



Victorian Equal Opportunity
& Human Rights Commission

Submission to the Inquiry into a Human Rights Act in Queensland

18 April 2016

Introduction

The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) welcomes the opportunity to make a submission to the inquiry of the Queensland Legal Affairs and Community Safety Committee into whether it is appropriate and desirable to legislate for a Human Rights Act in Queensland other than through a constitutionally entrenched model.

The Commission is Victoria's independent statutory human rights authority with functions under the Victorian *Charter of Human Rights and Responsibilities Act 2006* (**the Charter**). The Commission also has functions under the Victorian *Equal Opportunity Act 2010* and the Victorian *Racial and Religious Tolerance Act 2001*.

The Charter sets out the human rights of people in Victoria. It aims to promote a culture where everyone's rights are protected and considered in service delivery, policy, public decision making and legislation.

The Commission was given new statutory powers and functions under the Charter that were intended to help it contribute to developing a human rights culture in Victoria. These included providing human rights education, reporting on the operation of the Charter, interventions in court proceedings and conducting compliance reviews when requested by public authorities.

In exercising its functions since 2007, the Commission has developed significant expertise in human rights and the Charter in that time. It is well placed to observe the operation, effectiveness and benefits of the Charter, and a desirable framework for a proposed Human Rights Act. These submissions focus on the Victorian experience of having the Charter to protect and promote human rights.

Summary of Commission's submission and recommendations

The Commission submits that a Human Rights Act for Queensland would serve to better protect and promote the human rights of people in Queensland.

Firstly, the Commission recommends that a Human Rights Act for Queensland could be legislated in an Act of Parliament based on a 'dialogue model' of rights like the Charter, which was designed to preserve parliamentary sovereignty.

Secondly, the submissions summarise a report by a Victorian public consultation committee on the effectiveness of pre-Charter laws and mechanisms and its findings in favour of a human rights charter.

Thirdly, these submissions provide an overview of the operation of the Charter. They set out the human rights protected under the Charter and three key mechanisms for promoting and protecting human rights. These submissions provide a number of case studies of the Charter having a positive impact on the human rights of Victorians. The Commission considers that the Charter has been an effective tool, particularly for ensuring that human rights are embedded in government policy and practice, and in the development and drafting of legislation.

Fourthly, the Commission recommends that lessons learned from the Victorian experience should be taken into account where legislating and implementing a Human Rights Act for Queensland. They include: ensuring that the human rights body vested with functions be able to take complaints and investigate human rights breaches, and provide alternative dispute resolution; giving long-term prioritisation and funding to human rights education; having clearer, more accessible and enforceable remedies in the form of a direct cause of action; and making changes to the operation of human rights scrutiny of legislation, and

clarifications to certain provisions of the Charter, to provide an enhanced model for protecting and promoting human rights.

Finally, these submissions outline the outcomes of reviews of the Charter following four and eight years of the Charter's operation. The Eight Year Review in 2015 considered that the Charter performed an integral role in Victoria's democratic society. A range of recommendations were made to enhance the effectiveness of the Charter and improve its operation. Many of those recommendations addressed issues identified by the Commission or adopted recommendations made by the Commission.

The appropriateness and desirability of a Human Rights Act – Term of Reference 1

The Charter is not constitutionally entrenched. It is an Act of Parliament. The Charter was crafted to anchor human rights in the ordinary interactions between governments and individuals. It is referred to as a 'dialogue model' of rights – that is, the emphasis is on identifying, considering and applying rights in everyday practice so as to make them a fundamental framework for government thinking that will prevent breaches of rights occurring in the first place.

The Charter's adoption of a 'dialogue model' means that Parliament retains its sovereignty, because it cannot be forced to adopt a particular position on a human rights issue, and may enact legislation that is inconsistent with the human rights set out in the Charter.

The Charter drew significantly on the Human Rights Acts that operate successfully in other jurisdictions, in particular the Australian Capital Territory, the United Kingdom and New Zealand. All of these Human Rights Acts recognise parliamentary sovereignty and respect the traditional balance between Parliament and the courts in the Westminster tradition.

Based on the Victorian experience, a Human Rights Act based on a 'dialogue model' would be appropriate and desirable in better protecting and promoting the human rights of people in Queensland.

The effectiveness of pre-Charter laws and mechanisms for protecting human rights in Victoria

The Commission does not purport to make submissions on the effectiveness of current Queensland laws and mechanisms for protecting human rights and possible improvements to those mechanisms under Term of Reference 2(a).

The Commission does however wish to note that the Charter was also enacted following a public consultation process, which considered whether Victoria needed a new law on human rights.

In 2005, the Attorney-General announced the appointment of a Human Rights Consultation Committee. The Committee was chaired by Professor George Williams, a constitutional lawyer with human rights expertise, Rhonda Galbally AO, community leader and social justice advocate, Andrew Gaze, basketballer and former Olympic team captain, and the Hon Professor Haddon Storey QC, former Liberal Attorney-General.

The Committee found in favour of a charter to better protect and promote human rights in Victoria.¹ It recommended that the charter be an Act of Parliament,² based on the 'dialogue

¹ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 18 (Recommendation 1).

² Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 22 (Recommendation 2).

model'.³ The Committee proposed a model which, broadly speaking, was ultimately enacted under the Charter.

The Committee found a strong level of community support for a change in Victorian law to better protect human rights. The Committee received 2,524 submissions in a variety of formats. According to the Committee's report, 84% of formal submissions and 94% of petitions expressed support for this change.⁴ Of the 161 community and other organisations that made a submission, almost all supported the idea of better protection for human rights in Victorian law.⁵

The Committee noted that human rights were protected by the Australian and Victorian Constitutions, legislation, the common law and international law.⁶ However, the Committee found that human rights protection in Victoria was 'far from comprehensive' and the 'rights that are protected are scattered and often hard to find'. A human rights charter would benefit Victorians by writing down in one place the basic rights that Victorians hold and expect government to observe.⁷

The Committee also found that the rights of marginalised people, such as people with disabilities, prisoners, culturally and linguistically diverse communities, Indigenous Australians, LGBTI communities, and homeless people, were not always respected. A human rights charter could provide valuable additional protection for the most disadvantaged in the community.⁸

The Committee further considered that a human rights charter could be extremely valuable in promoting better government. It would require that government laws, policies, decisions and actions take into account fundamental human rights. Where the government wants to restrict human rights, a human rights charter would ensure 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.⁹

The Charter's operation and effectiveness – Term of Reference 2(b)

Overview of the Charter's key mechanisms

The Charter's main purpose is to protect and promote human rights.

The Charter sets out three key mechanisms for achieving this:

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

³ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) Chapter 4.

⁴ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 3.

⁵ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 4.

⁶ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 5.

⁷ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 6.

⁸ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 6-9.

⁹ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 10.

The human rights protected by the Charter

The Charter sets out the human rights that Parliament specifically seeks to protect and promote (section 7(1)) under Victorian domestic law.

Australia has a proud record of respect and acknowledgment of international human rights. In 1948, the United Nations adopted the Universal Declaration on Human Rights. Australia played a role in developing this and several international human rights treaties that followed. Signed by a federal Labor Government in 1972 and later ratified by a federal Coalition Government, the International Covenant on Civil and Political Rights (**ICCPR**) represents a widely-recognised and accepted standard of human rights that transcend political differences and have widespread acceptance in our community.

The Charter builds on this tradition. The human rights are set out in Part 2 of the Charter. They are civil and political rights, which are based directly on the rights set out in the ICCPR.

The Charter incorporates 20 fundamental human rights into the law of Victoria. A brief description of each of those rights is set out below (refer to the Charter for the full text of each right).

- **Right to recognition and equality before the law:** Everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination.
- **Right to life:** Every person has the right to life and to not have their life taken. The right to life includes a duty on government to take appropriate steps to protect the right to life.
- **Right to protection from torture and cruel, inhuman or degrading treatment:** People must not be tortured. People must also not be treated or punished in a cruel, inhuman or degrading way. This includes protection from treatment that humiliates a person. People must not be subjected to medical treatment or experiments without their full and informed consent.
- **Right to freedom from forced work:** A person must not be forced to work or be made a slave. A person is a slave when someone else has complete control over them.
- **Right to freedom of movement:** People can stay in or leave Victoria whenever they want to so long as they are here lawfully. They can move around freely within Victoria and choose where they live.
- **Right to privacy and reputation:** Everyone has the right to keep their lives private. A person's family, home or personal information cannot be interfered with, unless the law allows it and it is based on reasonable grounds.
- **Right to freedom of thought, conscience, religion and belief:** People have the freedom to think and believe what they want, for example, to follow a religion. They can do this in public or private, as part of a group or alone.
- **Right to freedom of expression:** People are free to say what they think and want to say. They have the right to seek, receive and share information and ideas. In general, this right can be limited to respect the rights and reputation of other people, or for the protection of public safety and public order.
- **Right to peaceful assembly and freedom of association:** People have the right to join groups or unions and to meet peacefully for a purpose.
- **Right to protection of families and children:** Families are entitled to protection. Children have the same rights as adults with added protection according to their best interests. Children have the right to have a say about matters that affect them.
- **Right to take part in public life:** Every person has the right to take part in public life, such as the right to vote or run for public office.
- **Cultural rights:** People have different family, language, religious or cultural backgrounds. They can enjoy their culture, declare and practise their religion and use their languages. Aboriginal persons hold distinct cultural rights.

- **Property rights:** People are protected from having their property taken, unless the law says it can be taken.
- **Right to liberty and security of person:** Everyone has the right to freedom and safety. The right to liberty includes the right not to be arrested or detained except in accordance with the law. The right to security means that reasonable steps must be taken to ensure the physical safety of people who are in danger of physical harm.
- **Right to humane treatment when deprived of liberty:** People have the right to be treated with humanity if they are detained.
- **Rights of children in the criminal process:** A child charged with committing a crime or who has been detained without charge must not be held with adults. They must also be brought to trial as quickly as possible and treated in a way that is appropriate for their age.
- **Right to a fair hearing:** A person has a right to a fair hearing. This means the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- **Rights in criminal proceedings:** There are a number of minimum guarantees that people have when they have been charged with a criminal offence. These include the right to be told the charges against them in a language they understand; the right to an interpreter if needed; the right to have time and the facilities (such as a computer) to prepare their own case or to talk to a lawyer; the right to have their trial heard without too much delay; and the right to be told about Legal Aid if they don't already have a lawyer. People are presumed innocent until proven guilty; they do not have to testify against themselves or confess guilt unless they choose to do so.
- **Right not to be tried or punished more than once:** A person will only go to court and be tried once for a crime. This means if the person is found guilty they will only be punished once. If they are found to be innocent they will not be punished.
- **Protection from retrospective criminal laws:** A person has the right not to be prosecuted or punished for things that were not criminal offences at the time they were committed.

The Charter recognises that human rights are not absolute. The Charter includes what is known as a 'general limitations clause' under section 7(2). Section 7(2) provides that all rights may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including five key considerations.¹⁰ A limit on a human right is 'compatible' with that right where it is a reasonable limit taking into account these factors. Section 7(2) incorporates a proportionality test, and provides a clear and effective framework for considering the limits that may be placed on human rights, having regard to competing public interests and policy objectives.

Obligations on public authorities

Definition of public authorities

The Charter imposes obligations on public authorities.

Public authorities are defined by section 4 of the Charter. A number of public authorities are expressly identified as being bound by the Charter and include public officials, entities established by statute with public functions, Victoria Police, local councils, Ministers, and

¹⁰ Those key considerations are: (a) the nature of the human right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (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.

courts, tribunals and members of parliamentary committees when acting in an administrative capacity. These are generally referred to as 'core' public authorities.

Section 4 also recognises that private and other not-for-profit entities are increasingly providing Victorian government services and exercising public functions. The definition of public authority therefore encompasses what is known as a 'functional' public authority. Section 4(1)(c) provides that a public authority includes an entity 'whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority'. Guidance on these criteria is found in section 4(2)-(5).

Section 38 of the Charter

Section 38(1) provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'.

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

Section 38(1) has two limbs:

- The first limb of section 38(1), which is substantive in character, makes it unlawful to act in a way that is incompatible with a human right. 'Act' is defined in section 3 to include a failure to act or a proposal to act.
- The second limb, which is procedural in character, requires public authorities to give 'proper consideration' to relevant human rights in making decisions. The procedural limb of section 38(1) makes the human rights in the Charter a mandatory relevant consideration for all decisions made by public authorities.

Section 38(1) improved on the state of the law in Victoria. Before the Charter was enacted, there was no legal obligation generally for public authorities to comply with and give consideration to human rights.

A breach of either public authority obligation renders conduct unlawful unless the public authority could not have acted differently as the result of a statutory provision (section 38(2)). For example, where a public authority is acting to give effect to a statutory provision that is incompatible with a human right, this will not be in breach of section 38(1).¹¹

Examples of the operation of section 38(1)

The Commission has reported that after eight years of working with the Charter, Victorian public authorities were reporting an ongoing commitment to making human rights part of everyday business. Public authorities continue to promote and protect human rights by using the Charter to inform new or revised policies and procedures. In some cases, public authorities embedded the Charter and human rights in business plans and corporate plans. Some public authorities also demonstrated that the Charter is an integral tool to improve decision-making and to assist staff.¹²

Section 38(1) has been applied in a variety of contexts, as demonstrated by the following examples.

The Charter and planning decisions

The Charter has assisted local councils in making decisions when it faces complex community matters, including where different human rights may be relevant. For example, Hume City Council applied the Charter when considering a planning permit application.

A group had applied to build a mosque next to a church in an industrial zone. The Al Sadiq Foundation Ltd sought to establish a Shi'ite Islamic mosque and related facilities on its land. There was no Shi'ite mosque in the area. Significantly, the mosque was proposed to be

¹¹ Charter, Example to section 38(2).

¹² VEOHRC, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (2015) 45.

located on land immediately adjacent to the St Mary's Ancient Church of the East, whose congregation comprises people mainly of Assyrian background, many of whom have fled violence and human rights abuses in Iraq at the hands of Islamic extremists.

The Council granted the application for a permit, after considering that:

- Victoria's town planning framework did not distinguish between religions but supports planning that responds to community needs.
- The Charter enshrines religious freedom and equality. The Council was obliged as a public authority to consider the Charter in its decision making and to act compatibly with human rights in planning matters.
- The application to develop a place of worship engaged the right of the Islamic community to freedom of thought and religious belief. Refusing to grant the application based on perceived intimidation would unreasonably limit this right.

The grant of the planning permit was challenged, but upheld by the Victorian Civil and Administrative Tribunal (**VCAT**).¹³

Shelly's story: investigation of injury¹⁴

Shelly lived in supported accommodation and accessed the community with support from a disability service provider. When visiting Shelly one day, her parents noticed she had bruising around her chin. Shelly had limited verbal communication skills and was unable to tell them what had happened. The incident had not been reported to the Department of Health and Human Services.

Shelly's parents contacted the Victorian Disability Services Commissioner (DSC) concerned that she may have been assaulted and that the service was not taking the matter seriously. The DSC assessed that:

- the complaint related to Shelly's right to protection from cruel and degrading treatment under the Charter
- the service did not understand their obligations to report incidents
- the service failed to consider Shelly's human rights in making decisions that impacted on her quality of life.

DSC supported the service to develop an investigation plan. Shelly was supported to give her account of what may have caused the injury. Shelly's parents were included in the process.

Although the cause of the injury remained unexplained, Shelly's parents were satisfied that Shelly would be better supported by the provider in the future to communicate any concerns. Following advice from DSC, the service provider is now clear about considering the human rights of individuals they support and their obligations in reporting incidents.

Complaints against police

*Bare v IBAC*¹⁵ involved Nassir Bare, who had complained to the Victorian Office of Police Integrity (OPI) (now the Independent Broad-based Anti-corruption Commission) that, for example, he was capsicum sprayed by police while handcuffed, had his teeth chipped on the gutter during his arrest and was racially abused by officers. The OPI decided to refer the complaint to Victoria Police for investigation rather than investigating it themselves.

The Supreme Court had dismissed Mr Bare's challenge of the OPI's decision.

¹³ *Rutherford & Ors v Hume CC* [2014] VCAT 786.

¹⁴ Case study provided by the Disability Services Commissioner in VEOHRC, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (2015) 38.

¹⁵ [2015] VSCA 197.

Mr Bare appealed. The Court of Appeal considered that the OPI had breached section 38 of the Charter by failing to give proper consideration to Mr Bare's right to protection from cruel, inhuman and degrading treatment, and right to equality. These human rights were relevant because of Mr Bare's allegations of serious and repeated mistreatment by police, and the suggestion that this was racially motivated and a systemic issue.

The Court of Appeal found that the breach of section 38 amounted to an 'error of law on the face of the record'. The record, in this case, was the OPI's written reasons. A majority of the Court of Appeal allowed Mr Bare's appeal and ordered that a fresh decision be made by the Independent Broad-based Anti-corruption Commission.

Enforcement of section 38(1)

However, legal proceedings cannot always be brought in relation to a breach of section 38(1) of the Charter. This is set out in the complicated provision of section 39 of the Charter.

Section 39(1) provides:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

Section 39 is original to the Charter and not replicated in any other Human Rights Act in existence. Section 39 only enables a person to seek relief or remedy for an unlawful act or decision (a breach of section 38) where they have an existing proceeding against a public authority. It does not identify what type of relief or remedy is available for a breach of the Charter but specifically excludes an award of damages (section 39(3)). The Charter does not enable a person to bring an independent action against a public authority on the basis of a breach of the Charter.

This issue is addressed further below in these submissions.

Victoria's scrutiny of legislation process

Statements of compatibility

The Charter underpins Victoria's legislative process. The Charter requires scrutiny of legislation to ensure that all Bills are assessed for compatibility with human rights. Section 28 of the Charter provides that a Minister or member of Parliament introducing a Bill must provide a statement of compatibility at the same time as tabling the Bill setting out how it is compatible with human rights, or alternatively, the extent any incompatibility. Statements of compatibility convey whether and how human rights are limited by a Bill and if so, whether that limitation is reasonable.

The Charter has had a fundamental impact on the development and drafting of legislation. Statements of compatibility can ensure that human rights are considered early in the development of legislation. Ministers and members are accountable to Parliament when introducing a Bill. The statement of compatibility process provides a transparent framework to consider relevant human rights and policy goals underlying legislation. It builds in consideration of how to achieve policy goals while ensuring that if human rights are limited, the least restrictive approaches can be taken.

Making better laws: the *Mental Health Act 2014*

The Charter has guided major legislative reforms in Victoria, such as the *Mental Health Act 2014*. Consultation over six years in developing the *Mental Health Act 2014* enabled the Victorian government, service providers and community to consider the significant human rights issues raised by mental health treatment. The new Act took a significant step forward

in protecting the rights of people with psycho-social disabilities.¹⁶ Among other things, the new Act:

- has an objective that people receive assessment and treatment in the least restrictive way with the least possible restrictions on human rights and dignity; and
- a principle that restrictive interventions may only be used after all reasonable and less restrictive options have been tried or considered and found to be unsuitable.

During the passage of this legislation through Parliament, amendments were made to improve human rights protections including gender identity being added to the list of things that are not mental illness and some safeguards around the use of electroconvulsive treatment on young people.

The Victorian Department of Health and Human Services also commented that the new Act has 'strengthened the focus on individual rights and safeguards in relation to mental health assessment, treatment and care in general.'¹⁷

The Charter also provides for scrutiny of regulations. The *Subordinate Legislation Act 1994* (Vic) requires a Minister to prepare a human rights certificate in respect of a proposed statutory rule, which includes regulations.¹⁸ This Act also states that SARC may report to Parliament if it considers that a statutory rule is incompatible with human rights under the Charter.¹⁹ Scrutiny of regulations is important as they can have a significant effect on human rights and contain detail about how laws operate in practice.

SARC scrutiny process

The Victorian Scrutiny of Acts and Regulations Committee (**SARC**) is a parliamentary committee which must consider any Bill introduced into Parliament and report to Parliament on whether the Bill is incompatible with human rights.²⁰ SARC prepares reports on all Bills for tabled in Parliament in an Alert Digest at the commencement of each sitting week. If a Bill raises Charter compatibility issues, SARC often corresponds with the Minister and includes ministerial responses in Alert Digests. Members of Parliament can refer to these issues in parliamentary debate. The reports can therefore assist in robust consideration of the human rights implications of legislation for Parliament and the broader public.

Scrutiny of Bills 1: the Criminal Organisations Control Bill 2012

Scrutiny by SARC provides a vital check by identifying gaps in the statements of compatibility. For example, for the Criminal Organisations Control Bill 2012, SARC provided an extensive analysis that alerted Parliament to various rights relevant to aspects of the Bill.²¹ Specifically, SARC highlighted that a 'declared organisation' with connections to serious criminal activity may permit declarations to be made about groups of people associating together due to personal or communal attributes protected by the Charter.

The relevant rights identified by SARC were equal protection of the law without discrimination, freedom of religion or belief, the protection of families and children, and cultural rights, including the cultural rights of Aboriginal persons.

¹⁶ VEOHRC, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (2015) 62.

¹⁷ VEOHRC, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (2015) 63.

¹⁸ *Subordinate Legislation Act 1994*, section 12A. See also section 12D in relation to human rights certificates for proposed legislative instruments unless exempted.

¹⁹ *Subordinate Legislation Act 1994*, section 21(ha). See also section 25A(1)(c) in relation to legislative instruments.

²⁰ Charter, section 30.

²¹ Parliament of Victoria Scrutiny of Acts and Regulations Committee, Alert Digest No.17 of 2012, 26 November 2012, 6-8.

The provisions of the Bill criminalised association based on the conduct of a small number of former, present or prospective members. SARC noted that similar Acts in Australia did not permit a declaration based solely on the activities of former members. Most statutes bar similar declarations being made based on the activities of some members unless those members constitute a significant influential group. SARC sought and received further explanation about the issues from the Attorney-General.²²

Scrutiny of Bills 2: the Fire Services Levy Monitor Bill 2012

Bills are also sometimes amended due to human rights issues. For example, the Fire Services Levy Monitor Bill 2012 permitted a Fire Services Levy Monitor to request the Supreme Court to impose heavy penalties for making false, misleading or deceptive statements regarding abolition of a fire services levy. SARC wrote to the Minister asking whether applying a penalty of up to \$500,000 for individuals, for unintentional statements in non-commercial contexts breached the right to freedom of expression.²³ The Minister responded that this was not the intention of the Bill. An objective of the Bill was to prohibit insurance companies engaging in price exploitation. The Government moved a House amendment indicating that the clause would be limited to trade or commerce and not affect freedom of expression in non-commercial or political contexts.²⁴

Override declarations

An override declaration under section 31 of the Charter allows the Victorian government to expressly declare that an Act or a provision has effect despite being incompatible with human rights. An override lasts for 5 years and can be renewed. The Charter will not apply to the extent of the declaration. This means that legislation does not need to be interpreted compatibly with human rights, a declaration of inconsistent interpretation cannot be made in relation to it, and public authorities obligations do not apply. A member of Parliament introducing an override declaration must make a statement explaining the 'exceptional circumstances' that justify the override (which may include threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria).²⁵

Two override declarations have been made under the Charter. The Commission has observed that neither of them were consistent with the theoretical justification for the use of an override provision.²⁶ Further, the override declaration provision is not necessary under a 'dialogue model'. This issue is addressed further below in these submissions.

Interpreting existing laws compatibly with human rights

Section 32 of the Charter

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

²² Attorney-General Robert Clark, Minister's Response, reported in the Parliament of Victoria Scrutiny of Acts and Regulations Committee, Alert Digest No.18 of 2012, 11 December 2012, 11-14.

²³ Parliament of Victoria Scrutiny of Acts and Regulations Committee, Alert Digest No.17 of 2012, 26 November 2012, 13-14.

²⁴ Minister for Consumer Affairs Michael O'Brien, Minister's Response, reported in the Parliament of Victoria Scrutiny of Acts and Regulations Committee, Alert Digest No.18 of 2012, 11 December 2012, 16.

²⁵ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 2842.

²⁶ See VEOHRC, *Submission to the Eight-Year Review of the Charter of Human Rights and Responsibilities Act 2006 (2015)* 87-8 for a description of the two override declarations made. The first was to maintain cross jurisdictional consistency in the application of a national uniform law, and the second was to make a law specifically in relation to one prisoner (Julian Knight).

The requirement in section 32(1) of the Charter that all Victorian laws are interpreted so far as possible in a way that is compatible with human rights is central to the Charter's purpose to protect and promote human rights. It is one of the primary vehicles by which the purpose of the Charter is to be achieved. Section 32 is essential to maintaining meaningful and robust human rights outcomes for individuals.

Section 32(1) applies to all Victorian statutes and subordinate instruments. All persons who interpret legislation, including government decision-makers, the courts and tribunals, are obliged to comply with section 32(1).

Section 32(2) allows for reference to relevant international sources when interpreting a statutory provision.

In the High Court case of *Momcilovic v The Queen*²⁷ (**Momcilovic**), a 6:1 majority found that section 32(1) was an ordinary principle of statutory interpretation and constitutionally valid.

The Victorian Court of Appeal has predominantly interpreted *Momcilovic* as saying that section 32(1) is equivalent to the 'principle of legality' with a wider field of application.²⁸ For example, the Court of Appeal in *Slaveski v Smith* said:

Consequently, if the words of a statute [sic] are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.²⁹

Example of the operation of section 32(1)

The Charter and housing evictions

In *Director of Housing v Cochrane*,³⁰ VCAT applied section 32(1) to interpret the Victorian *Residential Tenancies Act 1997*, which provides that a landlord may serve a notice to vacate where the tenant causes malicious damage.

The tenant had lived at the property for over a decade and had a number of children. The Director was aware of property damage at a prior time but had waited to serve the notice until there were no longer children under the age of 18 living with her. The tenant gave evidence that she had relinquished care of her younger children in order to take drug rehabilitation and aim to reunite with her children. The Tribunal accepted that reunification with her children would be unlikely without the property and that her eviction may result in homelessness. It also accepted there was no current or ongoing malicious damage.

The Tribunal found that an interpretation of the *Residential Tenancies Act* that allowed a landlord to hold off issuing a notice to a time when the damage was no longer current would be incompatible with the right to privacy, family and home under the Charter when a less harsh and unjust interpretation was possible. The Tribunal said that the Act required the cause of the damage to be current and continuing. It dismissed an application by the landlord for possession because the damage had not occurred for a significant time.

²⁷ (2011) 245 CLR 1.

²⁸ The principle of legality is a common law presumption that Parliament does not intend to abrogate or curtail fundamental common law rights, freedoms and immunities except by clear and unambiguous language.

²⁹ (2012) 34 VR 206, 215 [24].

³⁰ [2014] VCAT 1180.

Declarations of inconsistent interpretation

The Charter's requirement that all statutory provisions be interpreted compatibly with human rights is not unlimited. Specifically, the endeavour to interpret statutory provisions compatibly with human rights must stop at the point at which such an interpretation would be inconsistent with the purpose of the relevant provision.

If a statutory provision cannot be interpreted compatibly with human rights, the relevant court or tribunal must apply the human rights inconsistent interpretation of the provision. However, should the proceedings be before the Supreme Court or Court of Appeal, section 36 of the Charter provides that the Court has the additional discretion to make a declaration of inconsistent interpretation.³¹

A declaration of inconsistent interpretation does not affect the validity of the particular statutory provision or the rights of any party to the relevant proceedings.³² The making of a declaration triggers the following process under section 36(6)-(7) and section 37:

- the declaration is forwarded to the Attorney-General
- if the relevant statutory provision falls within the portfolio of another Minister, the Attorney-General must forward the declaration to that Minister
- within six months, the responsible Minister must respond to the declaration and the response must be tabled in Parliament and published in the Victorian Government Gazette.

A High Court majority in *Momcilovic* confirmed that declarations of inconsistent interpretations were valid under the Constitution. Section 36 declarations of inconsistent interpretation do not encroach on parliamentary sovereignty, but offer information to Parliament to help it do its work.³³ The Commission's view is that the power of the Court to make declarations and obligation on the responsible Minister to respond are important and effective features, because they facilitate the robust and public institutional dialogue intended by the Charter.

The Charter's first declaration of inconsistent interpretation

A declaration of inconsistent interpretation has been made on one occasion in Victoria – in *R v Momcilovic*³⁴ before the Victorian Court of Appeal. That Court issued a declaration in relation to section 5 of the Victorian *Drugs, Poisons and Controlled Substances Act 1981*, which deemed a person to be in possession of drugs unless they satisfied the court to the contrary. The Court of Appeal held that section 5 could not be interpreted compatibly with the right to be presumed innocent under the Charter. However, it was set aside on appeal to the High Court in *Momcilovic*.

The Commission's functions under the Charter

As the statutory human rights body in Victoria, the Charter gives the Commission a number of specific powers and functions. These are:

- a right to intervene in proceedings before any court or tribunal in which a question of law arises that relates to the application of the Charter or that arises with respect to the interpretation of a law in accordance with the Charter (section 40(1)) – the Attorney-General also has this right)

³¹ Section 36(2), Charter.

³² Section 36(5), Charter.

³³ As Chief Justice French of the High Court said, section 36 provides 'a mechanism by which the Court can direct the attention of the legislature, through the Executive Government of Victoria, to disconformity between a law of the State and a human right set out in the Charter': *Momcilovic v The Queen* (2011) 245 CLR 1, 67 [95].

³⁴ (2010) 25 VR 436.

- a requirement to present an annual report to the Attorney-General on the operation of the Charter, including its interaction with other laws; all declarations of inconsistent interpretation made during the year; and all override declarations made during the year (section 41(a))
- when requested by the Attorney-General, to review the effect of statutory provisions and the common law on human rights and report to the Attorney-General in writing (section 41(b))
- when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights (section 41(c))
- to provide education about human rights and the Charter (section 41(d))
- to assist the Attorney-General in the four- and eight-year reviews of the Charter (section 41(e))
- to advise the Attorney-General on anything relevant to the operation of the Charter (section 41(f)).

The Commission has been actively exercising and fulfilling these powers and functions since 2007.

Solitary confinement of children in prisons

In July and August 2012, five children were transferred from youth justice centres to adult prison, including a 16-year-old Aboriginal boy who was held in solitary confinement at Port Phillip Prison for a number of months.³⁵

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

The Commission's review advised that the use of solitary confinement for long periods of time has been found to be degrading treatment under human rights law. In the case of children, it may not be necessary for the young person to be in solitary confinement for long periods to breach this right. As a principle, solitary confinement should not be used for prisoners under 18 years old.³⁶

Although the Commission has a range of powers and functions under the Charter, it cannot take complaints about human rights breaches by public authorities³⁷ and cannot offer dispute resolution services in relation to such complaints.

How a Human Rights Act for Queensland could be legislated – Term of Reference 3

The Commission considers that the Charter has been an effective tool for Victorian government to consider the human rights impacts of proposed policies, decisions and laws, for the people of Victoria to be informed of and empowered by their human rights, and for the courts to uphold human rights. A Human Rights Act for Queensland could be legislated similar to the Charter model outlined above, but taking into account lessons learned from the Victorian experience.

³⁵ Victorian Ombudsman, *Investigation into Children Transferred from the Youth Justice System to the Adult Prison System* (2013).

³⁶ Victorian Ombudsman, *Investigation into Children Transferred from the Youth Justice System to the Adult Prison System* (2013) 27.

³⁷ We note that pursuant to subsection 13(2) of the *Ombudsman Act 1973 (Vic)*, the Ombudsman has the power to enquire into or investigate whether any administrative action that he or she may enquire into or investigate under subsection (1) is incompatible with a human right under the Charter.

As part of the review following eight years of operation of the Charter, the Commission submitted that improvements could be made on the Charter.³⁸ Some of the main issues are set out below. These could be addressed when legislating and implementing a Human Rights Act for Queensland, to ensure an enhanced model for protecting and promoting the human rights of people in Queensland.

Complaints, investigations and dispute resolution

There is no single body in Victoria that can receive complaints and investigate allegations of a human rights breach against all public authorities as defined in the Charter. The Charter provides a patchwork of options, with very little opportunity for a complainant to access independent dispute resolution services.

In the interests of access to justice, the human rights body vested with functions under a Human Rights Act for Queensland should have the functions and be resourced to take complaints about human rights breaches by public authorities, provide alternative dispute resolution, and investigate complaints about human rights breaches.

Sustained government support in education

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

Over the past four years, the Commission has seen a reduction in dedicated funding to entrench human rights into Victorian government workplace cultures. Investment in education is critical to developing a human rights culture. Human rights education helps departments, agencies and local governments ensure that proper consideration is built into their project planning and that their service delivery is compatible with their obligations under the Charter.

When implementing a Human Rights Act for Queensland, long-term prioritisation and funding should be given to human rights education.

Clearer breach outcomes

Not having clear, accessible and enforceable remedies attached to the Charter creates a barrier for the development of a human rights culture. The way in which section 39 of the Charter was drafted meant there are no obvious consequences of a breach of section 38. If a breach of human rights carries tangible consequences, then public authorities are more likely to ensure that they meet their obligations. Good will from public authorities is important, but without a method of enforcement as a last resort, the rate of cultural change will be slower.

Parliamentary scrutiny

The Commission considers that changes to the operation of human rights scrutiny of legislation under the Charter would enhance its effectiveness. For example, resourcing SARC members – including Charter training and access to expert Charter advice, encouraging public submissions on Bills raising human rights issues and providing an analysis of submissions in reports to Parliament, allowing for sufficient time for SARC to hold hearings on Bills raising significant human rights issues, making human rights certificates for regulations publicly accessible, and ensuring that House amendments are subject to human rights scrutiny.

³⁸ VEOHRC, *Submission to the Eight-Year Review of the Charter of Human Rights and Responsibilities Act 2006* (2015).

When implementing a Human Rights Act for Queensland, consideration should be given to such matters.

Clarifying provisions of the Charter

The Commission has observed that certain provisions of the Charter could be clarified in order to enhance their effectiveness and operation.

- **Public authorities under section 4:** A definition of public authority, which encompasses non-State entities as 'functional' public authorities when exercising functions of a public nature on behalf of the State, is flexible and effective.

A Human Rights Act for Queensland must reflect the reality that modern governments frequently and increasingly outsource important government functions to non-government organisations. A flexible definition of public authority provides this. However, one option to increase clarity of the definition is to give greater (but non-exhaustive) indication of the types of functions that will be covered by the Human Rights Act for Queensland.

- **Bringing legal proceedings and remedies for breach of section 38 under section 39:** Some of the key uncertainties and barriers posed by section 39 of the Charter that have arisen in court and tribunal cases are that section 39 is complex, the need to attach a Charter claim to another claim significantly reduces the ability for individuals to obtain effective relief, the jurisdiction of VCAT to consider Charter claims is limited, there are no clear consequences of a breach of section 38, and there is no entitlement to damages.

Issue of jurisdiction 1

In *Director of Housing v Sudi*³⁹ (**Sudi**), the Victorian Court of Appeal held that VCAT did not have jurisdiction to consider whether the Director of Housing had breached section 38 of the Charter in seeking an order for possession of Mr Sudi's home.

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

The Court of Appeal found that the Tribunal was not given power under the Victorian *Residential Tenancies Act 1997* nor section 39 of the Charter to review the Director's decision to apply for a possession order.

This finding diminished the opportunities to raise human rights concerns in the context of housing matters in the Tribunal, and created a mistaken belief in some advocates and public authorities that the Tribunal had no jurisdiction at all to consider human rights.

For tenants, the *Sudi* decision meant having to go to the Victorian Supreme Court to challenge eviction decisions on Charter grounds, which is complex and costly and beyond the reach of most public housing tenants.

Issue of jurisdiction 2 and no entitlement to damages

In *Slattery v Manningham City Council*,⁴⁰ Paul Slattery made a complaint to VCAT that a local council had discriminated against him under the Victorian *Equal Opportunity Act 2010*, and breached section 38(1) of the Charter. Mr Slattery was an active member of his local community. He had a number of diagnosed disabilities. The local council had indefinitely banned Mr Slattery from attending all council buildings on the basis he posed a health and safety risk to council staff.

³⁹ (2011) 33 VR 559.

⁴⁰ *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869.

The Council attempted to argue in light of *Sudi* that the Tribunal had no jurisdiction to consider the Charter claim. However, the Tribunal rejected this argument. The question of lawfulness of the local council's ban was being directly dealt with by the Tribunal.

The Tribunal found that the Council's indefinite ban was disproportionately excessive and incompatible with Mr Slattery's human rights under the Charter to take part in public life, freedom of expression and the right to enjoy his human rights without discrimination. The Council ban was also unlawful discrimination under the *Equal Opportunity Act*. The Tribunal:⁴¹

- Ordered the Council revoke the declaration prohibiting Mr Slattery from attending any building that is owned, occupied or managed by the Council
- Ordered the Council provide training on the Charter and local government for its councillors, CEO and Directors
- Ordered the Council pay Mr Slattery \$14,000, and
- Declared that the Council breached Mr Slattery's human rights.

Despite the Council's argument about the impact of *Sudi*, Mr Slattery was successful in having his Charter claim determined in VCAT. However, because section 39 of the Charter excludes an award of damages for Charter unlawfulness, the Tribunal was only able to award compensation in relation to the finding of unlawful discrimination in breach of the *Equal Opportunity Act*. The Commission considers that having no entitlement to damages under the Charter is unsatisfactory, as compensation in some (but not all) cases is necessary to provide an effective remedy where a person's human rights have been infringed.

A Human Rights Act for Queensland should provide for a direct right of action to an independent tribunal in an accessible, low cost jurisdiction, in respect of a complaint that a public authority has breached human rights. Such a tribunal should be able to make a range of orders, including where appropriate, compensation for loss, damage or injury suffered in consequence of a contravention.

- **The override declaration under section 31:** The Commission considers that the override declaration mechanism is inappropriate under the Charter dialogue model and should be repealed. The override declaration provision is not necessary as the Charter is designed to preserve parliamentary sovereignty. Under the Charter, legislation cannot be declared invalid by the judiciary. Furthermore, the override provision undermines the 'dialogue' process established under the Charter between the courts and Parliament, as it prevents the judiciary from interpreting law for compatibility and considering whether a declaration of incompatibility is warranted.

A Human Rights Act for Queensland should not include an override declaration mechanism.

- **Interpretation under section 32:** There has been confusion about the impact of case law on section 32 of the Charter. The High Court decision in *Momcilovic* was complex, and produced six separate judgments. *Momcilovic* has predominantly been interpreted as saying that section 32(1) is equivalent to the 'principle of legality' with a wider field of application.

However, at least one justice of the Victorian Court of Appeal⁴² and some commentators have questioned whether this interpretation of *Momcilovic* is correct. The Commission considers that an obligation to interpret laws compatibly with human rights is intended to be a stronger rule than the principle of legality or ordinary principles of interpretation. A

⁴¹ *Slattery v Manningham CC (Human Rights)* [2014] VCAT 1442.

⁴² *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37, [188]-[190]; see also Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter - Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43, 66-7.

Human Rights Act for Queensland should have an interpretive obligation drafted in a way that makes this clear.

- **Justification and proportionality under section 7(2):** *Momcilovic* also left unresolved whether section 7(2) applies in relation to statutory interpretation under section 32.

The Commission's view is that a limitation on human rights will only be incompatible if it is not reasonable and demonstrably justified, having regard to the factors set out in section 7(2). Section 7(2) reflects that human rights under the Charter are not absolute. It provides a clear and effective framework for considering the limits that may be placed on human rights, having regard to competing public interests and policy objectives. The application of justification and proportionality is consistent with the approach taken in other jurisdictions with Human Rights Acts, and at international law.

A Human Rights Act for Queensland should enact a provision similar to section 7(2), and make clear that it applies to the obligation to interpret Queensland laws compatibly with human rights (as well as to the equivalents of sections 38 and 28 of the Charter).

Reviews on the Charter – Term of Reference 2(d)

The Charter has been the subject of two reviews. As a new and developing law, the Charter required a review after four and eight years of operation.

Four Year Review of the Charter

The Four Year Review of the Charter was undertaken by SARC in 2011.

SARC was unable to reach unanimous agreement on proposed improvement of the Charter. It presented two options for consideration. The first was that the current Charter framework be retained with significant reforms and simplification. The second was that the obligations of public authorities and the role of courts be removed, but the process for parliamentary scrutiny of laws be retained.

The Victorian Coalition government responded by saying it was 'strongly committed to the principles of human rights and considers that legislative protection for those rights provides a tangible benefit to the Victorian benefit to the Victorian community'. The government considered 'that there is an ongoing place for the courts in protecting right in relation to the Charter'.⁴³ The Charter was not amended following the Four Year Review.

Eight Year Review of the Charter

The Eight Year Review of the Charter was undertaken in 2015 by an independent reviewer, Mr Michael Brett Young, former CEO of the Law Institute of Victoria. The Eight Year Review looked at ways to enhance the effectiveness of the Charter and improve its operation.

Mr Brett Young considered that the Charter was designed to improve the lives of individuals and the community as a whole. The Charter 'performs an integral role in our democratic society by protecting fundamental rights and freedoms'. Mr Brett Young found that the Charter had clearly helped to promote and protect human rights in Victoria, although there is more work to be done.⁴⁴

Mr Brett Young made a range of recommendations in his report offering practical steps to building a human rights culture in Victoria. Many of these addressed issues identified or adopted recommendations made by the Commission. They included:

- **Complaints and dispute resolution:** Providing that the Victorian Equal Opportunity and Human Rights Commission offer dispute resolution for disputes under the Charter.

⁴³ Victorian Government, *Review of the Charter of Human Rights and Responsibilities 2006: Victorian Government Response* (2012) 2, 23.

⁴⁴ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) iii.

- **Education:** A focus on human rights education within the public sector, particularly leaders across the Victorian public sector, local government councillors, staff of Victorian public sector departments, agencies and local government, and private entities that perform functions of a public nature and have obligations under the Charter.
- **Public authorities under section 4:** Amending section 4 to set out a non-exhaustive list of functions of a public nature, in respect of 'functional' public authorities.
- **Bringing legal proceedings and remedies for breach of section 38:** Introducing a direct cause of action under the Charter for breaches of section 38 of the Charter by public authorities, to enhance the Charter's ability to deliver human rights outcomes. Section 39 of the Charter is limited and uncertain in its operation. The Charter needs to be able to enforce the standards that it sets, as a last resort. Mr Brett Young was not convinced that this would significantly increase civil litigation.
- **More effective parliamentary scrutiny:** Ensuring human rights training for members of SARC, considering how best to ensure that SARC has sufficient time to scrutinise Bills that raise significant human rights issues, SARC referring to public submissions made to it in its reporting, giving SARC clear power to consider and report on House amendments, publishing all human rights certificates, and requiring SARC to consider all statutory rules and legislative instruments for human rights issues.
- **The override declaration under section 31:** Repealing the override declaration mechanism because it is not necessary to preserve parliamentary sovereignty and it fails to make clear to the public that Parliament can enact human rights incompatible legislation without an override declaration.
- **Interpretation under section 32:** Amending the obligation to interpret legislation compatibly with human rights under section 32 of the Charter to make clear that it is a stronger rule of interpretation than the principle of legality.
- **Justification and proportionality under section 7(2):** Making clear that something is compatible with human rights when it places no limit on a human right, or it limits human rights in a way that is reasonable and demonstrably justifiable under section 7(2).

The Commission is presently awaiting the Victorian government's response to the Eight Year Review.

Conclusion

The Commission strongly supports a Human Rights Act for Queensland. A Human Rights Act based on a 'dialogue model' like the Charter would better protect and promote the human rights of people in Queensland.

Thank you for the opportunity to make this submission. The contact persons for this submission are Bruce Chen, Senior Legal Adviser and Kristina Hoel, Legal and Policy Officer. They may be contacted at bruce.chen@veohrc.vic.gov.au and kristina.hoel@veohrc.vic.gov.au.

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