissioner should have a similar function. This means that the Attorney General would be able to call upon the Commissioner to undertake systemic inquiries on human rights. This helps to tackle the big picture issues around human rights rather than relying solely on litigation.

### **5.4.5 Human rights auditing**

A feature of the ACT legislation is that it provides for the Human Rights and Discrimination Commissioner to undertake audits of government departments to see if their legislation, policy and practice are consistent with human rights.

So far, the Commissioner has completed a comprehensive audit of the Quamby Juvenile Detention Centre. This project was undertaken in partnership with the Department of Disability,

Housing and Community Services. The Commissioner made fifty two recommendations, nearly half of which the ACT Government agreed to in full, with the remainder of recommendations agreed to in-principle. The Commissioner will now monitor the implementation of these recommendations and report progress in the Annual Report of the Human Rights Office.<sup>12</sup>

The Committee sees great value in such cooperation. By providing assistance in this style of auditing, government departments can gain the benefit of the Human Rights Commissioner's expertise in making a comprehensive assessment of specific areas. This is of great benefit to departments in terms of identifying and finding solutions to difficult human rights problems. It also helps to spread knowledge about how to achieve policy aims within human rights standards, making a positive contribution towards including human rights across the whole of the public sector.

Members of the community responded positively to the idea of human rights audits, with some groups, including the Ethnic Communities Council of Victoria, suggesting a regular audit every one to three years. (Submission 984)

The Victorian Multicultural Commission also stressed the importance of independent advice and support for public authorities:

*The Equal Opportunity Commission Victoria can also, where necessary, provide advice and direction to government departments and authorities in relation to the operation of programs, policies and/or services that may impact upon individuals or a community's human rights.*  
(Submission 988)

The Committee is aware that public authorities are already closely monitored, scrutinised and audited. It does not wish to create a burden that diverts scarce resources away from service delivery or leads to a tokenistic tick-a-box approach to human rights compliance. We believe that, as much as possible, the implementation and monitoring of human rights should be built into existing frameworks, such as departmental annual reports. This is an element in the ACT *Human Rights Act 2004* and we believe that Victorian government departments should similarly state in their annual reports what they are doing to comply with the Charter.

However, in regard to human rights auditing the Committee recognises that the particular expertise for this type of work is likely to rest with the Victorian Human Rights Commissioner, at least for the first years of the Charter.

In order to strike a workable balance between existing reporting mechanisms and the positive benefits of human rights auditing, the Committee believes that the Human Rights Commissioner should be adequately resourced to provide auditing assistance to departments and other public authorities.

Auditing should be undertaken on a voluntary basis. The Committee considers that, as in the ACT, there will be strong incentives for departments and other public authorities to participate.

Auditing will help to avoid breaches of the Charter and will help to find solutions to human rights issues that can be faced on a day-to-day basis. The Committee believes that the Victorian Human Rights Commissioner should make a positive contribution to enabling such bodies to better deliver front line services and serve the community. This is best achieved through cooperation and the building of strong partnerships rather than by compulsion.

The outcomes of audits should only be publicly released where the body being audited consents to such a release. This should limit the possibility of an adversarial, rather than constructive, relationship emerging between the Human Rights Commissioner and the public authority being audited. It should also encourage more bodies to take advantage of the Commissioner's assistance.

After the first four years of the Charter, consideration should be given to whether the Commissioner should be able to undertake audits on his or her own volition, such as where there may be systemic breaches of Charter rights. The appropriateness of this step will depend on how the Charter has operated over that first four years and the extent to which public authorities are complying with it.

### **5.4.6 Community education**

As we discussed in section 5.2 above, the community has made a compelling case for education about the Charter and human rights generally. They have argued that human rights have the potential to be agents of positive community change, but this potential can only be realised if people know about and understand their basic rights and responsibilities.

The Committee agrees that there is a need for an ongoing community education strategy backed up by adequate resources. The Committee believes that a primary function of the Victorian Human Rights Commissioner should be responsibility for facilitating community education directly and in partnership with other community organisations. This is consistent with the existing functions of the Equal Opportunity Commission Victoria.

### **5.4.7 Intervening in important human rights cases**

In the ACT, the Discrimination and Human Rights Commissioner has the power to seek leave from courts to intervene in cases involving the application and interpretation of human rights. The federal Human Rights and Equal Opportunity Commission also plays an important role in intervening in cases that raise human rights issues, including in the High Court. The ACT legislation also requires the Supreme Court to notify the Commissioner if it is considering making a declaration of incompatibility about a particular piece of legislation.

The Committee is attracted by this model. First, it allows the Commissioner to work to protect human rights in the public interest. Secondly, it can assist in the Commissioner's broad role of monitoring the implementation of the Charter. Thirdly, it is consistent with the practice in other jurisdictions.

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## RECOMMENDATION 23

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There should be a Victorian Human Rights Commissioner (a member or Chairperson of the Equal Opportunity Commission Victoria). The Commissioner should have the following functions:

- to develop and deliver education programs about human rights and the Charter;
- to present the Attorney-General with an Annual Report on the operation of the Charter (which should then be tabled in Parliament) which should include consideration of any Acts that have been passed with override clauses and consideration of any Declarations of Incompatibility that have been made;
- to review the effect of Victorian laws on human rights every four years and report in writing to the Attorney-General on the results of the review (which should then be tabled in Parliament);
- where requested, to conduct audits of government departments and other public authorities to determine the consistency of programs and practices with the Charter;
- where the Victorian Human Rights Commissioner considers it necessary to do so, to intervene in proceedings that involve the Charter in any court or tribunal in Victoria; and
- to undertake systemic reviews of human rights issues, when such an inquiry has been referred to it by the Attorney General.

### 5.5 Reform across government

One of the strongest arguments for the Charter is that it will improve governance in Victoria. As in other democracies, Victorians need to know that the government always takes into account people's basic rights when making law and policy or delivering services.

The Committee is persuaded that by 'integrating human rights norms, standards and principles into the design, delivery and evaluation of policy'<sup>13</sup> we can, over time, build a human rights culture across the whole of government.

There may be concern that adopting a human rights framework in policy-making will lead to delay and make departments risk averse. However, all other democratic nations in the world now include human rights considerations in their governance arrangements and the policy making process has survived intact. Indeed, commentators in those other jurisdictions argue that policy making is improved by such arrangements. It has been said that human rights legislation 'adds rigour to policy development, extends an independent voice for vulnerable groups and provides overarching legitimacy'.<sup>14</sup>

Many submissions stressed that, in order to achieve improvements, there must be a comprehensive approach to building human rights values into every part of our public administration. The Justice Project stated:

*At a more general level, the rights set out in the Charter, in time, should become woven in the fabric of public administration, and principles such as due process, for example, should come to play a more prominent part in the ethos of the public service. (Submission 954)*

Olivia Ball agreed, saying:

*When human rights become law, those institutions that see their role as upholding the law, such as the police, will be more likely to respect and protect human rights. Meanwhile, policy-makers may come to appreciate that one-size-fits-most public policy is not good enough. Policy must be made with the rights of all in mind. In this way, Victorian law and public institutions should develop a greater respect for minorities and the powerless, voiceless and vulnerable. (Submission 67)*

In the United Kingdom, the Lord Chancellor's Department found that, after two years of operation of the *Human Rights Act 1998*, public decision making had improved by harnessing it to a clear set of fundamental standards. The ACT has also reported positive incremental change in how government undertakes its work.

Evidence from other jurisdictions indicates that, over time, a Charter can have a transforming effect upon how government operates – and thereby upon the daily lives of the people it serves. However, having clear lines of responsibility, having a coherent approach to human rights training for public sector workers and maintaining momentum are key issues for successful implementation of the Charter.

As Tim Bryar said in his submission:

*A massive cultural shift ... is needed to support this, but it needs to start from the top. (Submission 351)*

### **5.5.1 A specialist unit to provide policy support and vetting services**

An important feature of the Charter is the requirement that departments include human rights considerations when developing policy and legislation. In Chapter 4 we recommended that all major policy proposals put to Cabinet include a Human Rights Impact Statement. We also recommended that the Attorney-General make a compatibility statement to Parliament for all Bills and that subordinate legislation be accompanied by human rights information as part of the usual regulatory impact statement process.

In order to achieve these outcomes, the Committee has looked at the experiences of other nations to work out what sort of education, support, policy and legislative vetting processes would work best in Victoria. In particular, we have looked at whether all or some of these functions should be centralised or spread across all departments.

In the ACT, each department maintains responsibility for policy formation, including consultation within and outside government. Guidelines have been issued to all departments to assist public servants in the day-to-day process of building human rights principles into legislation and policy and to help them achieve organisational goals while still complying with the ACT *Human Rights Act 2004*.

New cabinet procedures have been implemented in the ACT to ensure the government is advised of the human rights implication of all new proposals. Public servants must include information on human rights implications in legislation bids and in cabinet submissions for in-principle agreement and final approval. The Cabinet Office is responsible for ensuring that departments comply with these requirements.

The Bill of Rights Unit in the ACT Department of Justice and Community Safety employs a small team of people who work with policy staff in all departments, providing advice on human rights compliance. Public servants are encouraged to consult the Bill of Rights Unit early in the process of developing a new policy or legislative proposal. This team undertakes the work around legislative vetting and advises the Attorney-General as to compliance. This team also develops and issues the guidelines discussed above.

The Committee is attracted by many aspects of the ACT model, which strikes a good balance between sharing knowledge across public authorities and building specialist expertise in a lead agency. The Committee notes the experience in the United Kingdom where a more decentralised approach, coupled with a heavy focus on compliance rather than promoting human rights as a core ethical value, has led to a stalling of progress after an initial flurry of activity.<sup>15</sup>

The Committee views institutional reform as a means to encourage respect for human rights among public authorities as a matter of best practice rather than risk avoidance. The Committee wants to avoid a situation where public authorities are under an obligation to observe Charter rights in a climate where there is a 'lack of awareness, lack of leadership and lack of help'.<sup>16</sup> We share the vision of Adam Pickvance that:

*Human rights should become part of government and community speak, it should be a primary focus in much the same way as economic impact is discussed, evaluated, monitored and reported on. (Submission 469)*

The Committee has formed the view that a specialist unit should be established in the Department of Justice to assist the whole of government in identifying and considering human rights. The Committee's view is that by investing in such a unit, the Victorian Government will be providing the Charter with the necessary institutional infrastructure to protect and promote human rights for all Victorians.



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## RECOMMENDATION 24

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A Department of Justice Human Rights Unit should be created that is responsible for:

- issuing guidance to government departments and agencies to ensure increased awareness of and compliance with the Charter;
- the vetting of policy and legislative proposals to ensure compliance with the Charter;
- providing assistance to government departments in their preparation of the Human Rights Impact Statements to be provided to Cabinet with policy and other proposals; and
- providing assistance to the Attorney-General in the preparation of Statements of Compatibility for new legislation.

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## RECOMMENDATION 25

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Victorian government departments should include information in their annual report on what they are doing to comply with the Charter.

### 5.5.2 Action plans

We also received submissions suggesting that departments, and indeed the whole of government, should develop comprehensive human rights action plans. Many people referred to the New Zealand model:

*In New Zealand, the Human Rights Commission is responsible for developing and implementing a national Plan of Action that identifies priorities in respect of human rights. A similar Human Rights Action Plan would be beneficial for Victoria. It should be developed in consultation with the community so as to address areas of priority to the Victorian community and identify specific outcomes and objectives with respect to the realisation of human rights.* Submission 140: Jonathan Wilkinson

Ruth Russell and Margaret Ross agreed stating:

*Alongside the introduction of a Charter of Human Rights there should be a comprehensive Action Plan to inform and widely discuss the protection that this Charter will bring. The Action Plan should encompass education and information sessions for government departments, NGOs, corporations and businesses as well as community groups and local government across the State over the next five years. This Action Plan, if well implemented, will provide a vision of a better Victoria and bring hope, reconciliation and a higher standard of civil behaviour to demoralised and disempowered individuals and communities ... and bring the Victorian Government into a leadership role as a progressive, fair minded and just society.* (Submission 354)

The Committee considers that, as part of a methodical approach to making human rights an intrinsic feature of government in Victoria, each department should be encouraged to develop a human rights action plan and report against it. However, the Committee believes this should be a matter of government policy and guidance, rather than as a statutory requirement under the Charter. Rather than having a one-size-fits-all planning model, there should be flexibility for departments in how they develop action plans to best fit their organisations and client groups. If this approach has not worked after the first four years of the Charter, consideration should be given to making such plans mandatory.

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### **RECOMMENDATION 26**

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The Victorian Government should issue policy instructions to departments to develop human rights action plans.



## Chapter 6

**What happens if  
there is a breach  
of the Charter?**

## 6.1 Summary

Some members of the community have been concerned that, because the Statement of Intent states a preference for no additional causes of action, this means that there would be no remedies for a breach of the Charter.

This would not be the case. As we set out in Chapter 4, the Charter should contain an interpretive clause. This clause would enable people to raise a human rights argument in cases before courts and tribunals. A new interpretation of a law can have a major impact on a case and lead to a successful outcome for a party that otherwise might have been unlikely. As the operation of the United Kingdom's law has shown, an interpretive clause can be a powerful tool.

We have also said that this interpretive clause should be complemented by the power of the Supreme Court to make a Declaration of Incompatibility where a law cannot be interpreted to be compatible with the Charter rights. Such a declaration would not strike down the law. Rather, it would return the law to Parliament for further consideration.

Remedies that now exist under Victorian law should also be applied to work with the Charter. The best way to achieve this is to include an obligation on public authorities to observe Charter rights. This is consistent with the express terms of the United Kingdom *Human Rights Act* 1998 and the *New Zealand Bill of Rights Act* 1990 and what can be implied from the Australian Capital Territory *Human Rights Act* 2004.

Where this obligation is breached, the courts should have a limited form of review of the decision-making of government, like that already found under Victorian law. This is consistent with the *Statement of Intent* because it works within existing remedies. It also makes sense to people who believe that 'where there is a right, there must be a remedy'.

Under our recommended approach, people will be able to seek judicial review of a decision or a declaration that a public authority has breached the Charter. These options will provide a limited remedy that could require the public authority to reconsider its decision or action in light of the Charter.

This provides greater clarity and certainty than the approach in the Australian Capital Territory, which does not set this out in clear terms. It would also exclude the possibility of damages or other forms of monetary compensation. While damages can be gained in the United Kingdom, removing them from the Charter represents a balance between the need for a remedy and not imposing potentially significant additional costs upon government. It also reflects the community's preference for a remedy that fixes the problem.

## 6.2 What should happen if your rights are breached?

In Chapter 3 we talked about the obligation upon public authorities to act compatibly with Charter rights. The question that follows from this is: what happens if this obligation is not met?

An overwhelming majority of submissions and people involved in our consultations said that Victorians should have access to a complaints system where their rights have been breached. This was seen as an important accountability measure. As stated by Chinder Teo:

*If a person's rights are breached, there must be law to apply consequences of that breach. The party responsible must be accountable for the breach.* (Submission 63)

Or as suggested by Reta Pretam Kaur:

*We want a kinder society not a cruel one. Agencies and individuals exercising power must always be responsible for the wrongs they commission.* (Submission 376)

While cases in the Courts are not the best measure of success of a human rights framework (and can be an expensive and slow way of dealing with problems), many community members argued that there is little point in having a right if there is no means of ensuring it is observed.

A range of views were expressed in regard to the particular system of redress that should be available. However, several key threads emerge from the submissions and consultations. These are discussed in the following sections.

### 6.2.1 Where a right exists, something must happen if there is a breach

The idea that the breach of a right must attract a remedy was seen by many people making submissions as a matter of common sense, as well as a longstanding legal principle. Some submissions noted that Article 2(3) of the *International Covenant on Civil and Political Rights* 1966 (ICCPR), which the *Statement of Intent* says should be the Committee's focus, contains an obligation to ensure that any person whose rights are violated has access to an effective remedy.

#### ***International Covenant on Civil and Political Rights 1966, article 2(3)***

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

This idea has a long history. The law generally seeks to put people back in the position they would have been in if the breach of their rights had not occurred. In 1703, Lord Chief Justice Holt in England remarked:

*If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.*<sup>1</sup>

Or as argued by Guy Abrahams in his submission:

*If a person believes their rights have been breached they must be able to lodge a complaint with the assurance that, if they are correct, this will lead to a real remedy.* (Submission 73)

Even among those who were worried about too much litigation, the idea that where there is a right there must be a remedy still resonated:

*Leeching lawyers should be kept out of it, but there does need to be a place where to complain and then the right to follow through.* Submission 579: Name withheld by request

### **6.2.2 Any mechanism must be ‘user friendly’**

Community members stressed the need for a system that is simple to use and navigate. People were less interested in big court cases and the possibility of damages than in getting the problem fixed. Quite a few people said the most important remedy was getting an apology. Some people were fearful of bad treatment if they complained.

*[There] [s]hould be an easy and open process to prove a breach with no fear of recrimination.* Submission 356: Name withheld by request

### **6.2.3 There is a legitimate, if limited, role for the courts**

There was strong support for courts being given a clear role in any system, with significant support for alternative forms of complaint handling. There was also considerable interest in building on existing frameworks, such as judicial review, the Victorian Civil and Administrative Tribunal (VCAT) and the Ombudsman. Many submissions said that a new body should be established to receive human rights related complaints from individuals.

People tended to prefer a range of remedies for different situations. The Disability Discrimination Legal Centre stressed this point:

*The Charter should provide for, or be accompanied by legislation to provide for, legal and non-legal remedies. No single legal or non-legal remedy will be sufficient. Rather, a full complement of remedies ought to be made available to provide adequate redress for people whose rights have been breached.* (Submission 357)

Rowan Creedon agreed, saying:

*I believe that stronger legal protections work better and that rights are most valuable where they can be enforced by a court or tribunal ordering Government to change its practices or by awarding compensation. (Submission 437)*

### 6.2.4 A Charter without clear remedies could lack authority

People did not want a Charter that allows public authorities to breach people's human rights. The State-wide Steering Committee to Reduce Family Violence said:

*[A]ny system purporting to enforce human rights legislation should have as its central pillars, a mechanism of accountability for those who breach the rights of others and a right of redress for those whose rights have been breached. Education, awareness and training is important and necessary to ensure long lasting change but a genuine response must include the former. Without it, the legislation stands the risk of being considered tokenistic. (Submission 1011)*

This view was echoed by many organisations and individuals, including Doug Pollard:

*[[I]f it is nothing more than a statement of what ought to be, without the means to ensure that those statements have legal force, then it is likely to engender cynicism rather than engagement. (Submission 39)*

Charlo Grech put it more bluntly when he said:

*[T]he charter must have teeth. (Submission 62)*

The Committee believes it is possible to find common ground on the issue of remedies. In the remainder of this Chapter, we set out a range of measures that meet the community's desire for an accessible, timely and fair resolution of a complaint where their Charter rights have been breached.

## 6.3 Interpretive clause and Declarations of Incompatibility

In Chapter 4 we talked about how the interpretive clause in the Charter will require Victorian courts and tribunals to interpret laws in a way that is compatible with human rights, so far as it is possible to do so while taking into account why the law was made in the first place.

An interpretive clause is 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.

To work this out, the court or tribunal when considering whether a public authority has acted unlawfully (that is, contrary to a human right protected by the Charter) will look at the human

right in question and any limitations on the right contained in the Charter. The court or tribunal will then look at the legislation that gave the public authority the power to act and ask questions such as:

- Does the legislation restrict the right?
- Is the restriction reasonable or justifiable?
- Can that statute be interpreted in a way that would be consistent with the right in a way that does not disturb the main purpose of the law?

If the legislation restricts a right and cannot be interpreted in a way that is consistent with the Charter, then – apart from being able to pursue a Declaration of Incompatibility – the person’s claim that the public authority acted unlawfully will fail. This is because the public authority did not have any choice about how to apply the law and cannot be seen to have acted unlawfully.

However, if a compatible meaning can be applied, the court or tribunal will adopt it and this will be the standard against which the public authority must act. If it has not done so and has wrongfully interfered with a person’s Charter rights, the court can apply a remedy within its existing powers. These powers vary according to the type of case and could include remedies in regard to administrative law actions, negligence, false imprisonment and wrongful arrest.

In the ACT, this is as far as remedies can go. The ACT Government did not want to establish any new causes of action.

In its first year of operation, the ACT *Human Rights Act 2004* was cited in 14 Supreme Court cases. In most cases, the Act was used in the interpretation of laws.

For example in the case of *R v Upton*<sup>2</sup> the Court took into account the right to a trial without unreasonable delay (section 22 of the Act) in considering whether to order a stay in proceedings. It is important to remember that the Court already had existing statutory and common law powers to order stays in such matters. The difference in this case was that the *Human Rights Act 2* was used to assist in the deliberations. The Judge held that the granting of a stay was appropriate and proportionate in the case because of the low order of the offence and the two year delay of the trial.

The Act was also considered in one administrative matter<sup>3</sup> where the decision of the public authority was confirmed.

No declarations of incompatibility have yet been made in the ACT.

As was discussed in Chapter 4, a Declaration of Incompatibility could be made by the Supreme Court when a law cannot be interpreted to be compatible with the Charter rights. This declaration would not strike down the law; only return it to Parliament for further consideration. In addition, it would also not grant an individual remedy to the person whose rights may have been breached.



Some submissions argued that relying solely on the Declaration of Incompatibility would sell the Charter short. Organisations including the Castan Centre for Human Rights Law at Monash University argued that a Declaration of Incompatibility may be seen by judges as a ‘consolation prize’ that, rather than upholding a person’s rights, fails to vindicate their claim. Others, including the Australian Lawyers Alliance were concerned that the legal profession will not take on human rights cases if their clients do not see any benefit from bringing a case:

*A weakness in the ACT Human Rights Act is the omission of any direct right of remedy whereby an application could be made to strike out a law as being inconsistent with the Human Rights Act. At this stage ACT residents would need to rely on other remedies already available, and the profession appears to be having difficulty in finding cases where such remedies would be applicable.* (Submission 1018: Australian Lawyer’s Alliance)

Several others were concerned that a declaration would not help the person whose rights may have been infringed and, as a result, very few people would bother to pursue a case:

*[A] complainant is unlikely to prosecute a human rights violation in the courts unless that complainant is able to receive relief that is meaningful to the complainant and/or proportionate to that violation. A Declaration of Incompatibility, whilst an ingenious device to ensure good governance and a marvellous pointer for identifying law incompatible with human rights, will not satisfy me.* Submission 92: The Jasmine Foundation

Given these limitations and the strong feeling in the community, the Committee has considered a number of other options. These are discussed in the following sections. In considering these options, the Committee has looked at the experience in other nations to see what works and what does not. The Committee believes that a model that combines the strengths of the United Kingdom and New Zealand human rights laws is a good and modest place to start. The Committee also considers that it makes good sense that any new approach should build upon our existing systems for dealing with complaints against government.

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### **RECOMMENDATION 27**

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The Charter should not disturb any of the remedies that a person may be entitled to under the existing law.

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### **RECOMMENDATION 28**

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A public authority should not be considered to have acted unlawfully if it could not have acted differently, in accordance with law.

## 6.4 Conciliation and mediation

Many people who made submissions had a preference for dispute resolution processes such as conciliation and mediation rather than having to go to court. This was often associated with the belief that any system of redress should be quick, cheap, accessible and easy to navigate:

*The important factor will be the accessibility of any complaint mechanism and the protection of the complainant. The Court system currently appears to favour those who can access greater financial resources and highly qualified and expensive legal counsel. The system of appeal to higher courts, whilst appearing to guarantee fairness and accountability can be prohibitively expensive for many people to contemplate. Submission 472: Uniting Care, Victoria and Tasmania*

Amelia Bassett added:

*Any legal mechanisms ... [and] tribunals must be scrupulous in their accessibility (physically and culturally), in particular they must be 100% accessible to marginalised groups in the Victorian community – who are most likely to be the complainants. They must be informal, low or no cost, with appropriate supports in place for complainants eg interpreters, support workers. (Submission 299)*

Handling complaints through conciliation and mediation would provide a less litigious alternative; however, it may increase the number of complaints that departments and other agencies would have to deal with by virtue of its accessibility. In addition, it may still require an adjudicatory step at the end of the process for complaints that are unable to be resolved.

Using conciliation and mediation would be consistent with current best practices in Victoria aimed at improving good governance, such as Freedom of Information, privacy and equal opportunity schemes. It would build on the existing system, as suggested by Victoria Police:<sup>4</sup>

*If there is support for a stronger mechanism than currently exists for evaluating human rights cases, Victoria Police suggests consideration be given to the possibility of incorporating additional human rights into the grounds for complaint under the Equal Opportunity Act 1995. Alternatively, the roles of the Equal Opportunity Commission, the Privacy Commission, and the Freedom of Information Office could be subsumed into a new Human Rights Commission. (Submission 773)*

There was strong support for a human rights commission, or similar body, to take complaints. Some people thought a new body should be established as an extension of the current Equal Opportunity Commission Victoria.

*A Human Rights Commission should be established to provide a mechanism for individuals and groups to make a complaint. Submission 436: Ruth McNair*

*Like any other breach a person should have the right to take it to the Equal Opportunities or any other protection service so that a stronger message is put out there. Submission 326: Bardia Amini*

*The VGLRL supports a mechanism that enables an individual, if their human rights are breached, to make a complaint to a Human Rights Commission (perhaps expanded from the current Equal Opportunity Commission (EOC) and renamed the Human Rights and Equal Opportunity Commission). Similar to the current EOC processes, the Commission should provide conciliation services and be able to refer matters to the Victorian Civil and Administrative Tribunal for a determination. There should be a right of appeal to the Supreme Court of Victorian on matters of law. Submission 446: Victorian Gay and Lesbian Lobby*

Others did not want to see such a body established:

*As more tribunals and commissions are set up to enforce these rights, those found to have violated the law will not be assured of trial by an impartial body (e.g. trial by peers), but by activists and those with an agenda. Those sitting on our Equal Opportunities Commissions, and other quasi-judicial administrative tribunals, are often far from representative of mainstream opinion. Submission 298: Greg Byrne*

The Equal Opportunity Commission Victoria also made a submission. In the first instance, the Commission stressed their ongoing role in dealing with discrimination complaints. Otherwise, they recommended the New Zealand model, where the substantive protection from discrimination contained in the Charter could be enforced through making a complaint to a like commission. They said that this would have a number of benefits, including:

- *dealing comprehensively and systematically with the inappropriate breadth that is currently granted to public authorities to discriminate by virtue of section 69 of the Equal Opportunity Act;*
- *placing government under the same substantive requirements as individual and corporate citizens in relation to non-discrimination; and*
- *dealing with public sector discrimination complaints within the framework of a conciliation model that would appear to meet a number of objectives contained in the Government's Statement of Intent. (Submission 816)*

This would mean that the Equal Opportunity Commission Victoria would continue to take discrimination complaints under the Charter, but that all other rights breaches would need to be handled by the courts.

This approach might create confusion and escalate matters into full litigation when a simpler alternative could be made available. An alternative model would be one where all human rights claims are considered for mediation by the Commission. This would avoid having a

disjointed system where people would have to go to different places to resolve their complaints, depending upon which right was in question. It would also reflect the fact that human rights claims can involve a breach of more than one right, with discrimination often being experienced alongside another breach. Finally, it would also help to develop the Commission into a more comprehensive human rights body.

We discussed the idea of a modern human rights body for Victoria in Chapter 5. In that discussion, we accepted that complaints handling on the full range of Charter rights could not take place until a fully fledged human rights commission is set up. The Committee recognises that it may take some time to establish such a body. The governance arrangements that might apply would be up to the Commission and government to decide.

The importance of dealing with systemic problems was also discussed in Chapter 5. The Committee believes that there is much to be gained from having both an individual complaints mechanism and a means of dealing with systemic issues within any future human rights commission.

### 6.5 The Ombudsman

Some people liked the idea of taking complaints to the Ombudsman.

*At minimum a person should be able to contact an independent body, such as an Ombudsman's office, and use mediation or another form of alternative dispute resolution to resolve conflict.* Submission 90: Alison Duggan

*The person should have the right to have their complaint heard by an appropriate body or an ombudsman, without the need to pay expensive legal costs.* Submission 87: Geelong Refugee Action and Information Network

Others thought there should be a special human rights Ombudsman.

*A human rights Ombudsman is essential for the victims to approach without fear or favour.* Submission 64: Kevin Davies

Thomas Kokkinos-Kennedy saw two advantages to having a Human Rights Ombudsman:

*To focus the cultural mind on the fact of the H.R. legislation [and] [t]o clarify the currently fuzzy legal liability of various departments of all levels of government wherein the buck gets passed in circles.* (Submission 8)

Still others thought there should be special posts in all government departments:

*[A] 'human rights ombudsman' role/office should be established as a senior position in each government department, separate to the daily workings of the department, which has the authority to overturn decisions which it deems have had a deleterious effect on a person's human rights.* Submission 62: Charlo Grech

The Committee sees a lot of potential for including human rights in the matters that the Ombudsman can consider. The Ombudsman is free, confidential and accessible. In Victoria, the Ombudsman deals with around 15,000 complaints per year. The United Kingdom experience shows that the Ombudsman is 'regarded by the public as independent. Ombudsman schemes also seek to promote good administration by considering the standards to be expected of public authorities and framing their decision making accordingly'.<sup>5</sup>

If the Charter becomes law, the Ombudsman would be able to use his or her existing powers to take action if s/he found that an administrative action was taken 'contrary to law'.<sup>6</sup> In his or her role as Director, Police Integrity, the Ombudsman would also continue to deal with complaints about the police.

However, given the significance of the Charter, the Committee considers that the legislation covering the role and functions of the Ombudsman should be amended to specifically include Charter rights. This has the advantage of building on an existing system and providing for the resolution of complaints through 'cooperative compliance rather than an adversarial approach'.  
Submission 1096: Dr Ben Saul, University of New South Wales

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### RECOMMENDATION 29

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The range of matters the Ombudsman may consider should be clarified to include Charter rights.

#### 6.6 Judicial review

Judicial review of administrative decision-making has been a standard part of the law in Victoria for many years.

When a person seeks judicial review they ask a court to look at the process the government department went through in reaching its decision. The court does not ask 'was the decision the right decision?' but whether as a matter of procedure and law it was a 'lawful decision'. For example, the court will ask: did the decision-maker stay within the limits of their power, take note of the concerns of someone who might be affected by the decision, take into account irrelevant considerations or act with bias?

If the court finds the decision was not lawful, it may set aside the decision and send the decision back to the decision-maker for reconsideration. Sometimes, a court may also compel government to act in a certain way to fulfil their obligations under the law.

A person can also bring a case to court seeking an additional remedy in the form of a declaration that an administrative action is unlawful or invalid.

### 6.6.1 Lessons from overseas

In the United Kingdom and New Zealand, people can seek judicial review of a government decision or action on the basis that it has breached their human rights. This extends beyond the current grounds of review in Victoria and shows that it is possible to import human rights considerations into administrative law. Human rights considerations have also had an effect on existing grounds of review. For example, a person might be able to show that a decision-maker had acted unreasonably because the way the decision-maker had acted was not appropriate or proportionate given the person's rights. As these nations show, judicial review on human rights grounds could be possible under the Charter without creating an undue burden on government.

As the law has developed in New Zealand, the country's *Bill of Rights Act 1990* has slowly gained momentum in judicial review, but Bill of Rights cases have not figured heavily in terms of numbers of cases. It has been suggested that the right to bring this type of case:

*...has barely caused a ripple in New Zealand administrative law ... the predicted deluge of administrative law litigation arising out of the Bill of Rights has yet to occur in either the procedural fairness or abuse of discretion domains ... there are few judgements in which the New Zealand courts have reviewed, let alone set aside, exercises of executive and administrative discretions by reference to the provisions of the Bill of Rights.<sup>7</sup>*

Human rights cases in the United Kingdom have seen a significant emphasis upon judicial review. This may be due in part to a strong administrative law tradition in that country, but is probably more about the fact that the obligation to observe human rights in the *Human Rights Act 1998* is clearly stated. People can see a link between their rights, the duty of government to observe those rights and how to bring a case if government does not meet that standard.

In the judicial review cases that have been considered in New Zealand and the United Kingdom, the influence of human rights laws has largely been limited to narrowing broad statutory powers to be compatible with human rights. For example, in the United Kingdom, a blanket policy of shackling pregnant prisoners when giving birth was found to be too rigid. The Court found that the Prison Service could operate this policy, but that in doing so it must look at each individual case.<sup>8</sup>

The Committee believes that the first step in cultivating a culture of human rights in government is to make human rights one of the considerations that officials must consider in their day to day decision making.

*Human rights should be relevant considerations when making decisions and the failure to take such considerations into account, should make any administrative decision reviewable.*  
Submission 1047:Eastern Community Legal Centre

Some people were worried that public authorities would not give due regard to Charter rights under the traditional system of judicial review. They said it was important not to just pay lip service to Charter rights but to give them genuine consideration.

*Judicial review does not provide a remedy when a decision-maker takes a relevant consideration into account but gives that consideration a weight that a court on review regards as inappropriate ... The result is that a decision-maker could escape review by paying lip service to the enumerated rights, without giving any substantial consideration to rights issues. In this context, rights considerations would require little more than 'box-ticking'; merely requiring some consideration, not adequate consideration.* Submission 507: Dr Simon Evans and Dr Carolyn Evans, University of Melbourne

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.

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### **RECOMMENDATION 30**

A person who claims that a public authority has acted unlawfully by acting in a way that is incompatible with the Charter should be able to:

- apply to a court for judicial review of the decision of the public authority to act in the way it did; and
- apply to a court for a declaration that the act of the public authority was unlawful,

where the existing requirements for those proceedings are satisfied.

### **6.7 Tribunal review**

Like a court exercising judicial review, the Victorian Civil and Administrative Tribunal (VCAT) can review government decisions if there is a right of review created by the relevant legislation. However, it can also go further in examining the merits of such decisions. It can look to see if the decision was lawfully made and can also 'stand in the shoes' of the decision-maker and make a fresh decision. This currently happens for matters such as Freedom of Information. This is called the tribunal's review jurisdiction.

VCAT is a forum that is experienced in considering the actions of government, is reasonably accessible and could allow for a speedy resolution of complaints. It also has the added advantage of being a jurisdiction that government departments know quite well so it would not require a lot of additional training for agencies.

When the Charter becomes law, those people who are taking matters to VCAT under its existing jurisdiction will be able to include arguments about Charter rights in their cases. VCAT would also continue to have jurisdiction over discrimination matters referred from the Equal Opportunity Commission Victoria as is the case now.

Potentially, the Charter could go further and allow VCAT to review all administrative decisions on their merits where there is just a human rights claim. However, rather than allowing VCAT to simply substitute its own decision in all cases, a more cautious approach would be needed if this idea was to be put into practice.

When considering this idea of extending merits review of government decisions, the Committee has looked to other places to see what the benefits and dangers might be. Rights based merits review does not exist in the ACT, New Zealand and United Kingdom, so taking this step requires caution.

The Committee believes that it would be best to remain within the current rules of VCAT and allow the Charter to settle in to the existing legal system. The Committee recommends that more work be done on establishing a rights based merits review at VCAT over time. As such we encourage the issue of remedies generally, and limited merits review by VCAT in particular, to be included in the four year review of the Charter that we discuss in Chapter 7.

### 6.8 DAMAGES

Quite a few submissions argued that a larger range of remedies, including damages, should be available. This is the case in the United Kingdom and by judicial implication also in New Zealand, but not yet in the ACT.

The New Zealand *Bill of Rights Act* 1990 does not mention damages, but the Court of Appeal implied this remedy in a case called *Baigent's Case*.<sup>9</sup> This decision means that damages are now possible for breaches of the *Bill of Rights Act* in New Zealand. However, awards under this principle have been rare.

In the United Kingdom people can seek 'just and appropriate remedies'. The right to compensation for human rights breaches is only available if no other remedy is appropriate. This approach was very attractive to many stakeholders, including the Law Institute of Victoria:

*The LIV supports the inclusion of an effective remedy under the Human Rights Charter for the infringement of an individual's human rights by any department or agency of government and strongly recommends the adoption of the method of enforcement currently contained in the UK Human Rights Act 1998. (Submission 128)*

Some people thought that the threat of damages would help to ensure compliance.



*I believe that stronger legal protections work better and that rights are most valuable where they can be enforced by a court or tribunal ordering Government to change its practices or by awarding compensation. Submission 304: David Wain*

In workshops undertaken with people who are homeless, the Public Interest Law Clearing House Homeless Person's Legal Clinic found that:

*77 per cent consider(ed) the availability of compensation to be very important, 72 per cent indicating that the availability and provision of an apology is very important, and 64 per cent stating that punitive damages (that is, damages designed to punish and deter conduct that is inconsistent with human rights) should be available. (Submission 186)*

The idea of 'just and appropriate remedies' is preferred by many stakeholders, not necessarily because it includes damages but because it upholds the principle that a person should be returned to the position they would have been in if the breach had not occurred.

While there is a high level of support for damages as a remedy, there is almost as much support for receiving an apology. It seems that the Victorian community is interested in having a more comprehensive range of remedies than just compensation.

In the United Kingdom, damages have not been a big feature of human rights cases, with claims for damages being considered in very few cases.<sup>10</sup> It seems that the pre-conditions for awarding damages depend very much upon individual facts and these have only rarely been held by the courts to give rise to a need for monetary compensation. In addition, if a person receives satisfaction from a declaration or referral of a decision back to an authority for reconsideration, then damages would be unlikely to be awarded.

The leading cases suggest that the United Kingdom courts are applying the damages provisions in a more restrictive way than might be expected by some commentators.<sup>11</sup> In human rights cases where damages have been awarded, they have been generally modest, with amounts roughly equal to payments ordered by the Local Government Ombudsman. Damages have been lower than in tort cases (such as for negligence) perhaps because the courts take the view that a finding of a human rights violation is by itself an important vindication. In contrast to private torts, damages are not the only remedy on offer in human rights cases in the United Kingdom.

If the Charter included damages, this could be similar to an action in tort (for example, for negligence or wrongful arrest) and would be a claim for damages for the breach of a duty on a public authority not to interfere with the plaintiff's human rights. The *Statement of Intent* is very clear about the Government's intention not to establish such a cause of action.

Some people share this view and do not think damages should be introduced, at least at this stage:

*I think that eventually there could be a right of action in relation to human rights violations, but that that is something to be considered at a later stage when a charter has been adopted and Victoria's laws changed.* Submission 314: Ron Thiele

Another way to deal with the issue of damages would be to cap them.

*For example, monetary damages could be made available as a matter of last resort; further, such damages could be capped ... It is preferable that Parliament, and not the Court, take the lead in setting such caps. Further, novel and more creative remedies than those traditionally available (e.g. apologies published in the media etc) should be made available so that the Courts can fashion the remedy most appropriate to a human rights violation.* Submission 92: The Jasmine Foundation

Another innovative idea was put forward by Tanja Kovac in her submission:

*If a human rights breach is found proven, a tribunal could also order compensation be paid into a public fund to educate people about human rights and prevent further human rights abuses.* (Submission 434)

The *Statement of Intent* indicates a clear preference for no additional causes of action. The Committee does not think that damages add significant extra value to the Charter model at this stage and most people seem more interested in making sure the rights are observed than in receiving compensation. Overseas experience shows that damages are rarely awarded and are not within the contemplation of many people who might seek justice for a rights violation.

For these reasons, the Committee recommends a broader and more explicit approach to remedies than the ACT, but does not think it appropriate to include a new cause of action for damages.

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## RECOMMENDATION 31

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None of the remedies available in relation to any conduct made unlawful by the Charter should enable the award of damages unless a right to damages was available under existing law.

### 6.9 Human rights advocacy

As we explored in Chapter 1, the rights of disadvantaged members of the community are often the most vulnerable to abuse. Several submissions noted that a Charter that protects human rights and provides remedies to individuals is meaningless for many disadvantaged people unless there is also advocacy support to enable people to bring a case.

The Public Advocate highlighted this point in his submission:

*To assist Victorians to assert their rights, adequate advocacy support must be made available. For people with disabilities, and particularly people with cognitive disabilities, access to this support will be essential if their rights are to be enforced.* Submission 456: Office of the Public Advocate

As Jenny Park, a homeless woman, said in one of the consultative workshops: 'it is no good having a proper law without a proper lawyer.' Submission 186: Public Interest Law Clearing House Homeless Persons Legal Clinic

In particular, the Committee received the strong message from the community that there are particular difficulties around access to appropriate legal advocacy services for people from rural and regional areas and other disadvantaged people.

The submissions canvassed a range of options as to the form that advocacy support could take, including:

- Providing resources for additional advocacy support for human rights issues through existing organisations such as Victoria Legal Aid.<sup>12</sup>
- Providing resources for additional advocacy support for human rights issues through specialist and generalist community legal centres.<sup>13</sup>
- Providing support for non-government organisations to respond to individual and community concerns about human rights.
- Establishing a Human Rights Legal Centre to facilitate and conduct strategic litigation and public policy advocacy to promote, protect or enhance the realisation of human rights.<sup>14</sup>
- Providing financial and legislative support for non-government, non-legal organisations to provide advocacy support for individuals whose rights have been breached. This could include allowing such groups to be able to represent individuals or having standing in relevant proceedings.<sup>15</sup>

The Committee is mindful of the Victorian Government's strong interest in encouraging the development of a human rights culture and tackling disadvantage through a commitment to access to justice. The Committee agrees that, without appropriate and accessible advocacy support for disadvantaged people, the effectiveness of the Charter will be greatly diminished.

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### **RECOMMENDATION 32**

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The Victorian Government should consider how best to implement appropriate and accessible advocacy support as part of its commitment to the Charter.





## **Chapter 7**

# **Commencement and Review**

## 7.1 Summary

The Charter of Human Rights and Responsibilities would be a major step in the development of Victorian democracy and in the better protection of the fundamental rights of the Victorian people. Such significant change and the building of a stronger human rights culture will take time. It cannot be achieved by overnight reform.

The implementation of the Charter should occur in stages, with most of the Charter commencing on 1 January 2007 and those areas that impose new obligations on public authorities commencing on 1 January 2008. This would allow the Charter to be introduced over a reasonable period of time and enable appropriate training and education to commence. With the help of the new Human Rights Unit in the Department of Justice and the Victorian Human Rights Commissioner, public authorities would have adequate time to review their current laws, policies and practices in light of the Charter prior to 1 January 2008.

Once in force, the Charter should be the subject of regular review. The community has told us that they want a new law that is able to be changed over time. Reviewing the Charter would also mean that it can be developed in line with changes in the way government works and in community values and aspirations. Such reviews would assess whether the Charter is working effectively.

The first review of the Charter should take place after four years, by which time there should be substantial experience and information available. The review should include examination of some of the rights that the Committee has recommended should not be included in the Charter at this stage. A further review should be conducted again after eight years of the Charter's operation. Additional reviews should be considered at that time.

## 7.2 When should the Charter commence?

The Committee considered whether the Charter should commence (that is, begin its operation as a new Victorian law) as soon as it is enacted by Parliament, whether its commencement should be delayed for a period or whether there should be a phased start, with some provisions to commence immediately and others to commence later.

A number of people thought that there should be phased implementation of the Charter. Some said that this would be useful to allow for planning and preparation within government and for training for public servants and the judiciary:

*A phased implementation of a Charter would allow time for government to develop appropriate systems and procedures to support the Charter, and to ensure appropriate education and information strategies were in place.*

Submission 773: Victoria Police

Other submissions stressed that a delayed start would allow time for community education strategies to commence. As the Older Persons Action Centre commented:

*A charter should only be introduced after a period of education about the changes, so that the public knows what will happen and support it. (Submission 467)*

In some submissions, the need to plan for the budgetary implications of the Charter was given as another reason to delay its commencement. Women's Health West suggested:

*A phased implementation ... would allow for support to be built within the community, while also allowing organisations to implement planning processes, and departments to plan budgets that provide resources for implementation. (Submission 476)*

While agreeing that phased implementation makes sense, Adam Pickvance cautioned against waiting too long:

*I agree that a phased implementation combined with an education campaign on human rights is required to achieve sustainable outcomes. There must however be urgency around this issue, disadvantage and discrimination has gone on long enough and the government in association with business and the community must make correcting this situation a priority issue. (Submission 469)*

The Committee believes that the Charter should begin soon after it is enacted, but that a staggered start is appropriate. We are mindful that the Charter will impose new obligations, a new way of working in government and the courts and changes to the roles of bodies such as the Ombudsman and Parliament's Human Rights Scrutiny Committee. Time will be needed for human rights training and education for these and other bodies. Some laws, policies and practices may need to be changed to comply with the Charter.

In the United Kingdom, most of the provisions of the *Human Rights Act 1998* commenced two years after the law was enacted. The Australian Human Rights Centre pointed out in its submission that in the United Kingdom 'the relevant public and judicial education project was more ambitious but ... [that] judges and citizens already had some familiarity with the European Convention'.<sup>1</sup> In the Australian Capital Territory (ACT), delay of about six months was considered appropriate.

The Committee considers that a two year delay should be the upper limit for the commencement of any of the provisions of the Victorian Charter. We believe that much of the necessary preparations can be made in a shorter time. However, the Committee prefers a staggered implementation to the shorter implementation timetable in the ACT as we consider that six months would be the minimum needed to prepare for the Charter in a State as large as Victoria.

On the basis that the Charter was enacted by Parliament sometime in the first half of 2006, the Committee recommends that its commencement date be 1 January 2007. This would allow time, during 2006, for the establishment of the office of the Victorian Human Rights Commissioner and of the Human Rights Unit within the Department of Justice. It would also enable these bodies to begin the task of helping other areas of government to prepare for the operation of the Charter. As occurred in the United Kingdom, government departments and

other public authorities should begin reviewing their current laws, policies and practices for human rights compliance in 2006. The delayed start will also give judges, the Ombudsman, the Human Rights Scrutiny Committee and other bodies an opportunity to prepare for their responsibilities under the Charter. These activities will be important first steps in initiating the cultural change that is necessary for the Charter to work effectively.

This approach would mean that on 1 January 2007 most of the important provisions of the Charter would commence. These would include:

- the preparation of Human Rights Impact Statements for Cabinet;
- the vetting of Bills for compliance with the Charter and the preparation of Statements of Compatibility by the Attorney-General for new Bills introduced into Parliament;
- the scrutiny of new Bills by the Human Rights Scrutiny Committee of Parliament; and
- judges and tribunal members applying the new framework for the interpretation of laws in light of the Charter and the power of the Supreme Court to make Declarations of Incompatibility.

The Committee recognises that the proposed Charter would also impose obligations on public authorities, which (as discussed in Chapter 3) may include private bodies when they are performing a public function on behalf of government. To ensure that these bodies have sufficient time to prepare for their responsibilities under the Charter, the Committee recommends that the provisions relating to this aspect of the Charter start twelve months later on 1 January 2008.

### ***Getting Ready for Human Rights: The Police and the United Kingdom Human Rights Act 1998***

The police force in the United Kingdom prepared extensively for the introduction of the *Human Rights Act*. This involved

- Human rights training for 154,000 police officers spread across the United Kingdom. The Chairman of the Association of Chief Police Officers Human Rights Sub-Committee said: 'At the heart of the Human Rights Act lies the challenge of embedding a more defined human rights culture within the police service...We must be prepared to respond flexibly and effectively to ensure that both the spirit and the letter of the law are met.'
- Auditing laws, policies and practices for compliance with human rights principles. This consisted of three stages – review of legislation conducted by the United Kingdom Home Office, audits of force-wide policies and procedures and audits of each local police force. The audit results were sent to the Association of Chief Police Officers Human Rights Sub-Committee, which assessed the need for action in specific areas as critical, high, medium or low. The service-wide audits revealed 40 'human rights hot-spots' (for example, the use of strip searches) where there was a high chance of a legal challenge on human rights grounds, as well as a large number of specific compliance issues.<sup>2</sup>



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### RECOMMENDATION 33

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The Charter should commence on 1 January 2007, except that those provisions dealing with the duty on public authorities to comply with the Charter (and the consequences of any breach) should commence on 1 January 2008.

### 7.3 Review of the Charter

As indicated in earlier Chapters, the Committee considers that the Charter should be reviewed after a period of time. The Charter can only be the beginning of a journey towards the better protection of human rights in Victoria. As such, regular reviews are necessary to assess whether the Charter is working effectively and to ensure that it continues to reflect the values and aspirations of the Victorian community.

There was general agreement amongst the people who mentioned this issue in submissions or spoke to us at consultations that a review is desirable. Many people, such as the Queer Greens, said that reviewing the Charter is important to preserve its flexibility:

*We do not live in a static society. Therefore the rights which are considered important by the groups and individuals [a]ffected are also changing ... Therefore a system of review needs to be put in place so that the Charter remains relevant and useful for our ever evolving society.*  
(Submission 789)

Many participants considered that there is a need to build mechanisms into the Charter to ensure that it is evaluated, reviewed and enhanced. John Edney, a homeless man, explained this as necessary to 'keep it in the forefront and to keep it away from the cobwebs in archives. Don't let us become cobwebs'.

**Submission 186: Public Interest Law Clearing House: Homeless Persons' Legal Clinic**

Many submissions stressed that the review needs to consider whether any additional rights, such as economic, social and cultural rights, children's rights and women's rights should be protected by the Charter. For example, the Western Suburbs Legal Service said:

*[W]e suggest the Victorian Government commit to a two staged process of rights protection. The first being the adoption of a statute to protect civil and political rights (the Charter) and a commitment to expanding this Charter to incorporate economic, social and cultural rights within a reasonable period of time.* (Submission 742)

Some submissions said that the review process should consider whether additional Indigenous rights should be included in the Charter.

People also thought that the review should consider whether the remedies provided for under the Charter need to be strengthened, for example, by including a right to claim for damages. Others thought that the accessibility of the remedies for vulnerable and marginalised communities should be assessed in the review and that other remedies should be considered for inclusion in the Charter in light of access to justice considerations.

A number of people thought that the question of entrenching the Charter in the Victorian Constitution should also be considered in the review.

Some submissions recommended a timeframe for review similar to that in the ACT, namely, after one year and five years.<sup>3</sup> For example, Maria Psihogios-Billington said:

*Depending on the form and substance of the Charter there should be a review after 1 year, 5 years and 10 years with a view to broadening rights protected and ensuring that remedies under the Charter are effective. Consultations with communities and individuals should be ongoing.* (Submission 297)

Others, such as the Victorian Council of Social Service, thought that one year would be too soon to assess the effectiveness of the Charter and suggested that a first review after two or three years would be more appropriate.<sup>4</sup>

Some people stressed that the review of the Charter should be independent and involve public consultation. For example, Sharon Humphries said: 'A properly funded independent non-government group should review the Charter and make sure governments, corporations and groups are measuring up.' (Submission 362)

In considering when the Charter should be reviewed, the Committee is mindful of the competing considerations identified by the Mallesons Stephen Jaques Human Rights Law Group. They stated:

*It is important not to wait too long before an initial review of a Charter of Human Rights, but this must be balanced against the benefit of waiting in order to have access to a wider range of information and experience, thus enabling a better assessment of the effectiveness of the Charter of Human Rights.* (Submission 807)

The Committee agrees that one year would be too soon to have a worthwhile review of the Charter. In any event, annual reports on the work of the Charter will be prepared by the Victorian Human Rights Commissioner. We consider that the Charter should be first reviewed four years from the date it commences operation, that is, that the first review of the Charter should commence on 1 January 2011. This would ensure that the review would not be within the same parliamentary cycle as the commencement of the Charter. Such a review might be expected to take six months.

The Committee believes that it is important not to be too fixed on how a review might best be carried out. However, we believe that the review should be conducted by the Attorney-General or by people appointed to undertake it on behalf of the Attorney-General. Whatever the form of the review, we think it important that it involve significant public consultation, including with disadvantaged groups, Indigenous communities and business organisations. The review should also involve consultation within government, including with local government and service providers.

The Committee notes the comments made by some people in relation to the scope of the review and recommends that the first review look at a wide range of issues to see if any changes to the Charter are needed.

The Committee further recommends that the Attorney-General again reviews the Charter in a further four years, that is, from 1 January 2015, eight years after its commencement date. At that point, the Attorney-General should decide whether further reviews are necessary and the time frames for those reviews.

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### RECOMMENDATION 34

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The Charter should be reviewed four years after its commencement. The review should include consultation with the public and should consider matters including:

- whether the Charter should also protect human rights contained in other international instruments to which Australia is a party, such as the *International Covenant on Economic, Social and Cultural Rights*, *Convention on the Rights of the Child* and *Convention on the Elimination of All Forms of Discrimination Against Women*;
- whether, following consultations with Victorian Indigenous communities, a right to self-determination should be included in the Charter, and, if so, the appropriate definition and scope of that right;
- whether the protection from discrimination provided by the Charter should include additional grounds;
- whether changes should be made to how government departments are affected by the Charter, such as whether regular audits of their programs for compliance with the Charter should be made mandatory; and
- whether the remedies available under the Charter should be expanded, especially in light of access to justice considerations.

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**RECOMMENDATION 35**

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The Charter should again be reviewed eight years after its commencement. At that time, a decision should be made about whether further reviews are necessary and the timing of those reviews.



## Chapter 8

# Our Consultation

## 8.1 Summary

In late April 2005, Attorney-General Rob Hulls announced a process to consult with the Victorian community about whether Victorian law should be changed to better protect human rights. He also announced the appointment of the Human Rights Consultation Committee and released the Government's *Statement of Intent*.

The community consultation commenced on 1 June 2005, when the Committee released its community discussion paper and called for submissions. The Committee employed a range of innovative strategies to ensure that information about the process was distributed as widely as possible, particularly to marginalised and disadvantaged people in the community.

A total of 2524 people and organisations took the time in the form of a submission to tell the Committee what they thought about whether human rights could be better protected in Victoria. The Committee also participated in 55 community consultation meetings, information sessions and public forums and 75 consultations with government and other bodies. These events provided opportunities to engage directly with the community, including with marginalised and disadvantaged people and people from regional and rural areas across the State. The Committee also undertook specific consultations with groups such as the judiciary, Indigenous peoples, religious organisations, police, business, victims of crime and academics with expertise in the law.

We believe that the consultation was successful in engaging with a significant number and diversity of groups and gave people a real say on this important question about Victoria's future. The response, as reflected in the large number of submissions we received, makes this process the most citizen-involved consultation on the issue of a bill or charter of rights so far undertaken in Australia.

## 8.2 Background

In May 2004, following its approval by Cabinet, Attorney-General Rob Hulls released the Victorian Government's *Justice Statement – New Directions for the Victorian Justice System 2004–2014*. A key theme of the Statement was the need to ensure that human rights are valued and protected. The Statement included a commitment to establish a process of discussion and consultation with the community on how human rights and obligations can be best promoted and protected in Victoria, including whether there is a need for a Charter of Human Rights and Responsibilities.

In April 2005, the Attorney-General released the Government's *Statement of Intent*, entitled *Human Rights in Victoria*. It announced the appointment of the Human Rights Consultation Committee to seek the views of Victorians on how best to better protect and promote human rights in the State.

The *Statement of Intent* outlined the Government's preferred human rights model (including as to the role of the courts, the need to focus on dispute prevention and the rights to be protected) and the process by which the Committee was to undertake the community consultation. The Committee was asked to report to the Attorney-General by 30 November 2005. The full text of the *Statement of Intent* can be found in Appendix B.

### 8.3 Getting the word out

The Committee met with many groups before the formal launch of the consultation to get advice on how to develop a process that would involve genuine engagement with people at the grass-roots level. We also recognised the need to develop strategies so that marginalised and disadvantaged communities and people from regional and rural areas were given the chance to have their say.

The community consultation process was formally launched by the Attorney-General on 1 June 2005. At that time, the Committee released our community discussion paper entitled *Have your say about human rights in Victoria* and invited people to make a submission. The Committee indicated that we would like to receive submissions by Monday 1 August 2005, but said also that we would continue to take and consider submissions after this date.

The community discussion paper sought to provide accessible background information on the main issues around developing a framework to better protect and promote human rights in Victoria. The aim was to get people thinking about human rights and what the government and the community might do to encourage a culture of respect for human rights in Victoria. The paper asked ten key questions to encourage debate. We drafted these key questions to be as open-ended as possible so that people responded to us without feeling constrained by the preferences expressed in the *Statement of Intent*. The ten questions were:

1. Is change needed in Victoria to better protect human rights?
2. If change is needed, how should the law be changed to achieve this?
3. If Victoria had a Charter of Human Rights, what rights should it protect?
4. What should be the role of our institutions of government in protecting human rights?
5. What should happen if a person's rights are breached?
6. What wider changes would be needed if Victoria brought about a Charter of Human Rights?
7. What role could the wider community play in protecting and promoting human rights?
8. What other strategies are needed to better protect human rights?
9. If Victoria introduced a Charter of Human Rights, what should happen next?
10. Is there anything else you would like to tell us about how human rights should be protected in Victoria?

In addition to the community discussion paper, a short summary document was prepared that provided a brief background to the issues, information on how people could participate in the process, an outline of the ten key questions, and how people could get more information.

After the launch of the consultation, advertisements and calls for submissions were placed in *The Age*, the *Herald-Sun* and regional newspapers. In addition, advertisements and calls for submissions were placed in specific print media outlets for different community groups.

In June 2005, the Department of Justice established a website for the consultation. It included an electronic version of the discussion paper, an electronic version of a summary of the discussion paper and specific information for particular groups in the community. For the period 1 June to 15 November, the website had 51208 hits and 8099 visits or sessions of activity.

In total:

- Over 4000 printed copies of the full discussion paper were distributed.
- 2160 copies of the discussion paper were downloaded from the website.
- 15000 printed copies of the summary document were distributed in hard copy and 581 copies were downloaded from the website.
- Information on how to access the discussion paper was distributed by email to tens of thousands of people. This included information contained in email alerts and bulletins from many community and non-government organisations. This assistance ensured that many thousands of people received information about the process and were given the opportunity to participate. Importantly, this also included people who often find it difficult to access this sort of information. To take just a few examples, the following organisations sent out email bulletins to Victorians containing information about the consultation with links to our discussion paper (such bodies sometimes also set out information on the process on their website and in their printed newsletters):
  - Equal Opportunity Commission Victoria (to 1800 community groups);
  - Law Institute of Victoria (to 12200 legal practitioners).
  - Our Community (to 22000 people and community groups); and
  - Victorian Council of Social Services (to 735 organisations, peak bodies and networks, and 230 individuals).

The summary document was also produced in 10 community languages, including languages for new communities, and distributed to over 600 organisations from culturally and linguistically diverse communities. In addition, electronic versions of these materials were made available on the website and 978 copies were downloaded.



Versions of the full discussion paper in audio format and in large print were made available for people with sight impairments.

Overall, 22,719 copies of the full discussion paper and summary were made available in hard copy, by email or downloaded from the web.

Specific materials were developed for secondary school teachers to assist in preparing teaching lesson plans to help students to contribute to the consultation. These materials were made available on the human rights project website, with over 50 schools and teachers' associations specifically requesting copies of the materials. The Charter was also the topic for debate at the Victorian Schools Constitutional Convention.

Specific material was also developed for Indigenous communities that provided a background to the issues, as well as specific information on human rights issues for Indigenous Victorians.

Relevant material was also prepared for specific groups in the community, including people with disabilities, faith based groups, people who are homeless, older people, women, young people and people from the gay/lesbian/transgender community.

Radio announcements for emerging communities were produced and broadcast on community language programs on community radio 3CR. Radio announcements about the consultation were also made on community radio programs for specific groups, including older people, young people, prisoners and the gay/lesbian/transgender community.

The Committee notes the views of some people that there was insufficient community awareness about the consultation project.<sup>1</sup> In the time we had, we made every effort to distribute information regarding the consultation as widely as possible and in as many different formats and languages as possible.

Some submissions argued that the content and timing of the *Statement of Intent* had the effect of limiting the scope of the consultation.<sup>2</sup> In particular, concerns were expressed about the *Statement's* focus on civil and political rights, and not other rights such as economic, social and cultural rights,<sup>3</sup> the indication in the *Statement* that the Government does not want a Charter of Human Rights included in the Constitution,<sup>4</sup> and the statement that the Government does not wish to create new individual causes of action based on human rights breaches.<sup>5</sup>

Some submissions were also critical of the constraints placed on the consultation within the *Statement of Intent*. These criticisms were that six months was not long enough for the consultation,<sup>6</sup> that the priority on written submissions excluded particular disadvantaged people,<sup>7</sup> and the lack of representation of Indigenous people or people from culturally and linguistically diverse (CALD) communities on the Committee.<sup>8</sup>

The Committee acknowledges these concerns and recognises that no process can be perfect. However, we are pleased to report that the consultations have proved to be successful in

engaging with a wide cross-section of the community (including people from marginalised or disadvantaged groups). We also feel that the six month period we were given to talk to people has been sufficient, due in part to much hard work and to the support we received from community organisations. We were also pleased that people responded positively to answering the open-ended questions about human rights that we set out online and in our community documents.

### **8.4 How people made submissions**

The *Statement of Intent* required the Committee to consult with the community primarily by seeking and deliberating on written submissions from members of the Victorian community. With this in mind, the Committee recognised the importance of making the process of contributing submissions accessible to as many people as possible in the community.

The Committee invited submissions from individuals and on behalf of groups or organisations. Submissions could be made by post, email or using an interactive online submission form that was available on the website. The online submission form asked people to answer the question whether change was needed in Victoria to better protect human rights and then allowed people to type in free text responses to each of the remaining nine key questions.

In addition, a standard, hard copy submission template based on the ten questions was made available by the Committee to individuals, organisations and at face-to-face consultations and forums.

The Committee indicated in the discussion paper that we would publish all submissions received on the website, except where people indicated that they did not want their submissions to be published or if the submissions were considered by the Committee to contain material that was discriminatory, defamatory, vilifying or contained confidential information.

The Committee indicated that we would accept submissions in other languages and undertook to translate any submissions made in such form. The Committee also indicated that we would welcome verbal submissions made to members of the Committee or members of the Committee's support team.

In the *Statement of Intent*, the Committee was instructed to adopt strategies for engaging with marginalised and disadvantaged communities. Accordingly, the Committee arranged for a series of devolved consultations in partnership with non-government organisations to facilitate the involvement of people in specific groups within the community who are often marginalised from formalised methods of consultation. Details of these consultations are outlined in Appendix C.

The Committee believes that the large number of responses we received, together with the diversity of the groups responding to the consultation project, demonstrated the importance

of conducting specific consultation strategies for particular groups in the community. It also illustrated the value of using innovative tools for citizen engagement, such as interactive online submission forms and specific submission materials targeting disadvantaged communities.

### 8.5 Who made submissions

A total of 2524 submissions were received from individuals and organisations during the consultation period. A full list of the submissions is set out in Appendix D.

Of the submissions:

- 2341 were from individuals.
- 161 were from organisations. Many of these organisations represent significant memberships. For example:
  - The ALSO Foundation (5000 members);
  - Law Institute of Victoria (12200 members); and
  - The Victorian Bar (over 2200 members).
- 22 were reports from workshops conducted as part of the devolved consultations.

In terms of the way people made submissions and written responses:

- 2020 were made in a hard copy form.
- 504 were made using the online submission form or by email.

Statistical analysis of the submissions revealed that 84 per cent of formal submissions supported change to better protect human rights in Victoria. In conducting this analysis, the Committee acknowledges the need to exercise some caution because the consultation was not random or weighted to reflect the characteristics of the population, but was a call for submissions. Nonetheless, the outcome is not markedly different from the results of other surveys. For example, one opinion survey taken some years ago found that 72 per cent of respondents supported some form of Bill of Rights for Australia.<sup>9</sup>

In considering the submissions prepared using standardised questionnaire forms, the Committee notes that responses can be influenced by such things as the structure of the form, the nature of the wording of the questions and the order of the questions. However, the views expressed through such forms are important because they provide an accessible format for many people to express their opinions. These people may otherwise have not found it possible to take part in the consultation.

The Committee is also aware that the nature of a submission process is such that groups may organise campaigns to deliver a coordinated response suggesting a preferred outcome. We observed that a number of responses were received in similar or identical formats, reflecting

organised campaigns both in support of and opposing change to the law. In particular, we received:

- 229 printed postcards that supported a Charter of Human Rights.
- Petitions with 743 signatures organised by the Justice Project in support of a Charter of Human Rights.
- Petitions with 278 signatures organised by the Victorian Aboriginal Legal Service in support of a Charter of Human Rights and strongly advocating the:
  - inclusion of the right to self-determination for Indigenous peoples and the protection of their culture;
  - inclusion of economic, social and cultural rights; and
  - individual remedies for people who believe their rights have been ignored.
- 65 identical submissions that replicated a suggested submission included on the website of Saltshakers Inc.<sup>10</sup> These were all opposed to a Charter of Human Rights.

When all of these responses were added to the formal submissions, 94 per cent supported change to better protect human rights in Victoria.

Overall, the submissions indicated overwhelming support for some form of Charter or formal instrument to further protect and promote human rights in Victoria.

### **8.6 Face-to-face consultations**

The *Statement of Intent* allowed the Committee to arrange meetings and other constructive discussions with people and groups who made submissions. In addition, the Committee was asked to adopt strategies for engaging with marginalised and disadvantaged communities and people from regional and rural areas. We met as a Committee 14 times over six months to discuss consultation strategies, the issues arising in the submissions and consultations, and to formulate our report and recommendations.

During the consultation project, the Committee undertook 55 community consultation meetings, information sessions and public forums. These varied in format, depending upon the audience, the time available, the issues raised and the location. They included focussed consultations with particular communities and interested stakeholders, meetings with professional and peak bodies, and public forums. In general, the aims of the meetings were to:

- provide information about the project and how people could contribute and participate;
- provide an additional avenue through which people could contribute their views;
- seek the views of people or groups who may be otherwise excluded or marginalised from the submission process; and

- seek the views of particular people or groups who may have a particular interest or perspective on the issue to ensure that their views were considered.

A large number of people from a diverse range of backgrounds attended these meetings and consultations. They included people from faith based networks, family groups, artists, people representing business interests, welfare groups, young people, people with disabilities, older people, people from culturally and linguistically diverse backgrounds, Indigenous people, people from the gay/lesbian/bisexual/transgender community, women's groups, academics, and people in contact with the criminal justice system.

A full list of the meetings can be found in Appendix E. Many of these took place in rural and regional Victoria, with meetings conducted in Mansfield, Warrnambool, the Swan Hill region, Ballarat, Mildura, Geelong, Bendigo, Shepparton, Echuca and the Gippsland area.

In addition to the 55 community meetings, the Committee also undertook 75 focussed consultations with specific stakeholders. This included meetings with members of the judiciary (from the Supreme, County and Federal Courts, the Children's Court, the Magistrate's Court and the Victorian Civil and Administrative Tribunal). We also consulted with people including the Chief Commissioner of Police, the Deputy Director of the Committee for Melbourne, the National Australia Bank social responsibility representative, the Victorian Electoral Commissioner, the Victorian Ombudsman, the Privacy Commissioner, the Law Institute of Victoria, The Charter Group, the Equal Opportunity Commission Victoria, the Law Council of Australia, Commissioners of the Human Rights and Equal Opportunity Commission, several welfare peak bodies, the Scrutiny of Acts and Regulations Committee, and groups representing the victims of crime (including a representative from the Sentencing Advisory Council).

In late August, the Committee arranged a roundtable meeting with leading academics from Victorian universities and experts from New Zealand. The roundtable helped the Committee work through some of the complex legal questions raised in the consultations.

In September and October, the Chair of the Committee travelled to the United Kingdom for a university-funded trip. He met with a wide range of people about the United Kingdom *Human Rights Act 1998*, including people from human rights bodies, people within government and academic experts, to discuss issues about this consultation and to test ideas about the Committee's thinking and recommendations.

The Committee was also assisted by regular dialogue with representatives of government, including senior officials from a wide range of government departments. As part of this process, the Chair of the Committee attended two meetings of an Inter-Departmental Committee established to exchange and develop views on possible options for promoting and protecting human rights.

## **8.7 Comparison with other recent human rights inquiries**

In May 1985, the Victorian Parliamentary Legal and Constitutional Committee was asked to inquire into whether Victoria should have a legislative Bill of Rights. The Committee was asked to report by June 1986. The Committee received 180 submissions from individuals and organisations. It also conducted 15 public hearings, during which it received evidence from 95 witnesses.

In 2000–2001, the New South Wales Parliamentary Standing Committee on Law and Justice undertook an inquiry on whether it was appropriate for New South Wales to enact a statutory Bill of Rights. The Standing Committee received 141 submissions and written responses. It also conducted 12 public hearings from April 2000 to March 2001, with a total of 30 witnesses. The Standing Committee tabled its final report in October 2001.<sup>11</sup>

In the Australian Capital Territory (ACT), the community consultation on a Bill of Rights commenced in April 2002 with the appointment of an independent Consultative Committee. The Committee published a discussion paper and facilitated a series of six town meetings. The Committee also undertook targeted consultation meetings with community groups. In total, the Committee conducted 49 consultations or meetings with various community groups or individuals. The Committee received 145 submissions. The Committee also conducted a deliberative poll, in which 200 representative ACT residents participated over two days. The Committee presented its final report in May 2003.<sup>12</sup>

When compared to the level of response to similar inquiries in Victoria, New South Wales and the ACT, the Committee is pleased with the high interest expressed by Victorians in this consultation process.

## **8.8 A final word of thanks**

Consulting with the Victorian community over a six month period about such an important issue as their fundamental rights was always going to be a lot of work. Indeed, we could not have completed the consultations and this report without the support of many people and organisations.

The Committee would like to thank the organisations and people who run them, often on a volunteer basis, who gave us their considerable time and support. We cannot name them all here because there are simply too many to list. They often played a crucial role in helping us to get the word out about this process. They also helped people from across the community, ranging from people who are homeless to people living in remote communities, to be involved.

In dealing with legal and other issues, the Committee was fortunate to receive considerable assistance from the Victorian Solicitor-General, Pamela Tate SC. Ms Tate was able to attend

most of the Committee's meetings and her advice and legal expertise proved invaluable. On behalf of the Committee, she also prepared the drafting instructions for the Bill attached to this report. The Bill was then drafted by the Victorian Chief Parliamentary Counsel Eamonn Moran QC, and his staff. We acknowledge their hard work on a tight time frame and thank them for this.

Finally, we acknowledge the strong support we received from all levels of the Department of Justice, as well as from the many other government departments and agencies that we met with and who gave us ideas and information. In particular, the Committee wishes to recognise the debt we owe to the committed and efficient human rights project consultation team within the Department of Justice. Led by Michelle Burrell, the team of Peggy Aresti, Jennifer Breckenridge, Melanie Musumeci and Louis Schetzer often worked long hours to help us meet with as many people as possible, write this report and deal with the extraordinary number of submissions we received. We also thank Desi Kossivis for additional administrative support.

## Endnotes

### Chapter 1 Does Victoria need a new law on human rights?

- <sup>1</sup> For example, Submission 470: Victoria Legal Aid; Submission 840: Professor Marcia Neave and Professor Spencer Zifcak; Submission 816: Equal Opportunity Commission Victoria; Submission 1043: Public Interest Law Clearing House
- <sup>2</sup> Submission 448
- <sup>3</sup> Submission 140
- <sup>4</sup> Submission 128
- <sup>5</sup> For example, the freedom to discuss matters relating to the Australian government so that voters can participate effectively in elections was recognised in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
- <sup>6</sup> See *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Privacy Act 1988* (Cth)
- <sup>7</sup> In some circumstances, a person may use the Optional Protocols under particular international human rights treaties that Australia has signed to seek a remedy. However, these remedies are not binding on Australian Federal or State governments.
- <sup>8</sup> Submission 840: Professor Marcia Neave and Professor Spencer Zifcak
- <sup>9</sup> Submission 1043: Public Interest Law Clearing House
- <sup>10</sup> Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Discrimination in the Law: Inquiry under Section 27 of the Equal Opportunity Act 1995*, (2005)
- <sup>11</sup> Submission 1043: Public Interest Law Clearing House
- <sup>12</sup> Consultation 19: People with a Disability: Voting Issues
- <sup>13</sup> Ibid
- <sup>14</sup> Submission 1942: Victorian Council of Social Service and the Federation of Community Legal Centres, Victorian Human Rights Community Engagement Project.
- <sup>15</sup> Submission 444: Robert and Loretta Krelle.
- <sup>16</sup> Submission 1929: Workshop with People with Intellectual Disability conducted by Victorian Council of Social Service.
- <sup>17</sup> Consultation 19: People with a Disability: Voting Issues
- <sup>18</sup> Consultation 29: Gippsland Youth
- <sup>19</sup> Submission 1108: Australian Arabic Council
- <sup>20</sup> Consultation 53: Eritrean Community Meeting
- <sup>21</sup> Submission 186: Public Interest Law Clearing House, Homeless Persons' Legal Clinic
- <sup>22</sup> Submission 1020: World Vision Australia
- <sup>23</sup> For example, Submission 1043: Public Interest Law Clearing House
- <sup>24</sup> Submission 486: Leo Rosenthal
- <sup>25</sup> Submission 338: Chris White
- <sup>26</sup> Consultation 13: Jewish Community Council of Victoria
- <sup>27</sup> Helen Watchirs, *Review of the First Year of Operation of the Human Rights Act 2004* (2005), Democratic Audit of Australia, Australian National University, <<http://democratic.audit.anu.edu.au/WatchirsHRActJune05.pdf>> at 14 November 2005
- <sup>28</sup> Australian Capital Territory Human Rights and Discrimination Commissioner, *Human Rights Audit of Quamby Youth Detention Centre*, (2005)



- <sup>29</sup> The Police Human Resources Unit of the United Kingdom Home Office has established a Race, Equality and Diversity Team, the aim of which is to attract people from under-represented groups to the police force. The Home Office states: 'Increasing diversity is not just the right or moral thing to do – it is essential for us to deliver our business. A diverse workforce gives us access to a broad range of skills, education, experience and culture which maximises our ability to deliver a variety of local solutions to local problems.' See United Kingdom Home Office, *It Works ... The Operational Benefits of Diversity for the Police Force* <[http://police.homeoffice.gov.uk/news-and-publications/publication/human-resources/Operational\\_Benefits\\_Leaflet.pdf?view=Binary](http://police.homeoffice.gov.uk/news-and-publications/publication/human-resources/Operational_Benefits_Leaflet.pdf?view=Binary)> at 22 November 2005. The Team assists forces to develop policies and to share information about good practises. For example, the Team has developed a 'Positive Action Events Toolkit'. The toolkit assists police in conducting 'positive action' events for police recruitment from under-represented communities. See United Kingdom Home Office, *Positive Action Events Toolkit* <[http://police.homeoffice.gov.uk/news-and-publications/publication/human-resources/Pos\\_Action\\_Toolkit.pdf?view=Binary](http://police.homeoffice.gov.uk/news-and-publications/publication/human-resources/Pos_Action_Toolkit.pdf?view=Binary)> at 14 November 2005.
- <sup>30</sup> *Police Act 1996* (UK) sch 4 as amended by *Police Reform Act 2002* (UK) s 83.
- <sup>31</sup> Submission 344: Dr Aron Paul Igai; Submission 1017: Australian Lawyers Alliance; Submission 342: Anthony Bergen
- <sup>32</sup> For example Submission 128: Law Institute of Victoria
- <sup>33</sup> Andrew Parkin, *CRIC Poll Shows Charter Part of Canadian Reality*, Centre for Research and Information, <[http://www.cric.ca/en\\_html/guide/charter/charter.html#cric](http://www.cric.ca/en_html/guide/charter/charter.html#cric)> at 14 November 2005.
- <sup>34</sup> Submission 1014: Victorian Council of Social Service
- <sup>35</sup> Submission 439: Ruth Cummings
- <sup>36</sup> *Human Rights Act 1998: Impact on Court Workloads*, Department for Constitutional Affairs, <<http://humanrights.gov.uk/hrimpact3.htm>>, at 14 November 2005.
- <sup>37</sup> *Human Rights Act Statistics*, Department for Constitutional Affairs, <<http://humanrights.gov.uk/statistics.htm>>, at 14 November 2005.
- <sup>38</sup> Tom Mullen, Jim Murdoch, Alan Miller and Sarah Craig, 'Human Rights in the Scottish Courts' (2005) 32 *Journal of Law and Society* 148, 152
- <sup>39</sup> Submission 315: Salt Shakers
- <sup>40</sup> Submission 398: Chris Coleborn
- <sup>41</sup> Submission 476: Women's Health West; Submission 984: Ethnic Communities Council of Victoria
- <sup>42</sup> Submission 773: Victoria Police; Submission 981: B. Cooney
- <sup>43</sup> Submission 470: Victoria Legal Aid
- <sup>44</sup> *Legislative Standards Act 1992* (Qld)
- <sup>45</sup> Legal and Constitutional Committee, Parliament of Victoria, *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, (1987), ch 5.
- <sup>46</sup> Submission 816: Equal Opportunity Commission Victoria. See also Submission 92: The Jasmine Foundation
- <sup>47</sup> Submission 1167: Justice Kevin Bell
- <sup>48</sup> Submission 1167: Justice Kevin Bell; Submission 807: Mallesons Stephen Jaques Human Rights Law Group; Submission 842: The Charter Group
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## Chapter 2 Which rights should the charter protect?

- <sup>1</sup> Submission 357: Disability Discrimination Legal Service
- <sup>2</sup> Submission 112: Council of Intellectual Disability Agencies
- <sup>3</sup> Comment in Consultation 40: WIRE Women's Forum
- <sup>4</sup> ICCPR article 2
- <sup>5</sup> ICESCR article 2

- <sup>6</sup> Human Rights Committee, General Comment 14, *Nuclear Weapons and the Right to Life*, Twenty-third session, 1984, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev. 7, 139 [1].
- <sup>7</sup> *Pretty v. United Kingdom* [2002] ECHR 427 (Application no. 2346/02)
- <sup>8</sup> See for example Submission 330, name withheld by request
- <sup>9</sup> See for example *Paton v United Kingdom* [1981] 3 EHRR 408 (Europe), *Borowski v Canada* (Attorney General) (1987) 37 DLR (4th) 731m Sask CA (Canada), *Christian Lawyers Association of South Africa & Ors v Minister of Health and Ors* 1998 (11) BCLR 1434 (South Africa)
- <sup>10</sup> See for example, Submission 474: Albury-Wodonga Community Legal Service
- <sup>11</sup> Human Rights Committee: General Comment 18, *Non-discrimination*, Thirty-seventh session, 1989, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev. 7, 136 [2].
- <sup>12</sup> See articles 2(1), 24(1) and 26
- <sup>13</sup> Section 51(xxxi)
- <sup>14</sup> Submission 1175: Yorta Yorta Nation Aboriginal Corporation
- <sup>15</sup> Submission 1176: Victorian Aboriginal Child Care Agency
- <sup>16</sup> Muriel Bamblett, CEO Aboriginal Child Care Agency at Consultation 35: Indigenous Human Rights Forum, 10 August 2005
- <sup>17</sup> Submission 1176: Victorian Aboriginal Child Care Agency
- <sup>18</sup> Victoria, Royal Commission into Aboriginal Deaths in Custody, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Volume 1, (2005), 719 (Recommendation 163.)
- <sup>19</sup> See for example *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514, (1960) and *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Principles of the Charter of the United Nations*, GA Res 2625 (1970.)
- <sup>20</sup> Human Rights Committee, General Comment 12: *The Right to Self-Determination of Peoples*, Twenty-first session, 1984, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev. 7, 134 [1].
- <sup>21</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 23: *Indigenous Peoples*, Fifty-first session, 1997, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev. 7, 215 [4(d)].
- <sup>22</sup> Concluding Observations of the Human Rights Committee, Australia 24/07/2000 CCPR, A/55/40, paras 498-528.
- <sup>23</sup> Article 3
- <sup>24</sup> Article 19
- <sup>25</sup> George Williams, *The Case for an Australian Bill of Rights*, (1st ed), 2004, 71
- <sup>26</sup> Human Rights Committee, General Comment 23: *The rights of minorities*, Fiftieth session, 1994, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev. 7, 158 [9].
- <sup>27</sup> Paragraph 5.1
- <sup>28</sup> Paragraph 6.2
- <sup>29</sup> Consultation 50: Indigenous Human Rights Forum, Melbourne
- <sup>30</sup> Human Rights Committee General Comment 23: *The rights of minorities*, above n26, [7].
- <sup>31</sup> Article 12
- <sup>32</sup> See for example *Medical Treatment Act 1988* (Vic), s 5(1)
- <sup>33</sup> *R v Oakes* [1986] 1 SCR 103, 137-8, per Dickson CJ

### Chapter 3 Who should the charter apply to?

- <sup>1</sup> Human Rights and Equal Opportunity Commission, *Human Rights Explained*, <[www.hreoc.gov.au/hr\\_explained/index.html](http://www.hreoc.gov.au/hr_explained/index.html)> at 14 November 2005
- <sup>2</sup> *McDonald v Canada* [1995] 3 SCR 199
- <sup>3</sup> Submission 731: Committee for Melbourne
- <sup>4</sup> The Global Compact, Corporate Citizenship in the World Economy, *The Ten Principles*, <<http://www.unglobalcompact.org/Portal/Default.asp?>> at 14 November 2005
- <sup>5</sup> United Kingdom Audit Commission, *Human Rights: Improving Public Service Delivery* (2003) [51, 53] <<http://www.audit-commission.gov.uk/reports/NATIONAL-REPORT.asp?CategoryID=&ProdID=FDE9C6A9-7DAF-4cd3-B21E-21E9E13E1D43&SectionID=sect14#>> at 14 November 2005
- <sup>6</sup> Consultation forum 34: Academic Roundtable
- <sup>7</sup> *Aston Catlow* [2003] UKHL 37
- <sup>8</sup> Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act' House of Lords and House of Commons, HL Paper 39 HC 382 Seventh Report of Session 2003-04
- <sup>9</sup> United Kingdom Home Secretary, House of Commons Debate, 17 June 1998, col 433
- <sup>10</sup> *Lipohar v The Queen; Winfield v The Queen* (1999) 200 CLR 485
- <sup>11</sup> *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 183 CLR 10
- <sup>12</sup> Consultation 15: Mayor Vendy, City of Ballarat
- <sup>13</sup> G McKinnon, *The ACT Human Rights Act 2004 – The First Year*, (2005), Gilbert and Tobin Centre of Public Law [http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/17\\_GabrielleMcKinnon.pdf](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/17_GabrielleMcKinnon.pdf) at 14 November 2005
- <sup>14</sup> Submission 507: Dr Simon Evans and Dr Carolyn Evans
- <sup>15</sup> Submission 186: Public Interest Law Clearing House, Homeless Persons' Legal Clinic

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### Chapter 4 Institutions of Government

- <sup>1</sup> Submission 73: G Abrahams; Submission 92: The Jasmine Foundation; Submission 445: J Pope; Submission 807: Malleons Stephen Jaques Human Rights Group; Submission 507: Dr Simon Evans and Dr Carolyn Evans
- <sup>2</sup> Submission 134: Marg D'Arcy; Submission 139: Victorian Bar; Submission 362: S Humphries; Submission 456: Office of the Public Advocate; Submission 472: Uniting Care Victoria and Tasmania; Submission 1014: Victorian Council of Social Service; Submission 1138: Feminist Lawyers; Submission 773: Victoria Police; Submission 839: Dr. Julie Debeljak; Submission 1171: Victorian Privacy Commissioner; Submission 122: Dr. James Kelly and Dr. Janet Hiebert; Submission 1060: Jon Stanhope, MLA, Chief Minister of the ACT
- <sup>3</sup> Submission 839: Dr Julie Debeljak
- <sup>4</sup> Simon Evans, Legal Studies Research Paper No. 124 – *Improving Human Rights Analysis in the Legislative and Policy Process*, The University of Melbourne, Melbourne Law School, July 2005, as referred to in Submission 507: Dr. Simon Evans and Dr. Carolyn Evans.
- <sup>5</sup> Submission 842: The Charter Group; Submission 840: Professor Marcia Neave and Professor Spencer Zifcak; Submission 795: Kess Dovey
- <sup>6</sup> Submission 128: Law Institute of Victoria; Submission 795: Kess Dovey; Submission 840: Professor Marcia Neave and Professor Spencer Zifcak; **Submission 842: The Charter Group**
- <sup>7</sup> For example, Submission 807: Malleons Stephen Jaques Human Rights Group
- <sup>8</sup> Submission 128: Law Institute of Victoria; Submission 795: Kess Dovey; Submission 840: Professor Marcia Neave and Professor Spencer Zifcak; **Submission 842: The Charter Group**
- <sup>9</sup> Submission 140: Jonathan Wilkinson; Submission 1682: L Matthews
- <sup>10</sup> See, *International Covenant on Civil and Political Rights* 1966, art 4.

- <sup>11</sup> Submission 122: Dr. James Kelly and Dr. Janet Hiebert
- <sup>12</sup> Submission 22: Scrutiny of Acts and Regulations Committee
- <sup>13</sup> Submission 816: Equal Opportunity Commission Victoria; Submission 164: Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church of Australia; Submission 470: Victoria Legal Aid; Submission 807: Mallesons Stephen Jaques Human Rights Group; Submission 1080: Australian Centre for Human Rights; Submission 1043: Public Interest Law Clearing House
- <sup>14</sup> Joint Committee on Human Rights *The Work of the Committee in the 2001–2005 Parliament*, House of Lords and House of Commons, Nineteenth Report of Session 2004-05
- <sup>15</sup> Submission 22: Scrutiny of Acts and Regulations Committee
- <sup>16</sup> Submission 122: Dr. James Kelly and Dr. Janet Hiebert
- <sup>17</sup> Submission 22: Scrutiny of Acts and Regulations Committee; See also Submission 122: Dr. James Kelly and Dr. Janet Hiebert
- <sup>18</sup> Submission 507: Dr. Simon Evans and Dr. Carolyn Evans; Submission 958: Now we the People; Submission 820: FKA Children’s Services; Submission 842: The Charter Group
- <sup>19</sup> Submission 507: Dr. Simon Evans and Dr. Carolyn Evans
- <sup>20</sup> Submission 479: Royal Women’s Hospital; Submission 186: Public Interest law Clearing House Homeless Persons’ Legal Clinic; Submission 1085: Olivia Ball.
- <sup>21</sup> Submission 456: Office of the Public Advocate
- <sup>22</sup> Submission 186: Public Interest Law Clearing House Homeless Persons’ Legal Clinic
- <sup>23</sup> Submission 155: Castan Centre for Human Rights Law
- <sup>24</sup> Submission 842: The Charter Group
- <sup>25</sup> *Ghaidan v Ghodin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557, [33]
- <sup>26</sup> *Ghaidan v Ghodin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557, [110]
- <sup>27</sup> Submission 1080: Australian Human Rights Centre; Submission 463: Civil Rights Network; Submission 165: Melbourne Sexuality Law Reform Committee; Submission 139: The Victorian Bar; Submission 1171: Paul Chadwick, Office of the Privacy Commissioner; and individual submissions such as **Submission 377: Alex Brook**.
- <sup>28</sup> Submission 338: Chris White; Submission 364: Rolf Sorensen; Submission 437: Rowan Creedon; Submission 384: NSW Council for Civil Liberties
- <sup>29</sup> Submission 41: Dan Meagher; Submission 840: Professor Marcia Neave and Professor Spencer Zifcak; Submission 816: Equal Opportunity Commission Victoria
- <sup>30</sup> Submission 41: Dan Meagher; Submission 840: Professor Marcia Neave and Professor Spencer Zifcak
- <sup>31</sup> Submission 839: Castan Centre for Human Rights Law; Submission 839: Dr. Julie Debeljak
- <sup>32</sup> Francesca Klug and Keir Starmer, ‘Standing Back from the Human Rights Act: How Effective is it Five Years On?’ [2005] *Public Law*, Winter, 720
- <sup>33</sup> Submission 816: Equal Opportunity Commission Victoria
- <sup>34</sup> Submission 816: Equal Opportunity Commission Victoria
- <sup>35</sup> Submission 842: The Charter Group; Submission 840: Professor Marcia Neave and Professor Spencer Zifcak; Submission 1167: Justice Bell; Submission 795: Kess Dovey; Submission 807: Mallesons Stephen Jaques Human Rights Group
- <sup>36</sup> Submission 1167: Justice Bell.
- <sup>37</sup> Submission 1167: Justice Bell.
- <sup>38</sup> Submission 840: Professor Marcia Neave and Professor Spencer Zifcak; Submission 842: The Charter Group; Submission 795: Kess Dovey
- <sup>39</sup> Submission 456: Office of the Public Advocate; Submission 795: Kess Dovey; Submission 816: Equal Opportunity Commission Victoria; Submission 840: Professor Marcia Neave and Professor Spencer Zifcak

### Chapter 5 Building a Human Rights culture

- <sup>1</sup> Department of Education and Training, *Ideas for Human Rights Education*, (2005).
- <sup>2</sup> I Massey, 'Developing a Rights-Based Culture in Schools', (2005) *BIHR BRIEF: The Newsletter of the British Institute of Human Rights*, 9
- <sup>3</sup> See Equal Opportunity Commission Victoria <<http://www.equalopportunitycommission.vic.gov.au/default.asp?nc=3946&id=125>>, at 14 November 2005
- <sup>4</sup> Centre for Research and Information on Canada, *Is the Charter uniting or dividing Canadians?* (2002), 4, [http://www.cric.ca/pdf/cahiers/cricappers\\_april2002.pdf](http://www.cric.ca/pdf/cahiers/cricappers_april2002.pdf)> at 22 November 2005.
- <sup>5</sup> See for example Submission 816: Equal Opportunity Commission Victoria
- <sup>6</sup> See Department for Constitutional Affairs, *Guidance on the Human Rights Act*, <<http://www.dca.gov.uk/hract/guidlist.htm>> at 14 November 2005
- <sup>7</sup> See Submission 18: Stewart Bessant, Cultural Development Network; Submission 63: Chindar Teo; Submission 363: Bianca Jayawardena; Submission 376: Reta Pretam Kaur; Submission 811: Municipal Association of Victoria;
- <sup>8</sup> Submission 78: Hume City Council
- <sup>9</sup> Hume City Council, *Inaugural Citizens Bill of Rights* <[http://www.hume.vic.gov.au/Page/page.asp?Page\\_Id=298&h=0#BM1111](http://www.hume.vic.gov.au/Page/page.asp?Page_Id=298&h=0#BM1111)> at 14 November 2005
- <sup>10</sup> *Human Rights Act 2004 (ACT)*, s 41
- <sup>11</sup> Joint Committee on Human Rights, *The Case for a Human Rights Commission* House of Lords and House of Commons HL Paper 67-I, HC Paper 489-I, Sixth Report of Session 2002–03, [99].
- <sup>12</sup> The human rights audit of Quamby Youth Detention Centre is available at ACT Human Rights Office <<http://www.hro.act.gov.au/publications.html>> at 14 November 2005. The ACT Government response is available at ACT Department of Disability, Housing and Community Services <<http://www.dhcs.act.gov.au/>> at 14 November 2005
- <sup>13</sup> Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, speaking at a Victorian Department of Justice Workshop on 18 July, 2005.
- <sup>14</sup> Elizabeth Kelly, *The ACT Human Rights Act 2004 – A Year On* (2005) available at Equal Opportunity Commission Victoria at <<http://www.equalopportunitycommission.vic.gov.au/pdf/elizabethkelly.pdf>> at 14 November 2005
- <sup>15</sup> The Audit Commission Press Office, *Three Years On: Public Services Urged to take Human Rights Act into Account*, (Press Release), United Kingdom Audit Commission <http://www.audit-commission.gov.uk/reports/PRESS-RELEASE.asp?CategoryID=PRESS-CENTRE&ProdID=0C48A4AD-0929-4b97-B290-96F2BB700F50>> at 14 November 2005
- <sup>16</sup> Hansard, House of Lords, 16 Jan 2004 : Column 743, at <[http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds04/text/40116-01.htm#40116-01\\_head0](http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds04/text/40116-01.htm#40116-01_head0)> at 14 November 2005

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### Chapter 6 What happens if there is a breach of the charter?

- <sup>1</sup> In *Ashby v White* (1703) 2 Ld Raym 938, 953; 92 ER 126, 136
- <sup>2</sup> *R v Upton* [2005] ACTSC 52
- <sup>3</sup> *Merritt and the Commissioner for Housing* [2004] ACTAAT 37.
- <sup>4</sup> It should be noted that Victoria Police were not convinced that a Charter was needed.
- <sup>5</sup> United Kingdom Law Commission, *Monetary Remedies in Public Law*, Report of Seminar, (2004) 3 <[http://www.lawcom.gov.uk/docs/Final\\_report.pdf](http://www.lawcom.gov.uk/docs/Final_report.pdf)> at 14 November 2005
- <sup>6</sup> *Ombudsman Act 1973* (Vic), s 23
- <sup>7</sup> David Mullan, 'A Comparison of the Impact of the New Zealand Bill of Rights Act and the Canadian Charter of Rights and Freedoms in Judicial Review of Administrative Act' (2003) 1, *New Zealand Journal of Public and International Law*, 115-155

<sup>8</sup> *R (P and Q) v Sec State Home Department* [2002] 2 FLR 1122

<sup>9</sup> *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667

<sup>10</sup> Richard Clayton, 'Damage limitation: the courts and Human Rights Act damages' (2005) 3 *Public Law*, 429, 439

<sup>11</sup> *In Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, the Court of Appeal described damages as a remedy of last resort and confirmed that the fundamental principle underlying an award is that a claimant should, as far as possible, be placed in the position that he/she would have been in but for the breach of rights.

<sup>12</sup> See for example Submission 456: Office of the Public Advocate

<sup>13</sup> See for example Submission 127: Agwair Rual; Submission 339: Human Rights Legal Centre

<sup>14</sup> See for example Submission 139: Victorian Bar; Submission 339: Human Rights Legal Centre; Submission 842: The Charter Group

<sup>15</sup> Submission 446: Victorian Gay and Lesbian Rights Lobby

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### Chapter 7 Commencement and Review

<sup>1</sup> Submission 1080: Australian Human Rights Centre

<sup>2</sup> Jeremy Croft, 'Whitehall and the Human Rights Act 1998', The Constitution Unit, School of Public Policy, University College London, (2000), 64-67

<sup>3</sup> See for example Submission 470: Victoria Legal Aid; Submission 128: Law Institute of Victoria; Submission 456: Office of the Public Advocate; Submission 1043: Public Interest Law Clearing House Inc

<sup>4</sup> Submission 1014: Victorian Council of Social Service

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### Chapter 8 Our Consultation

<sup>1</sup> Submission 111: John Halford; Submission 417: B. Sloan; Submission 451: Tim Armytage; Submission 728: City of Whittlesea

<sup>2</sup> Submission 959: Federation of Community Legal Centres (Vic)

<sup>3</sup> Submission 128: Law Institute of Victoria; Submission 165: Melbourne Sexuality Law Reform Committee; Submission 21: West Heidelberg Community Legal Service; Submission 728: City of Whittlesea; Submission 947: Victorian Local Governance Association; Submission 959: Federation of Community Legal Centres (Vic)

<sup>4</sup> Submission 128: Law Institute of Victoria

<sup>5</sup> Submission 128: Law Institute of Victoria

<sup>6</sup> Submission 456: Office of the Public Advocate; Submission 128: Law Institute of Victoria; Submission 112: Council of Intellectual Disability Agencies; Submission 463: Civil Rights Network; Submission 476: Women's Health West; Submission 841: Women's Rights Action Network Australia; Submission 1014: Victorian Council of Social Service; Submission 1043: Public Interest Law Clearing House; Submission 84: Melbourne Unitarian Peace Memorial Church; Submission 728: City of Whittlesea; Submission 947: Victorian Local Governance Association; Submission 954: The Justice Project; Submission 956: Youth Affairs Council of Victoria; Submission 959: Federation of Community Legal Centres (Vic.); Submission 1173: Darebin City Council

<sup>7</sup> Submission 112: Council of Disability Agencies; Submission 947: Victorian Local Governance Association; Submission 959: Federation of Community Legal Centres (Vic)

<sup>8</sup> Submission 187: Tania Jones

<sup>9</sup> B. Galligan and I. McAllister, 'Citizen and Elite Attitudes Towards an Australian Bill of Rights' in B. Galligan and C. Sampford (eds), *Rethinking Human Rights*, 1997

<sup>10</sup> Salt Shakers Inc. (Christian Ethics in Action) <<http://www.saltshakers.org.au/>> at 21 October 2005

<sup>11</sup> Standing Committee on Law and Justice, Parliament of New South Wales, *A NSW Bill of Rights*, Report 17, October 2001, <<http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/>> at 14 November 2005

<sup>12</sup> Australian Capital Territory, ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act, Report of the ACT Bill of Rights Consultative Committee*, May 2003, <<http://www.jcs.act.gov.au/prd/rights/reports.html>> at 14 November 2005



## Appendices

## Appendix A – Rights protected by the Charter

The following table lists the rights recommended for inclusion in the Charter, as well as a short description of each right.

Human Right	Charter Section	ICCPR Article	Description
Recognition and equality before the law	7	16, 26	This says that everyone has the right to be recognised as a person before the law and is equal before the law. It means that all people are entitled to be protected equally by the law without discrimination because of things such as race, colour, gender identity, religion or impairment. It says that sometimes special measures are needed to enable some members of the community to achieve equality. These measures will not be unlawful under the Charter.
Right to life	8	6	This right protects life from the time of birth. It prohibits the arbitrary taking of someone's life in all circumstances.
Protection from torture, cruel, inhuman or degrading treatment	9	7	This protects people from torture and from other treatment that is inhuman and degrading.
Freedom from forced work	10	8	This prohibits slavery, servitude, or forced or compulsory labour.
Freedom of movement	11	12	This right recognises that people have the right to move freely and to live where they choose within Victoria. It also says that people have the right to enter and leave the State.
Privacy and reputation	12	17	This protects people from interference with their privacy and from attacks on their reputation.
Freedom of thought, conscience, religion and belief	13	18	This means that people have freedom of thought on all matters including the freedom of their personal, philosophical and political convictions. It also says that people have the right to choose and practise their religion (or choose not to have any religion).
Freedom of expression	14	19	This means that people have the right to hold opinions without interference. People also have the right to express themselves freely, subject to some limitations.



Human Right	Charter Section	ICCPR Article	Description
Peaceful assembly and freedom of association	15	21, 22	This says that everyone has the right to meet with others and to join and form associations, including trade unions.
Protection of families and children	16	23, 24	This says that families are important and are entitled to protection by society and the State. It also says that children have the right to be protected without any form of discrimination.
Taking part in public life	17	25	This means that Victorians have the right and must be given the opportunity and access to take part in public life and public decisions that affect them. This includes the right to vote, to be elected at periodic elections and to access appointment to the Victorian public service and public office for persons who are eligible under Victorian law.
Cultural rights	18	27	This states that people in minority groups are entitled to respect and understanding and have the right to enjoy their culture, practise their religion and use their language. It also recognises the cultural rights of Indigenous peoples.
Property rights	19	–	This protects people from having their property taken away from them except if this is permitted by law.
Right to liberty and security of the person	20	9, 11	This creates a presumption in favour of liberty and sets out the rights of people who are arrested or detained.
Humane treatment when deprived of liberty	21	10	This sets out the minimum standards of treatment that should apply to people when they are detained.
Children in the criminal process	22	10	This specifies additional guarantees for children detained in connection with a criminal offence.
Fair hearing	23	14	This means that everyone has the right to a fair and public hearing for criminal and civil matters, except where hearings need to be conducted in private.

*Appendix A – Rights protected by the Charter (continued)*

Human Right	Charter Section	ICCPR Article	Description
Rights in criminal proceedings	24	14	This contains additional guarantees for a fair trial in criminal proceedings. These include the presumption of innocence and to be tried without unreasonable delay.
Right not to be tried or punished more than once	25	14	This means that a person cannot be tried or punished again for a criminal offence for which they have already been convicted or acquitted.
Retrospective criminal laws	26	15	This means that a person cannot be convicted where their actions were not a crime when they occurred. It also means that a person cannot receive a heavier penalty than the penalty in place when the crime was committed.

## **Appendix B – Human Rights Statement of Intent, May 2005**

The Attorney-General's Justice Statement was approved by Cabinet and released in May 2004. It established as a priority the need to ensure that human rights are valued and protected and that issues of inequality and disadvantage are demonstrably addressed by the justice system. The commitment also supported the Government's agenda to restore democracy in Victoria and strengthen its democratic institutions.

A commitment was made to consult with the Victorian community on how best to protect and promote human rights in Victoria.

### **Establishing the Consultation – the Human Rights Consultation Committee**

The Government believes that the views of Victorians can best be sought by the establishment of a committee of independent persons who are eminent in their fields and respected in the community. It has appointed four people to form the Government's Human Rights Consultation Committee – Professor George Williams, who will chair the Committee, Ms Rhonda Galbally, Mr Andrew Gaze and Professor Haddon Storey QC. They will undertake the consultation and provide a report back to the Government on human rights issues in Victoria. The Committee will focus on identifying a human rights framework that serves Victorians' needs in the future rather than engaging in an account of current and past policies and actions.

### **Context for the Consultation**

Victorians are justifiably proud of their system of government and the rights and freedoms that it protects. We take for granted many rights that are still disputed in other parts of the world such as the right to vote, freedom of assembly and the right to a fair trial. The Government has already acted to improve and protect these rights by reforming the electoral system for the Legislative Council, and enhancing the independence of offices such as the Auditor-General and Director of Public Prosecutions.

The Government also has a strong record on addressing disadvantage. *A Fairer Victoria* maps out a comprehensive framework for further action to assist those who are most likely to experience hardship and disadvantage in our community.

The Human Rights Consultation Committee will continue this process of strengthening our democratic institutions and addressing disadvantage by examining what type of improvements could be made to protect and promote human rights in Victoria.

The human rights field is potentially very wide and the Government wishes the Committee to focus on those areas that the Government believes are most relevant to strengthening our democratic institutions and addressing disadvantage. The purpose of this document is to

*Appendix B – Human Rights Statement of Intent, May 2005 (continued)*

provide the Committee and the community with an indication of the scope of the issues which the Government considers should form the basis for the Committee's consideration and for submissions and comment from the community.

### **Preferred Human Rights Model**

The Government is concerned to ensure that the sovereignty of Parliament is preserved in any new approaches that might be adopted to human rights. In the Westminster system of government, a government is accountable through Parliament for its policies and actions. The community judges the record of a government at each election when it elects a new Parliament. A government should be able to pass laws and make policies that affect human rights on the basis that it will be accountable for those actions through the ballot box.

The Government is interested in a model similar to that used in the United Kingdom, New Zealand and most recently, the Australian Capital Territory, in which rights are contained in an Act of Parliament. The importance of human rights means that in practice legislatures are reluctant to modify the provisions of these Acts, but the principle of parliamentary sovereignty is respected in the power to make amendments if these are considered necessary.

The Government would focus on prevention and dispute mediation rather than litigation by ensuring that its policies and programs reflect good human rights practice and are therefore not likely to be challenged as breaching human rights standards. It is attracted to the procedures used in the UK, New Zealand and the ACT whereby legislation being introduced into Parliament is certified as complying with the jurisdiction's human rights obligations. This ensures that Ministers and their departments consider the impact of proposed legislation and policies on human rights before they become law.

The government does not wish to adopt a human rights model such as applies in the United States of America where the rights expressed in the constitutional Bill of Rights can be used to invalidate laws without recourse by the legislature. The Government believes that Parliament, as is currently provided for by the Victorian Constitution, should retain the final say, for which it can be held accountable by the people. Any model must operate within this constitutional framework.

### **Role of the Courts**

The courts have an important role to play in interpreting the law and enforcing rights and obligations. The Government's approach is to address human rights issues through mechanisms that promote dialogue, education, discussion and good practice rather than litigation. It is through such mechanisms that acceptance and support of human rights will be promoted in the community.

The Committee is therefore asked to focus on measures that would encourage continuing dialogue on human rights in the community and how they are balanced against each other.

### ***Individual Rights of Action***

Consistent with its focus on dispute prevention, the Government does not wish to create new individual causes of action based on human rights breaches.

### **Content of the Rights to be Protected**

There are many international treaties and covenants that recognise human rights. Some of the rights are general, such as those found in the International Covenants on Civil and Political Rights (ICCPR), and on Economic, Social and Cultural Rights (ICESCR), while others are specific to particular groups, such as the Covenants on the Rights of the Child, and to Eliminate All Forms of Discrimination Against Women.

The primary purpose of this consultation is to identify those mechanisms that will strengthen Victorians' enjoyment of their democratic rights and the institutions that protect those rights. Those who are living in poverty and people from marginalised communities have often had the most need of the protections offered by the basic rights found in the ICCPR, such as the rights to equality before the law, to a fair trial, freedom of expression, and to freedom of thought, conscience and religion. These essential features of a democracy are often taken for granted but are not clearly expressed or fully protected in our system of government, unlike in every other developed nation. The Committee is asked to focus on the rights in the ICCPR in considering a statutory human rights model as a starting point in its deliberations. The Government's primary purpose in this initiative is to adequately recognise, protect and promote those rights that have a strong measure of acceptance in the community.

In addition, the Committee should consider whether the scope of operation of any of the ICCPR Rights which are adopted should be altered or limited to remove any ambiguity and to add certainty.

Legislating for the protection of the ICESCR rights, such as the right to adequate food, clothing and housing, is complicated by the fact that such rights can raise difficult issues of resource allocation and that many deal with responsibilities that are shared between the State and Commonwealth Governments. The Government also believes that Parliament rather than the courts should continue to be the forum where issues of social and fiscal policy are scrutinised and debated.

The issues associated with specific international covenants, such as the Covenant on the Elimination of All Forms of Discrimination Against Women, are extensive. Recognising that

*Appendix B – Human Rights Statement of Intent, May 2005 (continued)*

many of these rights are already protected in domestic equal opportunity legislation, the Committee is not asked to examine the rights contained in those covenants.

### **Consultation Process**

The Committee is to consult with the community by seeking and deliberating on written submissions from members of the Victorian community on this Statement of Intent for human rights. In considering the submissions that it receives, the Committee may also wish to arrange meetings and other forms of constructive discussion with those who have made submissions. The Committee is also to adopt strategies for engaging with marginalised and disadvantaged communities, as well as strategies to ensure that people from regional and rural areas are given the opportunity to have their say.

### **Recommendations**

The Committee is asked to make recommendations on a suitable framework for human rights in Victoria based on the preferences expressed in this Statement of Intent and the views of the Victorian community expressed in the submissions that it receives and in subsequent consultations that it may undertake.

### **Report Date**

The Committee is asked to report by 30 November 2005.

## **Appendix C – Devolved Consultations**

### **Victorian Council of Social Service (VCOSS) and the Federation of Community Legal Centres (Vic.)**

#### **‘Human rights community education and engagement project’**

VCOSS and the Federation of Community Legal Centres utilised their community networks to access a broad range of people who might not otherwise engage in a human rights dialogue and/or who may need particular support to participate in consultation.

A total of fifteen community education and consultation sessions were conducted during August and September. These were attended by approximately 137 people. The sessions held were with:

- Clients, families and workers of the Victorian Alcohol and Drug Association (VAADA), the Association of Participating Service Users (APSU) and VIVAIDS
- Rooming house residents in St Kilda (two sessions)
- Women in prison (Dame Phyllis Frost Centre, Deer Park)
- Community workers – Metropolitan Eastern Region held in conjunction with the Whittlesea and Eastern Community Legal Centre
- Community youth / CALD workers experienced in working with young people and people from non-English speaking backgrounds
- People on low incomes in rural Victoria (Bendigo) – Participants were clients of the LCCLC and St Luke’s Anglicare (Bendigo), and were particularly concerned with issues around public housing, families on low incomes and child protection.
- Young people from culturally and linguistically diverse backgrounds, Centre for Multicultural Youth Issues
- Single mothers, Council of Single Mothers and their Children
- People living with an intellectual disability
- Consumers of mental health services, advocates and workers in the mental health sector
- People living with a disability, co-hosted by Villamanta Legal Service and the Mental Health Legal Service, with participants including people with a disability, advocates and workers with people with disabilities
- Members of the African Women's Group at the Inner South Community Health Service
- Turkish Muslim Women’s Group,
- Indigenous people in regional Victoria, Mildura Aboriginal Co-operative.

*Appendix C – Devolved Consultations (continued)*

The standardised questionnaire style submission form was also distributed by VCOSS and the Federation through various networks, and made available on their respective websites. The Committee received a total of 323 submissions in this style.

**PILCH Homeless Persons’ Legal Clinic**

The PILCH Homeless Persons’ Legal Clinic conducted 11 consultative workshops with homeless people. Participants in the workshops were currently experiencing homelessness or had recently experienced homelessness. Each workshop was facilitated by two to three lawyers from the Homeless Persons’ Legal Clinic and two to three people with prior first-hand experience of homelessness. The workshops were conducted at the following locations:

- The Big Issue;
- Flagstaff Crisis Accommodation;
- HomeGround Argyle Housing;
- Ozanam House (St Vincent de Paul);
- Credo Café;
- The Life Centre (Salvation Army);
- St. Peter’s Eastern Hill Breakfast Program (Anglicare);
- The Lazarus Centre (Anglicare);
- Melbourne City Mission;
- Hanover Southbank; and
- Public Interest Law Clearing House, (specifically targeting at homeless people who were not regularly connected with services).

A total of 106 people participated in the workshops. The structured questionnaires were completed by each of the participants and forwarded to the Committee as individual submissions.

**Youth Affairs Council of Victoria/Youthlaw**

The Youth Affairs Council (YACVic) and YouthLaw undertook specific consultations targeting young people. Utilising their existing networks, they facilitated six focus groups comprising a diverse range of young people. These focus groups were with:



- Cutting Edge Youth Services in Shepparton – workshop with 18 young men;
- Cutting Edge Youth Services in Shepparton – workshop with 17 young women;
- The Youth Affairs Council of Victoria Youth Reference Group – workshop with 14 young people;
- EVs Youth Centre;
- Western Young People’s Independent Network in Footscray – workshop with 9 young people; and
- Frontyard Youth Services in Melbourne – workshop with 5 young people who were homeless or at risk of homelessness.

In addition, YACVic and YouthLaw prepared specific materials to assist young people to make written submissions to the Committee. These were distributed by YacVic and YouthLaw through various youth networks, and electronic copies were placed on their respective websites.

### **The Charter Project and the Justice Project website**

These groups established a website resource. The aim of the project was to provide widely accessible public education material on human rights and human rights charters.

## Appendix D – List of people, groups and organisations who made submissions and written responses

1	Name Withheld By Request	38	J MacManus	80	K Brownless
2	P Rogers	39	D Pollard	81	S Prosser
3	C Osborne	40	C King	82	P & H Drew
4	D Mckenzie	41	D Meagher, School of Law, Deakin University	83	Name Withheld By Request
5	Name Withheld By Request	42	A Van De Kerkhof	84	Melbourne Unitarian Peace Memorial Church
6	A Wheatly	43	G Proctor	85	Name Withheld By Request
7	S Neill	44	R & M Pryor	86	Name Withheld By Request
8	T Kokkinos-Kennedy	45	D Kranz	87	Geelong Refugee Action & Information Network
9	W Chennell	46	D Fitzgerald	88	M Usher
10	Dr E Sutherland	47	K Clancy	89	G Lanyi
11	Nikit	48	R Weber	90	A Duggan
12	P Campbell	49	J De Angelis	91	Women’s Domestic Violence Crisis Service Victoria
13	P Sanader	50	P Mcintyre	92	The Jasmine Foundation
14	M Worrall	51	O Clarke	93	R Khayat
15	Name Withheld By Request	52	M Mazur	94	Name Withheld By Request
16	J Tough	53	J Foong	95	C Williams
17	J Morkham	54	Name Withheld By Request	96	A Stefano
18	S Bessant	55	G Tresise	97	Communications Law Centre
19	Name Withheld By Request	56	M Glover	98	J Kimmler
20	A Tuffnell	57	J F Nolan	99	H Casanova
21	West Heidelberg Community Legal Service	58	W Suiter	100	J Evans
22	Scrutiny Of Acts & Regulations Committee	59	R Franklin	101	Manyang Berbei
23	B Sansome	60	J O’Callaghan	102	RJ Leschke
24	J Spark	61	Ombudsman Victoria	103	R Mcglade
25	M Kottek	62	C Grech	104	Name Withheld By Request
26	A Kenos	63	C Teo	105	Moir Shire Council, Disability Advisory Committee
27	R Lawrie	64	K T Davies	106	Larysa
28	F Triolo	65	V Breadon	107	Community Child Care
29	Name Withheld By Request	66	S J Staats	108	J Rouw
30	S Johnston	67	O Ball	109	Endeavour Forum Inc
31	Cultural Development Network	68	D Foster	110	SSachs
32	T Graves	69	H Edge	111	J Halford
33	K Alexander	70	Name Withheld By Request	112	Council Of Intellectual Disability Agencies
34	P Gluyas	71	Working Against Sexual Harassment (Wash)	113	S Stuart
35	D M Herde	72	P Irani		
36	Name Withheld By Request	73	G Abrahams		
37	H Dindas	74	R Gates		
		75	B Quinn		
		76	Name Withheld By Request		
		77	K Mischkulnig		
		78	Hume City Council		
		79	P Lillingston		

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114	P McGrath	153	Y Sungkar	186	Public Interest Law
115	A Hartwig	154	D Kinngan		Clearing House
116	M Farrelly	155	Castan Centre For		Homeless Person's
117	J-C Tham		Human Rights Law,		Legal Clinic
118	M Sibly		Monash University	187	T Jones
119	J Bourke	156	Name Withheld	188	E Griffin
120	S Kelly		By Request	189	M Griffin
121	M Skermer	157	Name Withheld	190	G Swney
122	Dr J B Kelly, Concordia		By Request	191	S Trevail
	University & Dr J Hiebert,	158	A Hartwick	192	L Dawsey
	Queens University,	159	J Kingman	193	G Gallery
	Canada	160	R Jankovic	194	C Frawklin
123	A Hassan	161	Social Justice	195	Name Withheld
124	A Clendinnen		Committee, Croydon		By Request
125	Name Withheld		Uniting Church	196	S Lemin
	By Request	162	Civil Liberties Australia	197	R Mason
126	Name Withheld	163	D L Harris	198	G Mason
	By Request	164	Justice & International	199	J Edney
127	A Rual		Mission Unit, Synod Of	200	J Heeman
128	Law Institute Of Victoria		Victoria & Tasmania,	201	J Blyth
129	Name Withheld		Uniting Church In	202	S Bliss
	By Request		Australia	203	D Stalden
130	S Clendinnen	165	Melbourne Sexuality Law	204	T Cooper
131	M & A Corbooy		Reform Committee	205	Name Withheld
132	S Milton	166	S Tonkin		By Request
133	C P Maxwell	167	T Conte	206	L Arcanman
134	M D'Arcy	168	A Ballingall	207	R Stevans
135	P Edwards	169	A Migliorelli	208	R Bloore
136	B Alderman-Bates	170	R Andrews	209	G Lemmer
137	Insane Australia	171	Eastern Suburban	210	A Bakri
138	M Nazzari		Law Association	211	J Lockwood
139	The Victorian Bar	172	R Smith	212	R Wade
140	J Wilkinson	173	S Rankin	213	W Ross
141	Name Withheld	174	B Dodds	214	L Hurrell
	By Request	175	Name Withheld	215	R Rowlands
142	L Matthews		By Request	216	D Condick
143	S Licht	176	N G Hoare	217	H Douros
144	KM Stodden	177	Gay And Lesbian Health	218	G Conelan
145	J Broadhurst		Victoria	219	L Benett
146	V Kacala	178	J Stanger	220	A Hurley
147	M Hoey	179	T Pitt	221	S Evans
148	P Bridger	180	P Rosenfeldt	222	R Lane
149	J Morley	181	K M Stodden	223	J Worters
150	J A Bohan	182	T Smith	224	R Jones
151	B Shimmen	183	L Riley	225	C Williams
152	Name Withheld	184	I Natrass	226	M Henarath
	By Request	185	N Sommerville	227	A Funnawell

*Appendix D – List of people, groups and organisations who made submissions and written responses (continued)*

228	B Strain	275	S Whitehead	321	V Ray
229	R Bilszta	276	J Parnowitz	322	Social Concerns
230	J Park	277	C R Coustable		Committee, Deepdene
231	D Boon	278	J Stafford		Uniting Church
232	P Lucas	279	T Ford	323	Centre For Equity
233	C Otto	280	D J Howard		And Innovation In Early
234	B Park	281	L Smith		Childhood, University
235	C Burke	282	A Munari		Melbourne
236	D Fovey	283	P Dewhurst	324	Scope & Australian Group
237	D Shore	284	J Raffel		On Severe
238	M Chmielewski	285	H S Rimshaw		Communication
239	D Crofts	286	Marissa		Impairment Victoria
240	C Zan	287	I Natrass		Branch
241	C Norris	288	K Gopal	325	B Crljen
242	S Woods	289	B A Reade	326	B Amini
243	M Hapnin	290	A Plumbe	327	Name Withheld
244	P Farrell	291	J Magassy		By Request
245	W Baan	292	Dr D Clarnette	328	T Saliba
246	J W Cormody	293	G Shaw	329	D Grills
247	D Banertti	294	G Dawe	330	Name Withheld
248	G Ahearne	295	A Munden		By Request
249	E Gouindanaj	296	D Kenneally	331	Pax Christi Australia
250	K Davies	297	M Psihogios-Billington	332	A Grills
251	T Steinthal	298	G Byrne	333	A Buckley
252	W Coleman	299	A Bassett	334	G Koh
253	M Cantwell	300	A Lane	335	National Council Of
254	T Brabham	301	M Hood		Jewish Women Victoria
255	T Armitage	302	J Sloan	336	N Ryan
256	J Estorninho	303	L W Martin	337	J Kalogridis
257	B Mckenzie	304	D Wain	338	C White
258	L Kane	305	J Peet	339	Human Rights
259	A Crabbe	306	D & R Dobson		Legal Centre
260	D Dickman	307	V Soo	340	P Hume
261	T Martin	308	R Malins	341	J Lane
262	G Knudsen	309	Matrix Guild Victoria Inc	342	A Bergen
263	E Argut	310	Dr K Eckersall	343	B Mitchell
264	D Smith	311	T Winter	344	Dr A Igai
265	B Staff	312	D Lim	345	K & S Jeans
266	S Connolly	313	A Halma	346	N Brian
267	R Stolesda	314	R Thiele	347	G Moffatt
268	P Roberts	315	Salt Shakers	348	L Anderson
269	J Kiss	316	W & P Lentsment	349	H Paynter
270	A J Brown	317	S Muiznieks	350	T Smith
271	L Mc Kee	318	H Kilminster	351	T Bryar
272	K Marriott	319	Name Withheld	352	M Hadjilexiou
273	M J Shaw		By Request	353	B Batty
274	B Gibson	320	P Garbe	354	R Russell & M Ross

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355	J Law	394	B & G Tomasich	437	R Creedon
356	Name Withheld By Request	395	A Phorugngam	438	C Thomas
357	Disability Discrimination Legal Service Inc	396	V Brissenden	439	R Cummings
358	R McRae	397	Council To Homeless Persons	440	L Brown
359	S Ridley	398	C Coleborn	441	Name Withheld By Request
360	R Whitford	399	J A Anderson	442	J Mills
361	M Johnson	400	J Graham	443	Name Withheld By Request
362	S Humphries	401	G Shaw	444	R & L Krelle
363	B Jayawardena	402	M Mckenzie	445	J Pope
364	R Sorensen	403	N Healey	446	Victorian Gay & Lesbian Rights Lobby
365	D Coleman	404	A Wren	447	S Isle
366	Duty Of Care Inc	405	J Munro	448	B Skepper
367	S Goldner	406	F Bonnici	449	N Byrne
368	J Morrissey	407	R Withall	450	Name Withheld By Request
369	Name Withheld By Request	408	R Munro	451	T Armytage
370	Name Withheld By Request	409	Name Withheld By Request	452	D Plim
371	P McInerney	410	D Becker	453	F Monahan
372	K Earl	411	J A Anderson	454	B Bleeser
373	D Marshall	412	Name Withheld By Request	455	K Mullins
374	D & D Anderson	413	B Walters (SC)	456	Office Of The Public Advocate
375	C Rossum	414	L Palam	457	A Bleeker
376	P Kaur	415	R Birch	458	Mornington Peninsula Shire
377	A Brook	416	A Harris	459	A Mckenzie
378	C Morgan	417	B Sloan	460	J Gordon
379	C Hii	418	K Woulfe	461	Equity Research Centre Inc
380	Ms J Predl	419	M McCrohan	462	A Stone
381	M Boucher	420	G Bailey	463	The Civil Rights Network
382	Name Withheld By Request	421	G Hussey	464	G Cribb
383	Name Withheld By Request	422	P McCrohan	465	S Reside
384	NSW Council For Civil Liberties	423	B Earl	466	H McNamara
385	Voluntary Euthanasia Society Of Victoria	424	T McKenzie	467	Older Persons Action Centre
386	AGMC Committee	425	M & M Bohan	468	One World Network
387	C Coulson	426	T Bain	469	A Pickvance
388	M Niggl	427	K Adams	470	Victoria Legal Aid
389	S Charlton	428	J Klopogge	471	Dr S Evans – (Submission 1)
390	C Pink	429	Rainbow Network	472	Uniting Care, Victoria & Tasmania
391	F Martin	430	F Shand	473	The Cancer Council Victoria
392	J Moody	431	M Fountain		
393	D Johnston-Bell	432	Fertility Access Rights Lobby		
		433	Justin		
		434	T Kovac		
		435	L Miller		
		436	R McNair		

*Appendix D – List of people, groups and organisations who made submissions and written responses (continued)*

474	Albury-Wodonga Community Legal Service	507	Dr S Evans & Dr C Evans, University of Melbourne	551	L Daff
475	Tenants Union Of Victoria	508	K Raymond	552	W Sell
476	Women’s Health West	509	J Wills & K Nash	553	J Sell
477	C Stewart	510	M M Inerney	554	N Piestol
478	Rebecca	511	P Duyndam	555	A H Scott
479	The Royal Women’s Hospital	512	Dr J Gill	556	L Carey
480	Catholic Women’s League Of Victoria Wagga Wagga Inc Social Questions Committee	513	P Dennis	557	S & K Hartma
481	S Kress	514	S Johnson	558	R Spokes
482	C Svolos	515	R Allison, B Newton & U Brno	559	M Costello
483	The ALSO Foundation	516	A Kupcis	560	J Robinson
484	R Provan	517	B Tiewing	561	N Robinson
485	C Storm	518	P Blancy	562	T J Heinz
486	L Rosenthal	519	L Reilly	563	M Heinze
487	C Kyne	520	B Hickey	564	J Dunne
488	Centre Against Sexual Assault (Loddon Campaspe Region)	521	Van Der Velden	565	M Dunne
489	D Meagher, School Law, Deakin University (Submission 2)	522	B Bennett	566	B Heinze
490	Name Withheld By Request	523	I Briggs	567	E Heinze
491	Disability Support And Housing Alliance	524	D Briggs	568	S Heinze
492	H Robert	525	M Briggs	569	D Heinze
493	M Callahan	526	N Briggs	570	M Heinze
494	J Bohan	527	S Perkins	571	J Douma
495	T Miedecke	528	B Perkins	572	P Balcombe
496	Consumer Law Centre Victoria	529	Q Luke	573	D Briggs
497	C House	530	L K Keng	574	E Schlottmann
498	R Newell	531	T Garvett	575	Name Withheld By Request
499	J Studd	532	S G Eng	576	Name Withheld By Request
500	V Studd	533	Yc Goh	577	Name Withheld By Request
501	T & P Arnold	534	L Meng	578	Name Withheld By Request
502	B Murray	535	S Tan	579	Name Withheld By Request
503	A Hoysted	536	Sean	580	Name Withheld By Request
504	F Covill	537	Western Region Disability Network	581	Name Withheld By Request
505	D Kirsner	538	T F Yee	582	Name Withheld By Request
506	Bill Muehlenberg, Australian Family Association	539	N Mitaxa	583	Name Withheld By Request
		540	M H Smith	584	E Reichard
		541	J H Modra	585	Name Withheld By Request
		542	C B Modra	586	Name Withheld By Request
		543	A Sell		
		544	M Herbert		
		545	J M Douglas		
		546	A Everett		
		547	R Swan		
		548	D Finch		
		549	R Lorury		
		550	G Griffiths		

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587	Name Withheld By Request	617	Name Withheld By Request	641	Name Withheld By Request
588	Name Withheld By Request	618	Name Withheld By Request	642	Name Withheld By Request
589	Name Withheld By Request	619	Name Withheld By Request	643	Name Withheld By Request
590	Name Withheld By Request	620	Name Withheld By Request	644	Name Withheld By Request
591	S Gauci	621	Name Withheld By Request	645	Name Withheld By Request
592	Name Withheld By Request	622	Name Withheld By Request	646	Name Withheld By Request
593	Name Withheld By Request	623	Name Withheld By Request	647	Name Withheld By Request
594	R Duffy	624	Name Withheld By Request	648	Name Withheld By Request
595	S Filipowicz	625	Name Withheld By Request	649	Name Withheld By Request
596	Name Withheld By Request	626	Name Withheld By Request	650	Name Withheld By Request
597	K Suich	627	Name Withheld By Request	651	Name Withheld By Request
598	K Nolte	628	Name Withheld By Request	652	Name Withheld By Request
599	V Mullings	629	Name Withheld By Request	653	Name Withheld By Request
600	Name Withheld By Request	630	Name Withheld By Request	654	Name Withheld By Request
601	L Cornwell	631	Name Withheld By Request	655	Name Withheld By Request
602	L Van Negteren	632	Name Withheld By Request	656	Name Withheld By Request
603	Name Withheld By Request	633	Name Withheld By Request	657	Name Withheld By Request
604	Name Withheld By Request	634	Name Withheld By Request	658	Name Withheld By Request
605	J Boltin	635	Name Withheld By Request	659	Name Withheld By Request
606	F Klebber	636	Name Withheld By Request	660	Name Withheld By Request
607	Name Withheld By Request	637	Name Withheld By Request	661	Name Withheld By Request
608	Name Withheld By Request	638	Name Withheld By Request	662	Name Withheld By Request
609	K Stodden	639	Name Withheld By Request	663	Name Withheld By Request
610	M Nichells	640	Name Withheld By Request	664	Name Withheld By Request
611	Name Withheld By Request				
612	Name Withheld By Request				
613	Name Withheld By Request				
614	Name Withheld By Request				
615	Name Withheld By Request				
616	Name Withheld By Request				

*Appendix D – List of people, groups and organisations who made submissions and written responses (continued)*

665	Name Withheld By Request	702	S Ellis	740	M Wilson
666	Name Withheld By Request	703	P Dillon	741	Humanist Society Of Victoria
667	Name Withheld By Request	704	D Preston	742	Western Suburbs Legal Service Inc
668	Name Withheld By Request	705	C Chappell	743	J & R Mears
669	Name Withheld By Request	706	F Perry	744	Deaf Children Australia
670	Name Withheld By Request	707	F Dapiran	745	J C Lloyd
671	Name Withheld By Request	708	M Duggan	746	Attilesbica Australia
672	Name Withheld By Request	709	K Clow	747	P Ambikapathy
673	H Strnad	710	V Duggan	748	Gippsland Trades & Labour Council
674	I Marek	711	A Burke	749	M & R Pryor
675	J Habasque	712	B Stenshort	750	Lesbian & Gay Solidarity Melbourne
676	V Read	713	M Osborne	751	M Bekris
677	E Addis	714	R Shiells	752	N Wilson
678	H Wright	715	L Caridoi	753	Geelong Adolescent Sexuality Project
679	E Read	716	R Walson	754	Name Withheld By Request
680	M D Read	717	J Perkins	755	P A Robb
681	R G Oliver	718	B Palersch	756	Name Withheld By Request
682	J Gildea	719	S Folie	757	F Lavars
683	H Will	720	A Mcphate	758	R Gill
684	W Will	721	Name Withheld By Request	759	S Cambridge
685	R Harcourt	722	D Auhterlonie	760	F Moloney
686	C Lederman	723	C Storm	761	Name Withheld By Request
687	Name Withheld By Request	724	P Matthews	762	R Watson
688	C Rapport	725	C Waters	763	M Smith
689	P Rapport	726	J Talbot	764	P Hogson
690	Name Withheld By Request	727	D Hadden	765	A Skyring
691	R Ives	728	City Of Whittlesea	766	Name Withheld By Request
692	M Mcphote	729	Name Withheld By Request	767	N Ward
693	R Barrnes	730	J Crockett	768	Dr H Ward
694	J Gerrand	731	Committee For Melbourne	769	J Shannon
695	C Chow	732	Name Withheld By Request	770	K Salmon
696	F M Murnane	733	P Hatley	771	L Casanova
697	S Walsh	734	Older Women's Network	772	M Olomior
698	F Mcintosh	735	Social Justice Ministry Group Of The Canterbury Rd Community Of Congregations	773	Victoria Police
699	H Hodgens	736	Name Withheld By Request	774	D Robinson
700	M Hodgens	737	Building Mature Christian Ministries Inc	775	G Lee
701	G Illesca	738	T Chopra	776	I Johnston
		739	J Knight	777	J Handoll



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778	A Sadanandan	811	Municipal Association Of Victoria	848	Name Withheld By Request
779	K Smith	812	Name Withheld By Request	849	L Briskman
780	Australian Woman Network (Submission 1)	813	J Lynch	850	A Kirwan
781	Name Withheld By Request	814	C & K Priest	851	N Wheatland
782	Disability Advisory Council Of Victoria	815	D Lynch	852	F Green
783	Domestic Violence & Incest Resource Centre	816	Equal Opportunity Commission Victoria	853	S Edwards
784	Name Withheld By Request	817	Festival Of Light Australia	854	M Carthy
785	L De Summa	818	David	855	T Holmes
786	G Murray	819	The ALSO Foundation	856	M Moss
787	Australian Federation Of University Women Victoria	820	FKA Children's Services	857	C Baxter
788	A Bowen	821	S Smith	858	L Polineni
789	Queer Greens	822	A Managhan	859	D Stevanovic
790	E Stahr	823	G Gosling	860	A Dean
791	G Cranfield	824	K Williams	861	O Didumo
792	E Crossland	825	B Dugga	862	W Sampson
793	A Cribbes	826	K Incerti	863	V Vasilcivc
794	K Thomas	827	E Wright	864	J Wilson
795	K Dovey	828	Melissa	865	E Byatt
796	Z Cribbes	829	Ms Petterson	866	K Husmann
797	S Chandrasegaran	830	Name Withheld By Request	867	C Herps
798	J Bond	831	K Oldaker	868	P Sharp
799	D Williams	832	S Tonkin	869	N Karfratis
800	V Benjamin	833	L Short	870	A Zunica
801	D McCallum, School of Social Science, Victoria University	834	Name Withheld By Request	871	R Lyons
802	Name Withheld By Request	835	Name Withheld By Request	872	A Plerauzio
803	The Fertility Control Clinic	836	J Van Neveren	873	J Heller
804	G Fricke	837	Name Withheld By Request	874	N Puls
805	M Grummet	838	L Hobbs	875	P Walker
806	Mrs V Johnshone	839	Dr J Debeljak, Faculty of Law, Monash University	876	D Loding
807	Mallesons Stephen Jaques Human Rights Law Group	840	Prof M Neave & Prof S Zifcak	877	B Shelly
808	J Benjamin	841	Women's Rights Action Network Australia	878	L Gilles
809	B Gaze	842	The Charter Group	879	D Ross
810	The Social Justice Committee Of The Jewish Community Council Of Victoria	843	R McMillan-Sexton	880	D Hall
		844	M Goonan	881	K Olsen
		845	J L Woodrams	882	Y De Sousa
		846	M Harper	883	T Blackman
		847	T Donovan	884	L Wardle
				885	A Leonard
				886	B Argall
				887	J Gibb
				888	K Donald
				889	J Jerdah
				890	P Thompson
				891	R Gray
				892	M Gray
				893	C McInerny

*Appendix D – List of people, groups and organisations who made submissions and written responses (continued)*

894	M Knights	933	Name Withheld By Request	967	C. Maxwell
895	D Vallance			968	COTA National Seniors Partnership
896	H Spence	934	K Brenner	969	Z. Rakovic
897	J Klepner	935	S Harris	970	Australian Council Of Trade Unions
898	P Sellar	936	Name Withheld By Request	971	N T Sims
899	A Nagami	937	H Minter	972	Ministerial Advisory Committee On Gay & Lesbian Health
900	R Munqan	938	Women’s Mental Health Network Committee	973	N Ivanoff
901	S Speight	939	Name Withheld By Request	974	Centre for the Study of Contemporary Islam, University Of Melbourne
902	S Gunawaradana			975	D Peacock
903	Name Withheld By Request	940	A Mardes	976	J Gordon
904	D Collett	941	K Taylor	977	E Vockenhuber
905	S Hoyal	942	A Maguire	978	D Westaway
906	Name Withheld By Request	943	Name Withheld By Request	979	R Mueller
907	L Evickson	944	M Kenney	980	Presbyterian Church Of Victoria
908	C Davie	945	N Sivakumar	981	B Cooney and P Holding
909	E Cheesman	946	K Wiltshire	982	L A & M Morrissey
910	L Vickers	947	Victorian Local Governance Association	983	K Clements
911	A Hartley	948	R Green	984	Ethnic Communities Council Of Victoria
912	B Egan	949	Australian Citizens With A Disability & Unpaid Family Carers	985	G Lloyd-Smith
913	C Settle	950	Name Withheld By Request	986	C Benjamin
914	D Bryx	951	S Singline	987	SPAN Community House
915	Name Withheld By Request	952	J Logan	988	Victorian Multicultural Commission
916	A Jones	953	M Wilkii	989	V Richards
917	B Sydes	954	The Justice Project	990	A Hargreaves
918	M Bayer	955	E O’Hehir	991	J Pilruau
919	J Rae	956	Youth Affairs Council Of Victoria	992	M Campos
920	Name Withheld By Request	957	DJ & GH Simmons	993	S Hawker
921	G Boldstone	958	Now we the people (workshop)	994	S Pick
922	J Lean	959	Federation Of Community Legal Centres (Vic) Inc	995	K McInnes
923	M Cullen			996	L Goodier
924	Name Withheld By Request	960	M. Sabilia	997	R Davis
925	I Malkin	961	D. Graham	998	A Davis
926	C Leslie	962	A. Glaser	999	C Maxwell
927	P Spenar	963	S. Thurban	1000	M Schajermann
928	Name Withheld By Request	964	H. Millar	1001	F Maxwell
929	H Richardson	965	J. Robinson	1002	A Anderson
930	D McCluskey	966	J. Webber	1003	P Lewis
931	Name Withheld By Request			1004	J Szwarc
932	N Lees				

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1005	Action For Community Living Inc	1038	K Pillai	1070	M Magetti
1006	L Chamberlain	1039	M Alexander	1071	Youthlaw/YACVic Workshop- Frontyard Youth Services
1007	T Lambourne	1040	M Ronan & R Allingham	1072	Youthlaw/YACVic Workshop- East Gippsland
1008	Name Withheld By Request	1041	G Willson	1073	A Ciavarella
1009	F James	1042	C Osborne	1074	Youth Affairs Council of Victoria's Youth Reference Group
1010	S Chang	1043	Public Interest Law Clearing House Inc	1075	Youthlaw / YACVIC Workshop – Shepparton
1011	State-wide Steering Committee to Reduce Family Violence	1044	V Hogg	1076	N Batten
1012	Lynette	1045	Australian Volunteers International	1077	Youthlaw / YACVIC Workshop – Western Young People's Independent Network, the Centre Multicultural Issues and Moonee Valley City Council
1013	D Hall	1046	Peninsula Community Legal Centre Inc	1078	National Council Of Women Victoria
1014	Victorian Council Of Social Service (VCOSS) (Submission 1)	1047	Eastern Community Legal Centre Inc	1079	Living Waters Community Care
1015	L Mortimer	1048	National Union Of Workers	1080	Australian Human Rights Centre
1016	D Dawson	1049	A Wills	1081	S Macpherson
1017	Australian Lawyers Alliance	1050	Youthlaw at Frontyard	1082	C Salger
1018	Australian Lawyers Alliance ACT Branch	1051	Mansfield Shire Council	1083	S Douglas
1019	C Sitka	1052	Victorian Women's Trust	1084	WIRE Women's Information
1020	World Vision Australia	1053	Arnold Bloch Leibler Lawyers And Advisers	1085	O Ball
1021	G Connellan	1054	Australians For Native Title And Reconciliation	1086	Northern Disability Case Management Action Group
1022	D Sanders	1055	Victorian Trades Hall Council	1087	A Sadruddin
1023	B Hampe	1056	Real Rights For Refugee Children	1088	Save Albert Park Inc
1024	Name Withheld By Request	1057	B Christie	1089	J Hill
1025	Name Withheld By Request	1058	Reprieve Australia	1090	Name Withheld By Request
1026	Name Withheld By Request	1059	Name Withheld By Request	1091	D Hodge
1027	R Faggetter (Submission 1)	1060	J Stanhope, MLA	1092	E Dolan
1028	M Sleath	1061	Public Interest Advocacy Centre Ltd	1093	Australian Woman Network (Submission 2)
1029	M Pearce	1062	P Phillips	1094	Dr S Alomes
1030	Name Withheld By Request	1063	The Hon A Nicholson QC, J Tobin, D Sandor	1095	T Martin
1031	R Faggetter (Submission 2)	1064	City Of Port Phillip	1096	Dr B Saul, Faculty of Law, University of NSW
1032	Name Withheld By Request	1065	Baha'i Council For Victoria		
1033	C R Billing	1066	The R & Hon M Fraser		
1034	P Novacco	1067	Australia Lawyers For Human Rights		
1035	Name Withheld By Request	1068	Ministerial Advisory Council Of Senior Victorians		
1036	L Daniels	1069	O Cooper		
1037	D Portlock				

*Appendix D – List of people, groups and organisations who made submissions and written responses (continued)*

1097	D Tudor	1139	Tasmanian Gay & Lesbian Rights Group	1172	D Schilling
1098	C Armstrong	1140	Communique of Twelfth State Constitutional Convention (Victorian School)	1173	Darebin City Council
1099	R Armstrong	1141	Z Grimshaw	1174	K Egan
1100	J Burnside QC and G King-Siem	1142	J Gleeson	1175	Yorta Yorta Nation Aboriginal Corporation
1101	J Vanhulst	1143	S Lowe	1176	Victorian Aboriginal Child Care Agency
1102	A Barton	1144	Name Withheld By Request	1177	City Of Whitehorse
1103	YWCA Victoria	1145	R Shue	1178	N Martin
1104	C Laing	1146	P Horan	1179	Sacred Heart Parish
1105	Name Withheld By Request	1147	S Pennells	1180	Moreland City Council
1106	H Franceyne	1148	St Lukes Anglicare	1181	B Brown
1107	B Thomas	1149	B March	1182	New Matilda
1108	Australian Arabic Council	1150	R March	1183	Name Withheld By Request
1109	T Wilson	1151	Monash Law Students' Society	1184	A J Wilson
1110	Y Khan	1152	K Howse	1185	B M Wilson
1111	G Alexander	1153	Australian Christian Lobby	1186	W P Lewis
1112	Reconciliation Victoria	1154	The Australian Family Association	1187	G Patmore
1113	M Kirana	1155	D Bailey	1188	J Stanley
1114	C Quirk	1156	Name Withheld By Request	1189	K J Blackman
1115	S Braun	1157	Name Withheld By Request	1190	Amnesty International Australia
1116	P Palmer	1158	Name Withheld By Request	1191	Julie
1117	N Paterson	1159	M McKinley	1192	D Leggoe
1118	R Gregory	1160	C M O'Dea	1193	D Bell
1119	R Tsatsis	1161	R Fitzpatrick	1194	Islamic Council Of Victoria
1120	P Johnson	1162	G Kenneker	1195	N Kayrers
1121	Name Withheld By Request	1163	Mr C Barbetti	1196	B Tregonning
1122	J De Graaf	1164	Name Withheld By Request	1197	R W Finn
1123	C Penver	1165	J Gill	1198	B McGeoch
1124	J Meadows	1166	N Martin	1199	A Caldwell
1125	T Miller	1167	Justice Kevin Bell	1200	A Domee-Carro
1126	J Sheen	1168	A Dean	1201	B Kennedy
1127	B O'Flaherty	1169	L Tran	1202	V Parry
1128	M O'Rourke	1170	SANE Australia	1203	T Ellson
1129	L Benjamin	1171	Victorian Privacy Commissioner	1204	A Berih
1130	J Avisar			1205	L Tecele
1131	B Rogalla			1206	L Stein
1132	J Cameron			1207	J Leonard
1133	P Carter			1208	E Krasnic
1134	Name Withheld By Request			1209	R Dean
1135	C Baxter			1210	Y Harun
1136	Dr S Evans – University of Melbourne (Submission 2)			1211	J Puggiani
1137	S Dunstone			1212	G Mangubat
1138	Feminist Lawyers			1213	E Issa

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1214	C Brown	1261	J Rvole	1309	D Stavris
1215	A Abrahart	1262	M Bassett	1310	S Vale
1216	M Carthy	1263	E Issa	1311	L Racky
1217	D Steranovic	1264	L Losifoglov	1312	C Cummings
1218	L Woodhouse	1265	S Sharma	1313	B Bailey
1219	L Polimeni	1266	Y Helou	1314	N Pierce
1220	M Moss	1267	C Cao	1315	L Smith
1221	P Strauss	1268	R Pham	1316	K Odwyer
1222	S Edwards	1269	S Sgournelis	1317	L Spencer
1223	F Green	1270	J Zakkour	1318	A Beer
1224	Danica R	1271	K Ferguson	1319	J Mc Kay
1225	Lisa F	1272	S Liberto	1320	E Scott
1226	K Addlem	1273	J Lawson	1321	N Whitmore
1227	A Doyle	1274	T Skoullous	1322	M Lee
1228	K Paraskeras	1275	E Norman	1323	T Dobuey
1229	F Ghebrat	1276	L Armenio	1324	J Rowy
1230	Y Goz	1278	J Poloni	1325	A Chal
1231	J Jong	1279	P Haytor	1326	H Chipperfield
1232	A Abou-Zeid	1280	S Scibilia	1327	Z Bateman
1233	C Greenoulh	1281	J Snashall	1328	B O'Hoy
1234	G Downing	1282	B Jones	1329	R Rainer
1235	A Tibaldi	1283	C Bennett	1330	J Huthins
1236	A Alibasic	1284	K Mohr	1331	J Huntington
1237	M Mughal	1285	J Arber	1332	D Breorley
1238	L Limmanuel	1286	T James	1333	D Drummod
1239	J James	1287	S Joseph	1334	T Ben-David
1240	A Martirosian	1288	K Sweatman	1335	R Ball
1241	A Hewolf	1289	R Alexander	1336	C Moloney
1242	G Palmer	1290	M Mc Adam	1337	P Gerber
1243	C Grand	1291	A Hoel	1338	L Costello
1244	E Path	1292	M Smith	1339	S Webster
1245	S Tsitiridis	1293	S Kneebce	1340	D Yeow
1246	K Phan	1294	S Jacobson	1341	D Whittle
1247	L White	1295	G Carl	1342	S Cherry
1248	G Phu	1296	A Dastyari	1343	K Pillai
1249	J Daniel	1297	I Lorahan	1344	A Lamb
1250	J Tur	1298	B Naylon	1345	S Ashok
1251	T Douglas	1299	K Mfodwo	1346	F Maxwell
1252	L Burgees	1300	P Emerton	1347	F Fauzi
1253	G Gallacher	1301	K James	1348	C O'Connor
1254	A Gill	1302	M Paterson	1349	Preston – Reservoir Progress Association
1255	C Moore	1303	L Spagnolo	1350	J Lawson
1256	M Lanaan	1304	S Edquist	1351	Name Withheld By Request
1257	M Zorica	1305	M O'Sullivan	1352	Name Withheld By Request
1258	M Rankim	1306	D Yarrow		
1259	G Burcel	1307	R Lehrer		
1260	J Newey	1308	M Brennan		

*Appendix D – List of people, groups and organisations who made submissions and written responses (continued)*

1353	D Forte	1395	J Macdonald	1430	Name Withheld
1354	S Scott	1396	V O'Neill		By Request
1355	S Fox	1397	R Boreham	1431	K Funganuku
1356	I Davey	1398	D Parsons	1432	K Sheffield
1357	N Logistatos	1399	R Filmeno	1433	C Wade
1358	D Brogan	1400	K Clarke	1434	J Baillits
1359	D Vick	1401	Name Withheld	1435	B Hillard
1360	M Quon		By Request	1436	C Hunt
1361	Belinda	1402	D Sinclair	1437	K Berton
1362	J Fitzgerald	1403	Name Withheld	1438	Name Withheld
1363	P Grant		By Request		By Request
1364	L Carr	1404	E Kniese	1439	Communication Aid
1365	J Evens	1405	Name Withheld		Users Society
1366	Name Withheld		By Request	1440	Inner South East
	By Request	1406	K Thompson		Partnership In
1367	N Manyiel	1407	C Mitsud		Community & Heath
1368	M Chol	1408	K Ash	1441	Defence For Children
1369	A Ohuli	1409	Name Withheld		International Australia
1370	M Apout		By Request	1442	Job Watch Inc
1371	N Kosowski	1410	Name Withheld	1443	Crime Victims Support
1372	L Heaney		By Request		Association Inc
1373	Name Withheld	1411	Name Withheld	1444	Sue
	By Request		By Request	1445	K Stewart
1374	W Dilley	1412	Name Withheld	1446	J Dubberlin
1375	M Smith		By Request	1447	T Callander
1376	S Lazzari	1413	Name Withheld	1448	M Kelleher
1377	S Carlle		By Request	1449	M Carroll
1378	I Crosser	1414	Name Withheld	1450	A Fegan
1379	V Dervisovski		By Request	1451	Melbourne Catholic
1380	A Fleiches	1415	J Balabin		Commission For Justice,
1381	L Ellis	1416	A Dunbabin		Development & Peace
1382	Breeanne	1417	M Petron	1452	City Of Darebin
1383	K Anron	1418	R Van Dee Linde	1453	A Grigg
1384	T Fregon	1419	Name Withheld	1454	City Of Melbourne
1385	S Keiusaugh		By Request	1455	M Griffin
1386	Name Withheld	1420	S Rowley	1456	Name Withheld
	By Request	1421	B Shaw		By Request
1387	F Liu	1422	N Tadros	1457	J Wood
1388	P Coffey	1423	D McGee	1458	A Duncan
1389	M Wright	1424	N Thi Ty	1459	K Bashtannyk
1390	Name Withheld	1425	T Tan Phan	1460	Victoria Women
	By Request	1426	Name Withheld		Lawyers' Association
1391	T Overall		By Request	1461	P Mande
1392	Name Withheld	1427	T Vodopic	1462	G Batterham
	By Request	1428	V Roach	1463	A Myle
1393	H Forsseth	1429	S Akyel	1464	M Eleew
1394	D Sweeney			1465	J Nelta

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1466	Name Withheld By Request	1506	C Hubbard	1549	L Taylor
1467	Mary	1507	T Gatenby	1550	C Peters
1468	J Flinn	1508	Name Withheld By Request	1551	Mc Pheon
1469	A Day	1509	K Leahec	1552	R Scollan
1470	John L	1510	N Lane	1553	Diana
1471	L Mellhery	1511	A Nesci	1554	Pourasghen
1472	Jennfer	1512	O'Keeffe	1555	T Mathews
1473	Name Withheld By Request	1513	C Mikae	1556	Peta
1474	Name Withheld By Request	1514	G Oshee	1557	I Willson
1475	Name Withheld By Request	1515	J Smith	1558	J Clarksa
1476	S Beyard	1516	K Kennedy	1559	M Labataglin
1477	M Kathnis	1517	D Kaner	1560	A Endean
1478	D Williamson	1518	R Caun	1561	A Watton
1479	L Maddison	1519	D Emslie	1562	Name Withheld By Request
1480	B Hooper	1520	P Hill	1563	C Ford
1481	A Hooper	1521	M Hill	1564	M Droste
1482	D Hooper	1522	P Cuma	1565	A Singh
1483	S Granek	1523	Name Withheld By Request	1566	Name Withheld By Request
1484	A Harmj	1524	J Hardni	1567	K Mullan
1485	J Foreman	1525	D Zeplin	1568	G Nilson
1486	Michael	1526	D McGreor	1569	H Tiplady
1487	Name Withheld By Request	1527	M Heland	1570	N Oddie
1488	Name Withheld By Request	1528	P Forsyth	1571	M Lech
1489	O Slatly	1529	G Lawler	1572	S Rippn
1490	Name Withheld By Request	1530	E Mitchell	1573	F Ritpin
1491	S Slatley	1531	N Adams	1574	T Radford
1492	J Dawson	1532	C Macreade	1575	Name Withheld By Request
1493	K Danson	1533	I Kneebone	1576	Andrea
1494	M Trayno	1534	M Bull	1577	T Freeman
1495	J Dunn	1535	B Rooks	1578	C Holmes
1496	K Roca	1536	J Locarnini	1579	P Karnis
1497	M Roca	1537	D More	1580	S Guling Bulta
1498	M Lawernce	1538	Beverly	1581	J Kenny
1499	D Hatherly	1539	Name Withheld By Request	1582	L Mc Lennan
1500	R Cooke	1540	P Todd	1583	B Zippe
1501	E Rodan	1541	Name Withheld By Request	1584	P Tomlinson
1502	D McEluskey	1542	C Coghlan	1585	S McCaig
1503	F Jackson	1543	D Enker	1586	L Buchanan
1504	S Coffey	1544	H Gauci	1587	V Nicolas
1505	M Byrne	1545	A Jones	1588	E Colema
		1546	J Lobianco	1589	J Goerze
		1547	C Naparslek	1590	M Hansen
		1548	C Battgrham-Wilson	1591	E Fleming
				1592	R Spear

*Appendix D – List of people, groups and organisations who made submissions and written responses (continued)*

1593	S Beeton	1639	N Hoar	1683	J Egan
1594	K Mackren	1640	Name Withheld	1684	L Lee
1595	K Lovett		By Request	1685	R Sinclair
1596	C Edwards	1641	M Berlin	1686	P Larkins
1597	W Davis	1642	T Costelloe	1687	J Noone
1598	F Tegart	1643	K Weatherall	1688	Name Withheld
1599	T Brown	1644	J Dillon		By Request
1600	D Bosler	1645	M Gillies	1689	E Haire
1601	E Chalmers	1646	J Kuropatoff	1690	Signature
1602	M Tapessi	1647	E Young	1691	A Bouris
1603	S Hutton	1648	J Coles	1692	L Harold
1604	C Newcome	1649	A Martin	1693	K Williams
1605	C Foreman	1650	J Lesap	1694	M Burrlos
1606	R Ross	1651	M Huntington	1695	J Thomps
1607	J Hindhaugh	1652	Name Withheld	1696	A Adsett
1608	P Swann		By Request	1697	K McIntyre
1609	P Cole	1653	H Mc Gladdery	1698	V Kay
1610	L Thomas	1654	D Lancask	1699	M Peterson
1611	Name Withheld	1655	P Marks	1700	P McCarthy
	By Request	1656	M Marks	1701	K Thurlow
1612	R McLennan	1657	K McSwiney	1702	C Tracey
1613	H Holmes	1658	M Polis	1703	A Jones
1614	J Wells	1659	M Martin	1704	V Simie
1615	C Trussell	1660	J Parry	1705	M McLiesh
1616	L Devlin	1661	M O'Brien	1706	G Boeddu
1617	K Backholer	1662	C Thompson	1707	M Allison
1618	M Geddes	1663	S Weerasinghe	1708	E Kelly
1619	J Wilkison	1664	J Hickson	1709	C Harris
1620	J Tootell	1665	R Spencer	1710	A Copland
1621	D Phoenix	1666	T Schergat	1711	C Rodd
1622	P Agostino	1667	J Church	1712	D Bennett
1623	A Mc Cann	1668	Peter	1713	J Macdonald
1624	A Sprinzer	1669	P Hellema	1714	A Parkinson
1625	J Gardiner	1670	E Horvath	1715	P Middlete
1626	P Horan	1671	C McSwiney	1716	R Braslhuarle
1627	G Dalmau	1672	Name Withheld	1717	A Zeplin
1628	R Dalmau		By Request	1718	L Kibbis
1629	J Rodriguez	1673	A Nelsie	1719	M Anne Le Armoda
1630	J Harkness	1674	K Aleksaska	1720	J Mellberg
1631	F Paroissien	1675	N Blair	1721	A Baker
1632	A Spencer	1676	K Deakin	1722	N Scott
1633	K Dunas	1677	A Regan	1723	A Thompson
1634	L Spencer	1678	S Rodriguez	1724	J Miler
1635	J Brown	1679	Tara	1725	K Bear
1636	S O'Leany	1680	G Smith	1726	I Bear
1637	L Young	1681	H Christensen	1727	E Sultan
1638	D Yeow	1682	L Mathews	1728	R Moloney



## Appendices

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1729	E Goisly	1775	L Pitiaithly	1821	B Dallouoy
1730	S Chan	1776	P Porpall	1822	G Lewis
1731	C Kynain	1777	B Best	1823	S Coulson
1732	H Mack	1778	F Redman	1824	J Steel
1733	N Hutton	1779	J Forster	1825	J Strachan
1734	H Kotzman	1780	S Godwin	1826	G Morris
1735	C Adles	1781	M Strachan	1827	V Lewis
1736	C Tol	1782	J Wallace	1828	J Roberts
1737	A Tosin	1783	G Millar	1829	L Stewart
1738	M Carle	1784	A Wallace	1830	C Heirs
1739	S Kerr	1785	V Jacka	1831	C Dalton
1740	S Sheridan	1786	P Soeterboek	1832	M Perrett
1741	M Nalon	1787	M Spence	1833	J Buchanan
1742	A Salvague	1788	I Paraka	1834	J Renner
1743	B Holmes	1789	E Tomlinson	1835	B Costelloe
1744	M Gladsae	1790	V Renner	1836	R Brew
1745	R Browne	1791	R Neven	1837	S Pillon
1746	Name Withheld By Request	1792	E Neven	1838	Caitriona
1747	R Nairn	1793	M Dillon	1839	C Prendergast
1748	B Hill	1794	B Preudeyant	1840	M Garson
1749	C Elliott	1795	A Benton	1841	S Pryor
1750	H Dindas	1796	P Robin	1842	C Rmall
1751	J Bowman	1797	G Fenwick	1843	D Burke
1752	O Sviatochevski	1798	G Mcneill	1844	J Collgar
1753	E Orr	1799	Name Withheld By Request	1845	M Gunn
1754	N Elgar	1800	P Gwen	1846	J Gunn
1755	T Pettigdew	1801	A Gholipout	1847	J Mettar
1756	H Ziegler	1802	L Ireland	1848	P Rowley
1757	L Wilsen	1803	R Oshea	1849	R Partland
1758	B Caddell	1804	J Van Loon	1850	J De Wet
1759	M Cowie	1805	S Eharris	1851	S Leske
1760	K Maragos	1806	H Murnane	1852	L Spencer
1761	M De Zoysa	1807	J Bartlett	1853	L Florance
1762	M Scanlon	1808	J Bartlent	1854	P Smith
1763	C Soeterboek	1809	M Mccudden	1855	A Townsend
1764	M Leembluggen	1810	S Tobin	1856	M Kaiser
1765	G Wells	1811	D Randazzo	1857	R Gahan
1766	D Rerrer	1812	S Seyahumar	1858	F Stokes
1767	D Rerrer	1813	N Postwzin	1859	T Aheabne
1768	N Locarnini	1814	K Smith	1860	G Chotty
1769	K Monshat	1815	G Hiser	1861	Richard
1770	K Hansen	1816	R Hiser	1862	E Nathan
1771	P Storey	1817	E Dargan	1863	J Tropea
1772	M Horn	1818	C Hill-Smith	1864	M Phillips
1773	A Simic	1819	Dr K Hayes	1865	A Mcconrell
1774	L Morgan	1820	M Watson	1866	L Mckee
				1867	P King

*Appendix D – List of people, groups and organisations who made submissions and written responses (continued)*

1868	N Haimon	1913	Women At The Dame Phyllis Frost Centre (VCOSS/FCLC)	1940	St Kilda Rooming House Residents – Workshop 2 (VCOSS/FCLC)
1869	W Lott			1941	Young People from Multicultural Background Workshop (VCOSS/FCLC)
1870	G Dorheden	1914	Sarah Mcquarrie	1942	Victorian Human Rights Community Engagement Project (VCOSS/FCLC)
1871	L Woods	1915	L Scully	1943	K McIntyre
1872	D Muir	1916	C Misabella	1944	H Scoullar
1873	E Smart	1917	B Hook	1945	M Dalla
1874	G Hambly	1918	J Gill	1946	N Nigol
1875	D Dwyer	1919	Right To Life Australia Inc	1947	Olver
1876	M De Saxe	1920	The Hon P Breen MLC	1948	B Ross
1877	C Paulin	1921	Community Workers Working With Multicultural Youth (VCOSS/FCLC)	1949	Y Kovacs
1878	G Barrett	1922	Clients Of Housing And Family Services In Bendigo(VCOSS/FCLC)	1950	A Nott
1879	L Campbell	1923	Community Workers Working In The Eastern Metro Region (VCOSS/ FCLC)	1951	L Prestia
1880	C Horner	1924	J Reid	1952	C Claffey-Ross
1881	Name Withheld By Request	1925	B Hedditch	1953	J Pile
1882	D Fitzpatrick	1926	J Parke	1954	C Harkins
1883	E Greaves	1927	E O'Connor	1955	C Kump
1884	L Davids	1928	S Mortimer	1956	R Rower
1885	W Ripper	1929	Intellectual Disability Workshop (VCOSS/FCLC)	1957	G Simmons
1886	M Ripper	1930	People with Disability Workshop (VCOSS/FCLC)	1958	J Bartlett
1887	T Olincoln	1931	P Hutchings	1959	E Greaves
1888	J Pile	1932	Victorian Institute Of Forensic Mental Health	1960	C Mcnavigt
1889	H Rosenberg	1933	People with Mental Health Disability Workshop (VCOSS/FCLC)	1961	L Deakin
1890	G Dickman	1934	Muslim Women's Workshop (VCOSS/FCLC)	1962	C Worshop
1891	N Evans	1935	St Kilda Rooming House Residents Workshop 1 (VCOSS/FCLC)	1963	D Mccluskey
1892	A Rahatngoda	1936	African Women's Group (VCOSS/FCLC)	1964	F Jackson-Webb
1893	J Pierce	1937	Substance Users And Their Families (VCOSS/ FCLC)	1965	A Lucy
1894	B Duffy	1938	Sole Mothers Workshop (VCOSS/FCLC)	1966	L Moore
1895	G Haynes	1939	Indigenous People In Mildura (VCOSS/FCLC)	1967	K Nelson
1896	R Bengoin			1968	K Bergin
1897	M Baker			1969	M Button
1898	F Davari			1970	P Bergin
1899	T Joltey			1971	C Row
1900	T Lamaro			1972	C Bailey
1901	J Falney			1973	S Course
1902	W Cinnido			1974	P Callagaan
1903	D Stokes			1975	B Dike
1904	HSmith			1976	E Bailey
1905	Z Clark			1977	M Badenoch
1906	J Clark			1978	D Burke
1907	B Clark			1979	P Smith
1908	S Clark			1980	A Townsend
1909	B Clark			1981	S Leske
1910	P Fogarty				
1911	C Moore				
1912	J Jones				

## Appendices

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1982	L Spencer	2029	K Byrne	2076	C Hams
1983	R Partland	2030	F Carter	2077	L Sparrow
1984	P Rowley	2031	L Burke	2078	L Cleary
1985	C Hall	2032	M Kayak	2079	A Blonde
1986	A Raza	2033	A Benton	2080	A O'Donnell
1987	A Bararat	2034	A Rogers	2081	P Nicholls
1988	J Hanna	2035	E Swinburkne	2082	J Murray
1989	C Macindoe	2036	M Bradbeer	2083	J Slitirki
1990	P Coats	2037	L Minato	2084	R Kelada
1991	L Sweeney	2038	S Symonds	2085	H Dindas
1992	J O'shea	2039	C Burns	2086	A Higgina
1993	C Moore	2040	C Cally	2087	L Radic
1994	P Fogarty	2041	S Sweeney	2088	D Zeplin
1995	Teshan	2042	R Buttermonth	2089	L Smith
1996	R Gahan	2043	K Looney	2090	P Daniels
1997	F Stokes	2044	A Brown	2091	S Dillon
1998	K Chotty	2045	Bianca S	2092	D Glaspole
1999	D Stokes	2046	L Lee	2093	S Roberts
2000	J O'Callaghan	2047	B Duffy	2094	K Jackson
2001	H Smith	2048	N Zosko	2095	R Rudd
2002	L Matheson	2049	K Yates	2096	S & F Williams
2003	M Ballarat	2050	M Gray	2097	Helen & Judy
2004	F Lehmann	2051	H Anderson	2098	No Name
2005	A O'keefe	2052	B Thwaites	2099	M Richards
2006	B Ortega	2053	J Murray	2100	B Clarke
2007	L Osman	2054	S Reindal	2101	M Kaiser
2008	S Karrar	2055	J Glaspole	2102	D Saunders
2009	M Connie	2056	S Genovesi	2103	R Ryan
2010	A Afzal	2057	J Brown	2104	O Henderson
2011	M Thomas	2058	A Rahatungata	2105	P Wadham
2012	A Masood	2059	F Graham	2106	L Gorrie
2013	N Hussein	2060	C Lamble	2107	A Barry-Macawlay
2014	T Cantwell	2061	B Mcintyre	2108	T Thorpe
2015	N Kobayashi	2062	H Conrad	2109	C Poloni
2016	S Lai	2063	M Peters	2110	N Abraham
2017	V Abdella	2064	G Johnson	2111	L Wilks
2018	P Carey	2065	G Sweeney	2112	F Wiseman
2019	M Loy	2066	B Kilfoyle	2113	H Hussein
2020	N Blair	2067	C Coleman	2114	R Jarris
2021	E Walker	2068	L Rodopoulos	2115	No Name
2022	A Fraser	2069	J Murry-Beer	2116	M & P Hill
2023	D Standish	2070	G Rodopoulos	2117	M Maguire
2024	K Hayes	2071	S Jefford	2118	W Johnson
2025	P Ortega	2072	D Fitzsimon	2119	P Twomey
2026	J King	2073	M Alexander	2120	R Hayett
2027	R Beard	2074	V Auer	2121	J Gunn
2028	T Chan	2075	P Bennetts	2122	E Schlusser

*Appendix D – List of people, groups and organisations who made submissions and written responses (continued)*

2123	T Battaglici	2170	G Stephens	2213	T Power
2124	P Battaglia	2171	D Wells	2214	C Holden
2125	C Wolthuizen	2172	M Dowsey	2215	E Henry
2126	E Twomey	2173	P Horner	2216	D Buller
2127	A Cally	2174	S Holdworth	2217	B Homes
2128	J Middleton	2175	J Qran	2218	D Martin
2129	P Watkinson	2176	L Tyra	2219	C McMohon
2130	J Maggs	2177	K Blackman	2220	S Parker
2131	R Gough	2178	E Haarhoff	2221	A Glatton
2132	S Stevens	2179	K Crane	2222	R Brindus
2133	G Lonsdale	2180	H Gardner	2223	Name Withheld by Request
2134	J Clarke	2181	H Griffin	2224	J Palmer
2135	Z Clarke	2182	C Picton	2225	J Kelly
2136	L Palmer	2183	P Fitzgerald	2226	N Roberts
2137	A Jones	2184	J Picton	2227	D Robinson
2138	J Gardiner	2185	B Sleep	2228	L Joachim
2139	T Lee	2186	M Haarhoff	2229	M Decortis
2140	P Horan	2187	C Albrecht	2230	P Mclanchie
2141	J Jones	2188	J Brewster	2231	G Merry
2142	J Mettan	2189	D Albrecht	2232	A Porter
2143	M Gunn	2190	T Coway	2233	J Birckhean
2144	P Buchanan	2191	J Baker	2234	C Holmes
2145	J Kerr	2192	S Heley	2235	P Holmes
2146	R Smith	2193	B Davies	2236	G Lacey
2147	A Chernok	2194	A Papts	2237	L Innes
2148	J De Wet	2195	B Poster	2238	T Widdup
2149	J Collyer	2196	E Davids	2239	S Charles
2150	S Kitson	2197	The Australian Gay, Lesbian, Bisexual, Transgender, Intersex And Queer Multicultural Council (AGMC)	2240	L Scafe
2151	Gaik-Khim	2198	B Alfred	2241	A Wild
2152	J Pierce	2199	Dr D McDonnell	2242	J Lanauze
2153	R Cheetham	2200	B Wilson	2243	L Neame
2154	J Bartlett	2201	J Connor	2244	I Adams
2155	M Burrows	2202	M Spong	2245	L Saunders
2156	A Grummet	2203	A Spong	2246	L Anderson
2157	K Fernandes	2204	I Corr	2247	F Long
2158	A Radonic	2205	J Mcmohor	2248	V Raval
2159	S Biowno	2206	C Errey	2249	D Schrader
2160	N Ivanoff	2207	R John	2250	B Binks
2161	B Hornvng	2208	Dennis	2251	P Binks
2162	V Tobin	2209	B Henry	2252	V Voss
2163	N Topp	2210	S Kingsland	2253	S Jope
2164	E Hunt	2211	A Milne	2254	M Anderson
2165	G Farwatt	2212	J Orike	2255	L Wyse
2166	J Wild			2256	B Deller
2167	S Tashkoff			2257	F Hanlon
2168	M Davery			2258	D Trehwella
2169	R Martin				

## Appendices

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2259	T Wolkenbay	2306	M Stewart	2349	M Stewart
2260	B Bainbridet	2307	J Brown	2350	R Walsh
2261	W Atkinson	2308	D Mcmahon	2351	J Bell
2262	C Guinness	2309	Name Withheld By Request	2352	S Brown
2263	N Sheldon	2310	Name Withheld By Request	2353	K Duggan
2264	J Sinclair	2311	A Stevens	2354	J Halupka
2265	D Nicholls	2312	M Padiaditis	2355	K Jago
2266	S Williams	2313	S Gillies	2356	P Crilly
2267	D Kelly	2314	M Huth	2357	M Akene
2268	P Ferguson	2315	L Martin	2358	T Spratt
2269	G Atkinson	2316	K Turner	2359	M Goad
2270	L Bamblett	2317	J Kimber	2360	F Nall
2271	J Henderson	2318	S Weir	2361	B Polzin
2272	R Bamblett	2319	E Singh	2362	S Nelson
2273	M Rose	2320	C Harrison	2363	G Fahey
2274	S Martin	2321	C Harrison	2364	T Bourne
2275	D Moffatt	2322	D Lovett	2365	V Kelliher
2276	D Hewat	2323	A Taylor	2366	C Mclisky
2277	N Yarram	2324	A Canavan	2367	Name Withheld By Request
2278	V Briggs	2325	N Waddell	2368	P Bennett
2279	K Walker	2326	M Darvall	2369	T Hillier
2280	V Harrold	2327	P Dwyer	2370	Nicci
2281	T Marks	2328	Name Withheld By Request	2371	Ben A
2282	L Murray	2329	R Quakawut	2372	D Martin
2283	W Muir	2330	B Barnelt	2373	M Ketels
2284	D Morgan	2331	M Dulks	2374	B Hewy
2285	S Charles	2332	S Vas Nus	2375	W Jaggs
2286	T Beer	2333	Name Withheld By Request	2376	P Wilson
2287	L Bamblett	2334	B Sanashan	2377	J Evans
2288	M Cunningham	2335	E Lovett	2378	J Gruindy
2289	K Murray	2336	R Goddand	2379	J Rigotto
2290	A Khan	2337	S Quakanoot	2380	V Fazzalori
2291	S Poole	2338	J Proctor	2381	D Handley
2292	V Charles	2339	E Russdl	2382	Sangeetha
2293	D Maver	2340	M Georgion	2383	M Gladstone
2294	P Taylor	2341	P Lewis	2384	B Alexander
2295	S Cairns	2342	S Mongla	2385	P Harken
2296	D Markus	2343	M Hogarty	2386	C Ruey
2297	C Brown	2344	J Brickell	2387	N Stojanovski
2298	T Kenna	2345	J Cadd	2388	N Ugrinoski
2299	S Paters	2346	S Kerr	2389	M Jeyaratnam
2300	C Dixon	2347	M Andy	2390	L Van Nugtoren
2301	P Hutchson	2348	L Saunders	2391	K Srefey
2302	K Saunders			2392	A Sorkhi
2303	J Falson			2393	H Nowicka
2304	T Canavan			2394	C Brookes
2305	Warght				

*Appendix D – List of people, groups and organisations who made submissions and written responses (continued)*

2395	G Bamblett	2440	D Lovett	2488	J Clarke
2396	L O'Neill	2441	A Taylor	2489	B Clarke
2397	R Lovett	2442	A Canavan	2490	J Pocklington
2398	H Button	2443	N Waddell	2491	Jonathan
2399	P Hopivena	2444	M Darvall	2492	J O'brin
2400	M Zaecaro	2445	D Dwyer	2493	I Pederick
2401	C Horn	2446	Kate	2494	S Etta
2402	M Merply	2447	R Quakawoot	2495	J Smith
2403	H Webber	2448	B Banett	2496	H Smith
2404	G Jubb	2449	M Duke	2497	R Rooks
2405	R Inglis	2450	S Van Nus	2498	V Tuenker
2406	F Guivarra	2451	Cath	2499	S Watkins
2407	D Barry	2452	B Sanaehan	2500	J Wentworth
2408	M Williams	2453	E Lovett	2501	E White
2409	B Honeysett	2454	RGoddard	2502	E Micheal
2410	R Williams	2455	S Quakawoot	2503	A Kelly
2411	R Hamann	2456	J Proctor	2504	C Earnshaw
2412	R Bradley	2457	E Russell	2505	J Lamont
2413	R Coken	2458	M Georgion	2506	J Cousens
2414	L Adams	2459	R Kitchener	2507	A Mcdonald
2415	C Fitzdarence	2460	J Rooks	2508	G Francis
2416	K Nicholls	2461	P Turner	2509	M Kovacs
2417	P Waples-Crane	2462	S Fernok	2510	C Holmes
2418	C Dixon	2463	B Cleen	2511	K Ligocki
2419	P Huthison	2464	D Ball	2512	D Charlesworth
2420	K Saunders	2465	S Belarfald	2513	L Motteram
2421	J Falson	2466	T kirkbatin	2514	R Reaue
2422	T Canavan	2467	V Meier	2515	F Tuenker
2423	C Waight	2468	K Smith-Jones	2516	B Walker
2424	M Stewart	2469	R Nass	2517	G Taig
2425	J Brown	2470	J Nass	2518	P Sutton
2426	D Mcmohon	2471	P Raby	2519	V Fou
2427	Name Withheld by Request	2472	A Bann	2520	Regulatory Institutions Network Australian National University
2428	Name Withheld by Request	2473	G Green	2521	H Howells
2429	A Stevens	2474	N Sacten	2522	J Howells
2430	M Pediaditis	2475	C Buchwald	2523	P Rodriquez
2431	S Gillies	2476	R Dungan	2524	P Kerr
2432	M Huth	2478	A Davey		
2433	L Martin	2479	K Purvis		
2434	K Turner	2480	A Lorimer		
2435	J Kimber	2481	S Fraser		
2436	S Weir	2482	M Whittaker		
2437	E Singh	2483	A Whittaker		
2438	C Harrison	2484	J Mann		
2439	C Harrison	2485	J Gray		
		2486	A Anderson		
		2487	B Anderson		

## **Appendix E – Consultation meetings and forums conducted by the Committee**

- 1 Executive Committee, Ethnic Communities Council of Victoria, 28 June 2005
- 2 Ministerial Advisory Committee Senior Victorians, 29 June 2005
- 3 Ministerial Advisory Council for Cultural and Linguistic Diversity, Human Services, 21 June 2005
- 4 Disability organisations forum hosted by Disability Advisory Council, 11 July 2005
- 5 Liberty Victoria Arts Forum, 11 July 2005
- 6 Ethnic Communities Council of Victoria Forum, 13 July 2005
- 7 Social Justice Round Table, 9 July 2005
- 8 Islamic Council of Victoria, 19 July 2005
- 9 Mansfield Social Justice Forum, organised by Mansfield Council, 20 July 2005
- 10 Gay Lesbian Bisexual Transgender Inter sex, Ministerial Advisory Committee, 27 June 2005
- 11 Drug and alcohol network, 27 July 2005
- 12 Wangaratta Forum, organised by Anglicare Victoria (Hume Region) and Diocese of Wangaratta, 29 July 2005
- 13 Jewish Community of Victoria, 25 July 2005
- 14 Indigenous Consultation Warrnambool, 28 July 2005
- 15 Meeting with Mayor Vendy, Ballarat, 28 July 2005
- 16 Indigenous Consultation Ballarat, 29 July 2005
- 17 Community Meeting United Care, Ballarat, 29 July 2005
- 18 Municipal Association of Victoria Roundtable, 1 August 2005
- 19 Meeting for people with disability – voting issues, 3 August 2005
- 20 Association of Independent Retirees Victorian Division, 3 August 2005
- 21 Gay Lesbian Bisexual Transgender Inter sex meeting hosted by ALSO Foundation, 4 July 2005
- 22 Victorian Civil Administration Tribunal 2 August 2005
- 23 Community Consultation on Human Rights, organised by Mildura, Mallee Family Care and Mildura Council , 10 August 2005
- 24 Diversitat Geelong, 17 August 2005
- 25 Geelong community groups (including Create, Jindara Community Programs, Geelong Community Legal Service), 17 August 2005
- 26 Bethany Community Support, Geelong, 17 August 2005
- 27 Gippsland Local Government Network, 19 August 2005
- 28 Gippsland Country Women’s Association, (East Gippsland Chapter) 17 August 2005
- 29 Gippsland Youth Consultation YFC Warragul, 18 August 2005

*Appendix E – Consultation meetings and forums conducted by the committee (continued)*

- 30 Indigenous Consultation Lake Tyers, 17 August 2005
- 31 Indigenous Lakes Entrance, 17 August 2005
- 32 Gippsland Carers, 18 August 2005
- 33 Anglicare/ Migrant Resource Centre, Morwell, 18 August 2005
- 34 Academic Round Table, 24 August 2005
- 35 Indigenous Human Rights Forum, held at Aboriginal Advancement League, 10 August 2005
- 36 Darebin Community Forum organised with Darebin Council, 23 August 2005
- 37 Victorian Council of Churches Consultation 5 July 2005
- 38 Jeanette Powell MP, Shepparton, 25 August 2005
- 39 Consultation for People with Intellectual Disabilities and their Families Organised through RIAC, Shepparton 26 August 2005
- 40 Women's Forum, hosted by WIRE Women's Information, 21 July 2005
- 41 La Trobe University Bendigo 18 August 2005
- 42 Bendigo Social Service and Advocacy Organisations, Loddon Campesie Legal Centre, 19 August 2005
- 43 Indigenous consultation, Echuca, 18 August 2005
- 44 Public forum Melbourne University, 13 July 2005
- 45 Mallee Family Care Swan Hill, 30 August 2005
- 46 Peak welfare organisations, 5 July 2005
- 47 South East Metropolitan RAJAC – Ringwood 2 September 2005
- 48 North West RAJAC, 5 August 2005
- 49 Swan Hill Rural City Council, 30 August 2005
- 50 Indigenous Human Rights Forum (no 2), 8 September 2005
- 51 Australian Family Association Bendigo, 18 August 2005
- 52 St Lukes Bendigo, 19 August 2005
- 53 Eritrean Community Flemington, 22 August 2005
- 54 Footscray community meeting, 22 August 2005
- 55 Victims of Crime Groups, 22 September 2005





**Draft**  
**Charter of**  
**Human Rights and**  
**Responsibilities**

# Charter of Human Rights and Responsibilities Act 2006

Act No.

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# A BILL

to respect, protect and promote human rights.

## **Charter of Human Rights and Responsibilities Act 2006**

### **Preamble**

On behalf of the people of Victoria, the Parliament enacts this Charter to recognise the inherent dignity of all people and the right of every person to enjoy fundamental freedoms and human rights.

This Charter is founded on the following principles—

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity and participation of the people of Victoria enhances our community;

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- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Indigenous people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and material relationship to their traditional lands and waters.

**The Parliament of Victoria therefore enacts as follows:**

**PART 1—PRELIMINARY**

**1. Purpose and citation**

- (1) This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act.
  - (2) The purpose of this Charter is—
    - (a) to identify those human rights that the Parliament specifically seeks to protect and promote; and
    - (b) to ensure that all statutory provisions, whenever enacted, are interpreted so far as possible in a way that is compatible with human rights; and
    - (c) to impose an obligation on all public authorities to act in a way that is consistent with the human rights sought to be protected by this Charter; and
    - (d) to establish the office of the Victorian Human Rights Commissioner; and
    - (e) to make consequential amendments to certain Acts.
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**2. Commencement**

- (1) This Charter (except Division 4 of Part 3) comes into operation on 1 January 2007.
- (2) Division 4 of Part 3 comes into operation on 1 January 2008.

**3. Definitions**

In this Charter—

**"act"** includes a failure to act and a proposal to act;

**"Charter"** means the Charter of Human Rights and Responsibilities;

**"child"** means a person under 18 years of age;

**"court"** means the Supreme Court, the County Court, the Magistrates' Court or the Children's Court;

**"declaration of incompatibility"** means a declaration made by the Supreme Court under section 37(2);

**"discrimination"**, in relation to a person, means discrimination on the ground of—

- (a) race; or
  - (b) colour; or
  - (c) sex; or
  - (d) sexual orientation; or
  - (e) language; or
  - (f) impairment; or
  - (g) religious belief; or
  - (h) political or other opinion; or
  - (i) national or social origin; or
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- (j) birth; or
- (k) age; or
- (l) gender identity; or
- (m) any other attribute specified in section 6 of the **Equal Opportunity Act 1995**;

**"entity"** means a person or a body (whether incorporated or unincorporated);

**"government Bill"** means a Bill introduced, or to be introduced, into either House of Parliament by a Minister;

**"human rights"** means the civil and political rights set out in Part 2;

**"Human Rights Scrutiny Committee"** means the Joint House Committee established by section 5(k) of the **Parliamentary Committees Act 2003**;

**"interpreter"** means—

- (a) an interpreter accredited with the National Accreditation Authority for Translators and Interpreters Limited A.C.N. 008 596 996; or

- (b) a competent interpreter—

and relates only to the oral rendering of the meaning of the spoken word or other form of communication from one language into another language or form of communication;

**"override declaration"** means a declaration made by Parliament under section 31;

**"person"** means an individual, and does not include a body politic or corporate;



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**"public authority"** means—

- (a) a government department; or
- (b) a statutory authority; or
- (c) Victoria Police; or
- (d) a Council within the meaning of the **Local Government Act 1989**; or
- (e) an entity whose functions include functions of a public nature, when it is performing those functions on behalf of the State (whether under contract or otherwise); or
- (f) an entity declared by the regulations to be a public authority for the purposes of this Charter—

but does not include—

- (g) Parliament or a person exercising functions in connection with proceedings in Parliament; or
- (h) a court or tribunal except when it is acting in an administrative capacity; or

Note: 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.

- (i) an entity declared by the regulations not to be a public authority for the purposes of this Charter;

**"statutory provision"** means a provision of an Act (including this Charter) or of a subordinate instrument;

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**"Victoria Police"** has the same meaning as "the force" has in the **Police Regulation Act 1958**;

**"Victorian Human Rights Commissioner"** means the chairperson of the Equal Opportunity Commission appointed under the **Equal Opportunity Act 1995** or any other person appointed by the Governor in Council under Part 4 as the Victorian Human Rights Commissioner.

**4. Human rights in this Charter in addition to other rights and freedoms**

- (1) This Charter does not limit a right or freedom arising under a statutory provision or under a law of the Commonwealth or international law.
- (2) Any right or freedom not included in this Charter must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

**5. Application**

- (1) Only persons have human rights. All persons have the human rights in Part 2.

Note: Corporations do not have human rights.

- (2) This Charter applies to—
    - (a) the Parliament, to the extent that the Parliament has duties and powers under Divisions 1 and 2 of Part 3; and
    - (b) courts and tribunals, to the extent that they have duties and powers under Part 2 and Division 3 of Part 3; and
    - (c) public authorities, to the extent that they have duties and powers under Division 4 of Part 3.
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- (3) Sub-section (2) does not take away from or limit—
    - (a) any other duty or power imposed or conferred by this Charter on an entity specified in sub-section (2); or
    - (b) any duty or power imposed or conferred on any other entity by this Charter.
  - (4) This Charter binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.
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**PART 2—HUMAN RIGHTS**

**6. Human rights—what they are and when they may be limited**

- (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.
- (2) A human right may only be limited by a statutory provision if the limit is reasonable and 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—
  - (a) the nature of the right; and
  - (b) the importance of the purpose of the limitation; and
  - (c) the nature and extent of the limitation; and
  - (d) the relationship between the limitation and its purpose; and
  - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

**7. Recognition and equality before the law**

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

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- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

**8. Right to life**

- (1) Every person has the right to life and has the right not to be arbitrarily deprived of life.
- (2) For the purposes of this Charter, sub-section (1) applies to a person from the time of his or her birth.

**9. Protection from torture and cruel, inhuman or degrading treatment**

A person must not be—

- (a) subjected to torture; or
- (b) treated or punished in a cruel, inhuman or degrading way; or
- (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

**10. Freedom from forced work**

- (1) A person must not be held in slavery or servitude.
- (2) A person must not be made to perform forced or compulsory labour.
- (3) For the purposes of sub-section (2) "**forced or compulsory labour**" does not include—
- (a) work or service normally required of a person who is under detention because of a lawful court order, or who has been conditionally released from detention under a lawful court order, or who has been ordered to perform work in the community under a lawful court order; or

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- (b) work or service required because of an emergency threatening the Victorian community; or
- (c) work or service that forms part of normal civil obligations.

**11. Freedom of movement**

- (1) Every person lawfully within the State has the right to move freely within the State and to enter and leave it, and the freedom to choose his or her residence in the State.
- (2) Sub-section (1) does not apply with respect to persons lawfully detained or the subject of a court order restricting a person's movement.

**12. Privacy and reputation**

A person has the right—

- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have his or her reputation unlawfully attacked.

**13. Freedom of thought, conscience, religion and belief**

- (1) Every person has the right to freedom of thought, conscience and religion, including—
  - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
  - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

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- (2) A person must not be pressured or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

**14. Freedom of expression**

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether—
- (a) orally; or
  - (b) in writing; or
  - (c) in print; or
  - (d) by way of art; or
  - (e) in another medium chosen by him or her.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
- (a) to respect the rights and reputation of other persons; or
  - (b) for the protection of national security, public order, public health or public morality.

**15. Peaceful assembly and freedom of association**

- (1) Every person has the right of peaceful assembly.
- (2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

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**16. Protection of families and children**

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right to the protection needed by the child by reason of being a child, without discrimination.

**17. Taking part in public life**

- (1) Every person in the State has the right, and is to have the opportunity, without discrimination—
  - (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; and
  - (b) to participate in public life and in the public decisions that affect their lives.
- (2) Every eligible person has the right, and is to have the opportunity, without discrimination—
  - (a) to vote and be elected at periodic elections that guarantee the free expression of the will of the electors; and
  - (b) to have access, on general terms of equality, to the Victorian public service and public office.

**18. Cultural rights**

- (1) All persons belonging to a cultural, religious, racial or linguistic community must not be denied the right, with the other members of that community, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.



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- (2) Indigenous persons hold distinct cultural rights and must not be denied the right, with other members of their community—
  - (a) to enjoy their identity and culture; and
  - (b) to maintain and use their language; and
  - (c) to maintain their kinship ties; and
  - (d) to maintain their distinctive spiritual and material relationship with the land and waters and other resources to which they have a connection under traditional laws and customs.

**19. Property rights**

A person must not be deprived of his or her property other than in accordance with law.

**20. Right to liberty and security of person**

- (1) Every person has the right to liberty and security.
  - (2) A person must not be subjected to arbitrary arrest or detention.
  - (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
  - (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.
  - (5) A person who is arrested or detained on a criminal charge—
    - (a) must be promptly brought before a court; and
    - (b) has the right to be tried within a reasonable time after arrest or detention and, if not, must be released.
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- (6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear—
  - (a) for trial; and
  - (b) at any other stage of the judicial proceeding; and
  - (c) if appropriate, for execution of judgment.
- (7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must—
  - (a) make a decision without delay; and
  - (b) order the release of the person if it finds that the detention is unlawful.
- (8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

**21. Humane treatment when deprived of liberty**

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person who has been detained must be segregated from persons who have been convicted of offences, except where reasonably necessary.
- (3) An accused person who has been detained must be treated in a way that is appropriate for a person who has not been convicted.

**22. Children in the criminal process**

- (1) A child who has been accused of an offence and who is detained must be segregated from accused and convicted adults.
  - (2) A child who has been accused of an offence must be brought to trial as quickly as possible.
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- (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

**23. Fair hearing**

- (1) A person has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) Despite sub-section (1), a court or tribunal may exclude members of media organisations and the public from all or part of a hearing if the court or tribunal determines—
- (a) that it is necessary in order to protect public morality, public order or national or international security; or
  - (b) that it is necessary in the interests of the private lives of the parties; or
  - (c) that there exists special circumstances where publicity would prejudice the interests of justice; or
  - (d) that an Act or the rules of the court or tribunal permit the exclusion.
- (3) All judgments made by a court or tribunal in a criminal or civil proceeding must be made public unless it is against a child's interests to do so or the court considers that there are special circumstances which make it reasonably necessary to suppress part or all of the judgment.

**24. Rights in criminal proceedings**

- (1) All persons charged with a criminal offence have the right to be presumed innocent until proved guilty according to law.
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- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—
- (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
  - (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and
  - (c) to be tried without unreasonable delay; and
  - (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal assistance provided by Victoria Legal Aid under the **Legal Aid Act 1978**; and
  - (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal assistance under the **Legal Aid Act 1978**; and
  - (f) to have legal assistance provided if the interests of justice require it, without any costs payable by the accused person if he or she does not have sufficient means to pay for the assistance in accordance with the **Legal Aid Act 1978**; and
  - (g) to examine, or have examined, witnesses against him or her, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution, unless otherwise provided for by law; and
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- (h) to have the free assistance of an interpreter if he or she cannot understand or speak English; and
  - (i) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties which require such assistance; and
  - (j) not to be compelled to testify against himself or herself or to confess guilt.
- (3) A child who is charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.
- (4) Any person convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher court in accordance with law.

**25. Right not to be tried or punished more than once**

A person must not be tried or punished more than once for an offence for which he or she has already been finally convicted or acquitted in accordance with law.

**26. Retrospective criminal laws**

- (1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.
  - (2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.
  - (3) If a penalty for an offence is reduced after a person committed the offence, that person must be eligible for the reduced penalty.
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- (4) Nothing in this section affects the trial and punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.
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**PART 3—APPLICATION OF HUMAN RIGHTS IN VICTORIA**

**Division 1—Scrutiny of New Legislation**

**27. Statement of compatibility by the Attorney-General on government Bills**

- (1) The Attorney-General must prepare a statement of compatibility for every government Bill and cause the statement to be laid before the House of Parliament into which the Bill is introduced before the Minister introducing the Bill gives his or her second reading speech on the Bill.
- (2) A statement of compatibility under sub-section (1) must state—
  - (a) whether, in the Attorney-General's opinion, the Bill is consistent with human rights, and if so, how it is consistent; and
  - (b) if the Attorney-General considers that the Bill is inconsistent with human rights, the nature and extent of the inconsistency.
- (3) A statement of compatibility by the Attorney-General under this section is not binding on any court or tribunal.

**28. Statement of compatibility on non-government Bills**

- (1) A member of Parliament, other than a Minister, who introduces a Bill in a House of Parliament may prepare a statement of compatibility in respect of that Bill and cause the statement to be laid before that House before giving his or her second reading speech on the Bill.

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- (2) A statement of compatibility under sub-section (1) must state—
  - (a) whether, in the member's opinion, the Bill is consistent with human rights and, if so, how it is consistent; and
  - (b) if the member considers that the Bill is inconsistent with human rights, the nature and extent of the inconsistency.
- (3) A statement of compatibility by a member under this section is not binding on any court or tribunal.

**29. No effect on Victorian law**

A failure to comply with section 27 or 28 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any statutory provision.

**30. Human Rights Scrutiny Committee**

The Human Rights Scrutiny Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is inconsistent with human rights.

Note: The Human Rights Scrutiny Committee must also review all statutory rules and report to Parliament if it considers the statutory rule is inconsistent with human rights: see section 21 of the **Subordinate Legislation Act 1994**.

**Division 2—Override Declaration**

**31. Override by Parliament**

- (1) Parliament may expressly declare in an Act that that Act or a provision of that Act has effect despite one or more of the human rights or anything else contained in this Charter.
  - (2) A member of Parliament who introduces a Bill containing an override declaration, or a person acting on his or her behalf, must make a statement
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to the Legislative Council or the Legislative Assembly, as the case requires, explaining the exceptional circumstances that justify the inclusion of the override declaration.

- (3) A statement made under sub-section (2) must be made—
- (a) during the member's second reading speech; or
  - (b) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or
  - (c) with the leave of the Legislative Council or the Legislative Assembly, as the case requires, at any time before the third reading of the Bill.
- (4) If an override declaration is made—
- (a) this Charter, to the extent of the declaration, has no application to the Act or provision for which the override declaration has been made; and
  - (b) the Supreme Court must not make a declaration of incompatibility in respect of the Act or provision for which the override declaration has been made.
- (5) Parliament may, at any time, re-enact an override declaration.
- (6) A provision of an Act containing an override declaration (including an override declaration re-enacted under sub-section (5)) expires on the fifth anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.

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- (7) A failure to comply with sub-section (2) or (3) in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any statutory provision.

**Division 3—Interpretation of Laws**

**32. Interpretation**

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be read and given effect to in a way that is compatible with human rights.
- (2) International law and the judgments of foreign and international courts and tribunals relevant to a human right may be considered in reading and giving effect to a statutory provision.
- (3) In this section, reading and giving effect to a statutory provision means—
- (a) resolving an ambiguous or obscure statutory provision; or
  - (b) confirming or displacing the apparent meaning of a statutory provision; or
  - (c) finding the meaning of a statutory provision when its apparent meaning leads to a result that is unreasonable or manifestly absurd; or
  - (d) interpreting the meaning of a statutory provision in any other case.
- (4) This section does not affect the validity of—
- (a) an Act or provision of an Act that is inconsistent with a human right; or
  - (b) a subordinate instrument or provision of a subordinate instrument that is inconsistent with a human right, unless the empowering Act is consistent with the human right.
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**33. Referral to Supreme Court**

- (1) A court or tribunal may refer any question of law with respect to the interpretation of a statutory provision in accordance with this Charter to the Supreme Court if—
  - (a) a party has made an application for referral; and
  - (b) the court or tribunal considers that the question is appropriate for determination by the Supreme Court.
- (2) If a question of law has been referred to the Supreme Court under sub-section (1), the court or tribunal referring the question must not—
  - (a) make a determination to which the question is relevant while the referral is pending; or
  - (b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.
- (3) If a question of law is referred under sub-section (1) by the Trial Division of the Supreme Court or by VCAT, when constituted by the President or a Vice-President (whether with or without others), the referral is to be made to the Court of Appeal.

**34. Attorney-General's right to intervene**

- (1) The Attorney-General may intervene in any proceeding before any court or tribunal involving the application of this Charter and may be joined as a party to that proceeding.
  - (2) If the Attorney-General intervenes in a proceeding under this section, then, for the purposes of the institution and prosecution of an appeal from a judgment given in that proceeding, the Attorney-General may be taken to be a party to the proceeding.
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**35. Intervention by third parties**

Any person or group may seek to intervene in any proceeding before any court or tribunal involving the application of this Charter, and may be joined as a party to that proceeding with leave of the court or tribunal, subject to any conditions imposed by the court or tribunal.

**36. Notice to Attorney-General and Victorian Human Rights Commissioner**

- (1) A party to a proceeding must give notice in the prescribed form to the Attorney-General and the Victorian Human Rights Commissioner if—
  - (a) an issue arises in a Supreme Court or County Court proceeding regarding the interpretation of a statutory provision in accordance with this Charter; or
  - (b) a question of law is referred to the Supreme Court under section 33.
- (2) For the purposes of sub-section (1), a notice is not required to be given to—
  - (a) the Attorney-General if the State is a party to the relevant proceeding; or
  - (b) the Victorian Human Rights Commissioner if the Victorian Human Rights Commissioner is a party to the relevant proceeding.

**37. Declaration of incompatibility**

- (1) This section applies if—
    - (a) an issue arises in a Supreme Court proceeding regarding the interpretation of a statutory provision in accordance with this Charter; or
    - (b) the Supreme Court has had a question of law referred to it under section 33.
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- (2) Subject to any relevant override declaration, if the Supreme Court is satisfied that a statutory provision is not compatible with a human right, the Court may make a declaration that the statutory provision is incompatible with the human right.
- (3) The Supreme Court must not make a declaration of incompatibility unless the Court is satisfied that—
  - (a) notice in the prescribed form has been given to the Attorney-General and the Victorian Human Rights Commissioner that the Court is considering making a declaration of incompatibility; and
  - (b) a reasonable opportunity has been given to the Attorney-General and the Victorian Human Rights Commissioner to intervene in the proceeding or to make submissions in respect of the proposed declaration of incompatibility.
- (4) A declaration of incompatibility does not—
  - (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration is given; or
  - (b) create in any person any legal right or give rise to any civil cause of action.
- (5) The Prothonotary of the Supreme Court must give a copy of a declaration of incompatibility to the Attorney-General within 7 days after the declaration is made.

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**38. Attorney-General and Human Rights Scrutiny Committee's action on declaration of incompatibility**

- (1) If the Attorney-General receives a copy of a declaration of incompatibility he or she must cause a copy of the declaration of incompatibility—
  - (a) to be laid before each House of Parliament on or before the 6th sitting day of that House after the Attorney-General has received a copy of the declaration; and
  - (b) to be published in the Government Gazette within 10 days after receiving a copy of the declaration.
- (2) The Attorney-General must provide a copy of a declaration of incompatibility to the Human Rights Scrutiny Committee within 7 days after receiving the declaration.
- (3) The Human Rights Scrutiny Committee must review a declaration of incompatibility provided to it under sub-section (2) and report to each House of Parliament on the declaration within 3 months of the declaration having been laid before the Legislative Assembly and the Legislative Council (whichever is the later).
- (4) A report under sub-section (3) may contain such recommendations as the Human Rights Scrutiny Committee considers appropriate.
- (5) The Attorney-General must prepare a written response to the declaration of incompatibility and, no later than 6 months after receiving a copy of the declaration of incompatibility, must cause his or her response—

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- (a) to be laid before each House of Parliament;  
and
- (b) to be published in the Government Gazette.

**Division 4—Obligations on Public Authorities**

**39. Conduct of public authorities**

- (1) Subject to sub-section (2), it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
- (2) Sub-section (1) does not apply if, as a result of a statutory provision or a Commonwealth Act, the public authority could not reasonably have acted differently or made a different decision.

Note: For example, where the public authority is acting to give effect to a statutory provision that is inconsistent with a human right.

- (3) This section does not apply to an act or decision of a private nature.

**40. Legal proceedings**

- (1) If an act or decision of a public authority is made unlawful by this Charter, a person aggrieved by that act or decision may seek any relief or remedy, including—
  - (a) judicial review under the **Administrative Law Act 1978** or under Order 56 of Chapter I of the Rules of the Supreme Court;  
and

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(b) a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence—

where that relief or remedy would have been available had the act or decision been unlawful apart from this Charter.

(2) To avoid doubt, if a declaration of unlawfulness is sought in relation to an act or decision made unlawful by this Charter damages must not be awarded unless a person has a right to damages apart from the operation of this section.

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**PART 4—VICTORIAN HUMAN RIGHTS COMMISSIONER**

**41. Establishment of Victorian Human Rights Commissioner**

- (1) The Governor in Council may appoint a person as the Victorian Human Rights Commissioner.
- (2) A person who is a member of the Parliament of Victoria or of the Commonwealth or of any other State or a Territory cannot be appointed under sub-section (1).

Note: The chairperson of the Equal Opportunity Commission is the Victorian Human Rights Commissioner if no appointment is made under this section: see the definition of "Victorian Human Rights Commissioner" under section 3.

**42. Terms and conditions of appointment**

- (1) This section applies if the Victorian Human Rights Commissioner is appointed under section 41(1).
  - (2) Subject to this Part, the Victorian Human Rights Commissioner holds office for the period, not exceeding 7 years, that is specified in the instrument of appointment but is eligible for re-appointment.
  - (3) Subject to this Part, the Victorian Human Rights Commissioner holds office on the terms and conditions determined by the Governor in Council.
  - (4) The Victorian Human Rights Commissioner is entitled to leave of absence as determined by the Governor in Council.
  - (5) The Victorian Human Rights Commissioner must not engage, directly or indirectly, in paid employment outside the duties of Victorian Human Rights Commissioner.
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- (6) The **Public Administration Act 2004** does not apply to the Victorian Human Rights Commissioner in respect of the office of Victorian Human Rights Commissioner, except as provided in section 16 of that Act.

**43. Vacancy, resignation**

- (1) This section applies if the Victorian Human Rights Commissioner is appointed under section 41(1).
- (2) The Victorian Human Rights Commissioner ceases to hold office if he or she—
- (a) becomes an insolvent under administration; or
  - (b) is convicted of an indictable offence or an offence which, if committed in Victoria, would be an indictable offence; or
  - (c) nominates for election for either House of the Parliament of Victoria or of the Commonwealth or of any other State or a Territory.
- (3) The Victorian Human Rights Commissioner may resign by notice in writing delivered to the Governor in Council.

**44. Suspension of Victorian Human Rights Commissioner**

- (1) This section applies if the Victorian Human Rights Commissioner is appointed under section 41(1).
- (2) The Governor in Council may suspend the Victorian Human Rights Commissioner from office.
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- (3) The Minister must cause to be laid before each House of Parliament a full statement of the grounds of suspension within 7 sitting days of that House after the suspension.
- (4) The Victorian Human Rights Commissioner must be removed from office by the Governor in Council if each House of Parliament within 20 sitting days after the day when the statement is laid before it declares by resolution that the Victorian Human Rights Commissioner ought to be removed from office.
- (5) The Governor in Council must remove the suspension and restore the Victorian Human Rights Commissioner to office unless each House makes a declaration of the kind specified in sub-section (4) within the time specified in that sub-section.

**45. Acting appointment**

- (1) This section applies if the Victorian Human Rights Commissioner is appointed under section 41(1).
- (2) The Governor in Council may appoint a person to act in the office of Victorian Human Rights Commissioner—
  - (a) during a vacancy in that office; or
  - (b) during a period or all periods when the person holding that office is absent from duty or is, for any reason, unable to perform the duties of the office.
- (3) An appointment under sub-section (2) is for the period, not exceeding 6 months, that is specified in the instrument of appointment.

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- (4) A person is not eligible to be appointed under subsection (2) if the person is a member of the Parliament of Victoria or of the Commonwealth or of any other State or a Territory.
- (5) The Governor in Council may at any time remove the acting Victorian Human Rights Commissioner from office.
- (6) While a person is acting in the office of the Victorian Human Rights Commissioner in accordance with this section, the person has, and may exercise, all the powers and must perform all the duties of that office under this Charter.

**46. Validity of acts and decisions**

An act or decision of the Victorian Human Rights Commissioner or acting Victorian Human Rights Commissioner is not invalid only because—

- (a) of a defect or irregularity in or in connection with his or her appointment; or
- (b) in the case of an acting Victorian Human Rights Commissioner, that the occasion for so acting had not arisen or had ceased.

**47. Victorian Human Rights Commissioner may request assistance**

The Victorian Human Rights Commissioner may request the Equal Opportunity Commission to provide any assistance that the Victorian Human Rights Commissioner reasonably considers appropriate to perform his or her functions under this Charter, including the provision of staff and facilities.

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**48. Functions of the Victorian Human Rights Commissioner**

The Victorian Human Rights Commissioner has the following functions—

- (a) to present to the Attorney-General an annual report that examines—
    - (i) the operation of this Charter; and
    - (ii) all declarations of incompatibility made during the year; and
    - (iii) all override declarations made during the year; and
  - (b) to review every 4 years the effect of Victorian law, including the common law, on human rights and report in writing to the Attorney-General on the results of the review; and
  - (c) when requested, to review government departments to determine the consistency of programs and practices with human rights; and
  - (d) to provide education about human rights and this Charter; and
  - (e) where the Victorian Human Rights Commissioner considers it necessary to do so, to intervene in any proceeding before any court or tribunal that involves the application of this Charter; and
  - (f) to assist the Attorney-General in the review of this Charter under sections 52 and 53; and
  - (g) to advise the Attorney-General on anything relevant to the operation of this Charter; and
  - (h) any other function conferred on the Victorian Human Rights Commissioner under any other Act.
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**49. Powers**

The Victorian Human Rights Commissioner has power to do all things that are necessary or convenient to be done for or in connection with the performance of his or her functions.

**50. Reports to be laid before Parliament**

- (1) The Attorney-General must cause a copy of any report prepared by the Victorian Human Rights Commissioner in accordance with section 48(a) or (b) (as amended under sub-section (2), if applicable) to be laid before each House of Parliament on or before the 6th sitting day of that House after the Attorney-General has received the report.
- (2) The Attorney-General may amend a report received under section 48(a) or (b) if the Attorney-General considers it necessary to prevent disclosure of—
  - (a) the identity of any person whose human rights have, or may have been, contravened;  
or
  - (b) the identity of any person who may have contravened another person's human rights;  
or
  - (c) information that could, in the Attorney-General's opinion, harm the public interest.
- (3) If the Attorney-General amends the report in accordance with sub-section (2), he or she must present a statement that the report has been amended when laying the report before Parliament in accordance with sub-section (1).

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**51. Intervention by Victorian Human Rights  
Commissioner**

- (1) The Victorian Human Rights Commissioner may intervene in any proceeding before any court or tribunal involving the application of this Charter, and may be joined as a party to that proceeding.
  - (2) If the Victorian Human Rights Commissioner intervenes in a proceeding under this section, then, for the purposes of the institution and prosecution of an appeal from a judgment given in that proceeding, the Victorian Human Rights Commissioner may be taken to be a party to the proceeding.
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Part 5—General

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**PART 5—GENERAL**

**52. Review of Charter after 4 years of operation**

- (1) The Attorney-General must review the first 4 years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament within 4½ years after the commencement of Part 2.
  - (2) A review under sub-section (1) must include consideration as to whether—
    - (a) additional human rights should be included as human rights under this Charter, including but not limited to, rights under—
      - (i) the International Covenant on Economic, Social and Cultural Rights; and
      - (ii) the Convention on the Rights of the Child; and
      - (iii) the Convention on the Elimination of Discrimination against Women; and
    - (b) the right to self-determination should be included in this Charter; and
    - (c) the definition of "discrimination" in section 3 should be amended to extend the grounds of prohibited discrimination; and
    - (d) regular auditing of government departments to assess compliance with human rights should be made mandatory; and
    - (e) further provision should be made in this Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by this Charter.
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**53. Review of Charter after 8 years of operation**

- (1) The Attorney-General must review the fifth to eighth years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament no later than 8½ years after the commencement of Part 2.
- (2) A report under sub-section (1) must include a recommendation as to whether any further review of this Charter is necessary.

**54. Regulations**

The Governor in Council may make regulations for or with respect to any matter or thing required or permitted by this Charter to be prescribed or necessary to be prescribed to give effect to this Charter.

**55. Consequential amendments**

On the coming into operation of an item in Schedule 1, the Act referred to in the heading to that item is amended as set out in that item.

**56. Transitional provisions**

- (1) This Charter extends and applies to all Acts, whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or after that commencement.
  - (2) This Charter does not affect any proceedings concluded or commenced before the commencement of Part 2.
  - (3) Division 4 of Part 3 does not apply to any act or decision made by a public authority before the commencement of that Division.
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**SCHEDULE 1**

Section 55

**CONSEQUENTIAL AMENDMENTS**

**1. Co-operative Schemes (Administrative Actions) Act 2001**

In section 4 for "Scrutiny of Acts and Regulations Committee" (wherever occurring) **substitute** "Human Rights Scrutiny Committee".

**2. Environment Protection Act 1970**

In sections 18D(2), 18D(3), 18D(4), 49ADA(2), 49AN(8) and 70C(3) for "Scrutiny of Acts and Regulations Committee" (wherever occurring) **substitute** "Human Rights Scrutiny Committee".

**3. Estate Agents Act 1980**

In sections 10C(2) and 45A(2) for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

**4. Fair Trading Act 1999**

In section 32NA(7) for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

**5. Fisheries Act 1995**

In section 151(8B) for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

**6. Fundraising Appeals Act 1998**

In section 16A(6) for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

**7. Ombudsman Act 1973**

After section 13(1) **insert**—

"(1A) The functions of the Ombudsman under subsection (1) include the power to enquire into or investigate whether any administrative action is inconsistent with a human right contained in the Charter of Human Rights and Responsibilities."

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**8. Parliamentary Committees Act 2003**

8.1 In section 5(k) for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

8.2 For the heading to section 17 **substitute—**  
**"Human Rights Scrutiny Committee"**.

8.3 In section 17 for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

8.4 After section 17(a)(vii) **insert—**

"(viii) is inconsistent with the human rights contained in the Charter of Human Rights and Responsibilities;"

8.5 For section 17(c) **substitute—**

"(c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill—

(i) within 30 days immediately after the first appointment of members of the Committee after the commencement of a Parliament; or

(ii) within 10 sitting days after the Act receives Royal Assent—

whichever is the later, and to report to the Parliament with respect to that Act on any matter referred to in those paragraphs;"

8.6 At the foot of section 17 **insert—**

"Note: Section 38 of the Charter of Human Rights and Responsibilities requires the Committee to review all declarations of incompatibility made by the Supreme Court and provided to the Committee by the Attorney-General and to report to each House of Parliament on the declaration and make such recommendations as the Committee considers appropriate."

8.7 In Column 2 of the Table in section 65 for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

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**9. Police Regulation Act 1958**

9.1 In section 102BA(b), for "prevented." **substitute** "prevented; and".

9.2 After section 102BA(b) **insert**—

"(c) to ensure that members of the force have regard to the human rights contained in the Charter of Human Rights and Responsibilities."

**10. Port Services Act 1995**

In section 184 for "Scrutiny of Acts and Regulations Committee" (wherever occurring) **substitute** "Human Rights Scrutiny Committee".

**11. Public Administration Act 2004**

11.1 In section 7(1)(f), for "values." **insert** "values;".

11.2 After section 7(1)(f) **insert**—

"(g) **human rights**—public officials should respect and promote the human rights set out in the Charter of Human Rights and Responsibilities by—

(i) making decisions and providing advice consistent with human rights; and

(ii) actively implementing, promoting and supporting human rights."

11.3 After section 8(c) **insert**—

"(ca) all people are accorded human rights as set out in the Charter of Human Rights and Responsibilities; and".

11.4 After section 16(1)(k) **insert**—

"(ka) the Victorian Human Rights Commissioner in relation to the Office of the Victorian Human Rights Commissioner;"

**12. Radiation Act 2005**

In section 5(2) for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

**13. Rail Corporations Act 1996**

In section 38C(2) for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

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**14. Road Management Act 2004**

In sections 23(4) and 30(2) for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

**15. Subordinate Legislation Act 1994**

15.1 In section 3, in the definition of "Scrutiny Committee", for "Scrutiny of Acts and Regulations Committee" **substitute** "Human Rights Scrutiny Committee".

15.2 After section 10(1)(e) **insert—**

- "(ea) a statement explaining the effect of the proposed statutory rule on a human right contained in the Charter of Human Rights and Responsibilities, and explaining the nature of any human right affected;
- (eb) if any limitation is placed on any human right contained in the Charter of Human Rights and Responsibilities by the proposed statutory rule, a statement setting out—
- (i) the nature of the human right limited; and
  - (ii) the importance of the purpose of the limitation; and
  - (iii) the nature and extent of the limitation; and
  - (iv) the relation between the limitation and its purpose; and
  - (v) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve;"

15.3 After section 13(e) **insert—**

"(ea) appears to be inconsistent with the human rights contained in the Charter of Human Rights and Responsibilities;"

15.4 After section 21(1)(h) **insert—**

"(ha) is inconsistent with the human rights contained in the Charter of Human Rights and Responsibilities;"

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**16. Victorian Civil and Administrative Tribunal Act 1998**

In Schedule 1, after Part 2 insert—

**"PART 2A—CHARTER OF HUMAN RIGHTS AND  
RESPONSIBILITIES**

**4A. Referral of questions of law to Court**

Nothing in section 96 applies to a question of law involving the application of the Charter of Human Rights and Responsibilities."

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