



Victorian Equal Opportunity
& Human Rights Commission



2017 report on the operation of the Charter of Human Rights and Responsibilities



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Letter to the Attorney-General

27 July 2018

Dear Attorney-General

On behalf of the Victorian Equal Opportunity and Human Rights Commission, it is with pleasure that I present to you our eleventh annual report on the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) covering the 2017 calendar year.

In accordance with section 41(a)(i) of the Charter this report examines the operation of the Charter, including its interaction with other statutes and the common law.

During 2017 there were no declarations of inconsistent interpretation made by the Supreme Court of Victoria nor were there any override declarations passed by the Victorian Parliament. Accordingly, it has not been necessary for this report to examine matters under section 41(a)(ii) and (iii) of the Charter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kristen Hilton', written in a cursive style.

Kristen Hilton

Victorian Equal Opportunity and Human Rights Commissioner

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About the Commission

The Commission is an independent statutory body with responsibilities under Victoria's key human rights laws: the *Equal Opportunity Act 2010*, the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) and the *Racial and Religious Tolerance Act 2001*.

The Equal Opportunity Act makes it against the law to discriminate against people on the basis of a number of different personal characteristics. The Racial and Religious Tolerance Act makes it against the law to vilify people because of their race or religion. The Charter requires government and public bodies to consider human rights when making laws and providing services.

The Commission's role is to protect and promote human rights in Victoria. The Commission does this through a range of functions under our laws.

Resolve complaints: The Commission resolves complaints of discrimination, sexual harassment, racial and religious vilification and victimisation by providing a free confidential dispute resolution service.

Research: The Commission undertakes research to understand and find solutions to systemic causes of discrimination and human rights breaches.

Educate: The Commission provides information to help people understand and assert their rights. The Commission conducts voluntary reviews of programs and practices to help organisations comply with their equal opportunity and human rights obligations. The Commission provides education and consultancy services to government, business and community to drive leading practice in equality, diversity and human rights, including a collaborative approach to developing equal opportunity action plans.

Advocate: The Commission raises awareness across all parts of the community about the importance of equality and human rights, encouraging meaningful debate, leading public discussion and challenging discriminatory views and behaviours.

Monitor: The Commission monitors the operation of the Charter to track Victoria's progress in protecting fundamental rights.

Enforce: The Commission intervenes in court proceedings to bring an expert independent perspective to cases raising equal opportunity and human rights issues. The Commission also conducts investigations to identify and eliminate systemic discrimination.

Acknowledgements

The Victorian Equal Opportunity and Human Rights Commission acknowledges and thanks the following people and organisations for their invaluable assistance and input into the completion of this report:

- representatives of:
 - Corrections Victoria
 - Inspector General for Emergency Management
 - Registry of Births, Deaths and Marriages Victoria
 - Department of Health and Human Services' Health and Wellbeing division
 - East Gippsland Shire Council

who provided their perspectives on the Charter Education Project through the case studies included in this report

- the Victorian Commissioners Forum, which provided its perspectives on the key human rights issues in 2017 and the consequences for Victorians
- the Victorian Public Sector Commission for sharing People Matter Survey data
- the Human Rights Unit of the Department of Justice and Regulation, which assisted the Commission in engaging with public authorities and shared its expertise on the operation of the Charter
- the Commission staff who worked with great dedication to prepare this report.

Foreword from the Commissioner



The Victorian Equal Opportunity and Human Rights Commission (the Commission) is pleased to present the 2017 report on the operation of the Charter of Human Rights and Responsibilities (the Charter).

It has been 11 years since the Charter became Victorian law, and the 'dialogue model' created by the Charter remains central to its operation. The dialogue model involves a continuous conversation about human rights between public authorities, Parliament, the courts and the Victorian community. Each play a critical role to ensure that human rights are considered in the development of laws and policies, in the delivery of public services, and in government decision-making.

Accordingly, our report explores the Charter's operation in a number of different contexts, from the perspective of the various dialogue model participants.

The Charter helps us build a better and fairer Victoria and so we need to be constantly assessing the status of human rights in Victoria, and whether progress has been made towards fairer decisions and outcomes for all Victorians.

The human rights issues that arose in Victoria in 2017

In 2017, the significant human rights issues primarily fall under four main themes:

- human rights in closed environments
- Aboriginal cultural rights and self-determination
- the right to equality and non-discrimination
- aligning Australia to international human rights standards.

On the positive side, there were a number of human rights actions that Victorians can be proud of. Marriage equality became Australian law and steps were taken towards a Treaty between the Victorian Government and Victoria's Aboriginal peoples. The Australian Government committed to setting up a system of independent scrutiny of all closed environments and the Victorian Government released its strategy to prevent family violence and all forms of violence against women.

However, the picture is not all positive. In 2017 the Supreme Court again ruled that the Victorian Government breached the human rights of children held at the Grevillea unit within Barwon adult prison and acted unlawfully and incompatibly with their best interests. The path to marriage equality was a difficult one, with the process including a voluntary, non-binding postal survey that left many LGBTI people feeling vulnerable and distressed. The Australian Government was elected to the UN Human Rights Council, only to be criticised by the UN Human Rights Committee and the UN Committee on Economic Social and Cultural Rights for its own human rights failures, including its treatment of Aboriginal and Torres Strait Islander peoples and LGBTI communities. The Commission addresses these issues in this report.

The use and interpretation of the Charter by courts and tribunals

This report also includes the key Charter decisions in courts and tribunals. The Commission identifies and discusses the following themes within the 2017 human rights litigation:

- the right to a fair hearing before the courts
- best interests of the child
- the right to housing and privacy
- freedom of expression.

Looking back over the cases of 2017, it is clear that the Charter is increasingly being used effectively as a litigation tool across a range of legal issues. Courts have also strengthened the Charter by further clarifying the broad scope of issues that it affects.

The role of the Charter in law making

The Commission has reported on the instances of Parliament actively engaging with the Charter and contemplating human rights issues during parliamentary debates and throughout the law-making process. These are examples of the dialogue model operating effectively. The Commission encourages all participants in the law-making process to use the Charter's framework to ensure human rights are considered during the development of all Victorian laws.

The Commission has also emphasised that an essential part of maintaining public accountability in the law-making process is the capacity for organisations and individuals to contribute public submissions to the Scrutiny of Acts and Regulations Committee (SARC), drawing attention to key areas of a Bill that may limit human rights. When time permits, it is important that SARC's Charter reports to Parliament reflect an analysis of any public submissions. This promotes public engagement with the dialogue model and enhances parliamentary scrutiny of the human rights impacts of legislative reforms.

The importance of a human rights culture in public authorities

In 2017 the Victorian Government, endorsed by the Victorian Secretaries Board, recommitted to strengthening its human rights culture. This demonstrates that improving human rights culture is a high priority for the public sector.

Throughout the year, the Commission worked with a number of public authorities to support their efforts to grow a human rights culture, and to change the underlying attitudes and values that influence behaviour in their organisations. This report profiles the progress made by five public authorities to improve their human rights culture:

- Corrections Victoria
- Inspector General for Emergency Management
- Registry of Births, Deaths and Marriages Victoria
- Department of Health and Human Services' Health and Wellbeing division
- East Gippsland Shire Council.

The Commission hopes these case studies serve as inspiration to other public authorities, and encourage individuals across the Victorian public sector to take steps to grow a culture where the human rights of Victorians are thoughtfully considered and prioritised in everyday business.

Implementation of the 2015 Review recommendations

Finally, this year the Commission has included, for the first time, an overview of the implementation of the recommendations of the 2015 independent Review of the Charter's operation undertaken by Michael Brett Young (the 2015 Review). The Victorian Government's focus thus far has been on implementing the first key policy area, building its human rights culture. However, progress in relation to the implementation of other key policy areas has been limited to date. The Commission will continue to work with our partners to ensure the opportunities for strengthening the Charter identified in the 2015 Review are realised.

Eleven years on from its introduction, Victoria can be proud of the way the Charter is used to improve the quality of government services and decisions, to reduce discrimination and to create fairer laws, policies and practices. But more could be, and needs to be, done. To that end, I encourage everyone to take practical steps to help fulfil the Charter's objective of creating a fair and inclusive Victorian community, where everyone's human rights are protected and promoted.



Kristen Hilton

Victorian Equal Opportunity and Human Rights Commissioner

CHAPTER 1:

VICTORIA'S HUMAN RIGHTS FRAMEWORK

Overview of Victoria's human rights framework

Human rights are a basic entitlement of every one of us, regardless of our background, culture, gender, age or what we believe. Human rights endure and must be protected in difficult situations such as when facing criminal charges, entering prison or requiring care because of our age or disability.

When the Victorian Parliament passed the Charter of Human Rights and Responsibilities (the Charter), it affirmed the importance of building understanding and respect for human rights across the community.

The Charter enshrines a number of civil, political and cultural rights into Victorian law. Any limitation on these rights must be reasonable, necessary, justified and proportionate.

The rights protected under, and promoted by, the Charter reflect the fundamental values of freedom, equality, respect and dignity. These values are important for our wellbeing and our ability to live a dignified life.

HUMAN RIGHTS PROTECTED BY THE CHARTER

The Charter protects 20 basic rights and freedoms in Victoria:

- | | |
|---|--|
| Section 8: The right to recognition and equality before the law | Section 18: The right to take part in public life |
| Section 9: The right to life | Section 19: Cultural rights, including Aboriginal cultural rights |
| Section 10: The right to protection from torture and cruel, inhuman or degrading treatment | Section 20: Property rights |
| Section 11: The right to freedom from forced work | Section 21: The right to liberty and security of person |
| Section 12: The right to freedom of movement | Section 22: The right to humane treatment when deprived of liberty |
| Section 13: The right to privacy and reputation: | Section 23: Rights of children in the criminal process |
| Section 14: The right to freedom of thought, conscience, religion and belief | Section 24: The right to a fair hearing |
| Section 15: The right to freedom of expression | Section 25: Rights in criminal proceedings |
| Section 16: The right to peaceful assembly and freedom of association | Section 26: The right to not be tried or punished more than once |
| Section 17: The right to protection of families and children | Section 27: The right to protection from retrospective criminal laws. |

How the Charter works

The Charter operates by placing obligations on the three arms of government: the legislature (the Victorian Parliament), the judiciary (courts and tribunals), and the executive (public authorities, including government departments, local councils and bodies that execute a public function).

Public authorities under the Charter include:

- public officials
- Ministers of Parliament
- local councils (including councillors and council staff)
- Victoria Police
- statutory entities that have functions of a public nature

- entities that carry out functions of a public nature on behalf of a public authority
- courts and tribunals when they are acting in an administrative capacity.

The Charter creates a 'dialogue model' of rights – a continuous conversation about human rights – between public authorities, Parliament, the courts and the Victorian community. The dialogue model is designed to ensure that human rights are considered in the development of laws and policies, in the delivery of public services, and in government decision-making.

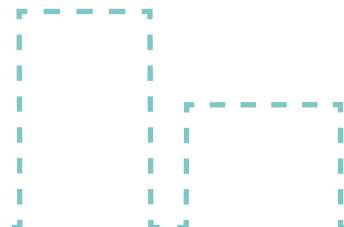
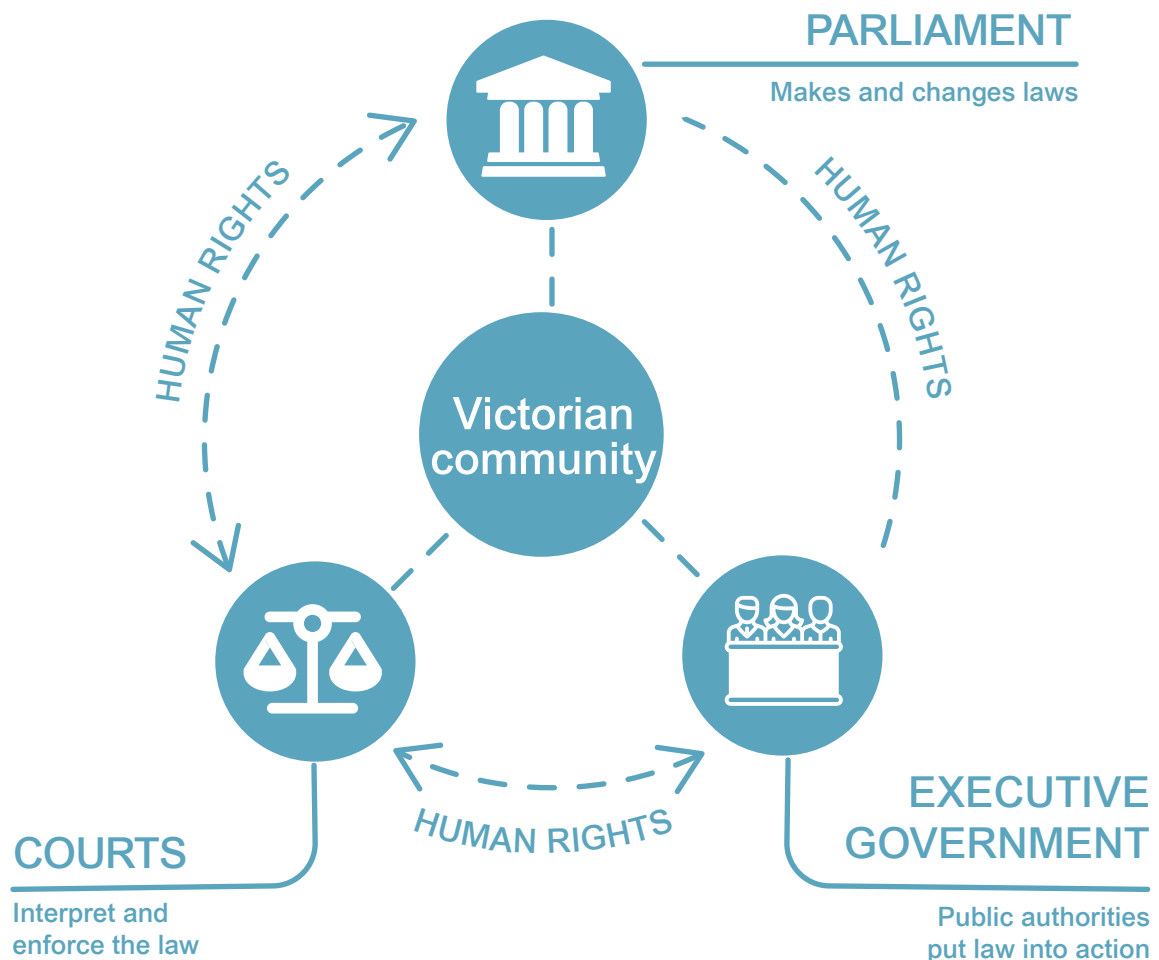


FIGURE 1: THE CHARTER'S DIALOGUE OF RIGHTS



The Charter protects human rights in three key ways by:

- acting as a 'filter' for new legislation – all new laws to be considered by Parliament require a statement of Charter compatibility. This statement scrutinises how the new law compares with rights established in the Charter. If there is an inconsistency between a proposed law and a Charter right, the statement must explain why and how¹
- placing an obligation on courts and tribunals to interpret all Victorian laws, as far as is possible, in a way that is compatible with human rights²

- making it 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.³

While each arm of government is subject to checks and balances, ultimate sovereignty rests with Parliament. Parliament cannot be forced to adopt a particular position on a human rights issue and can pass incompatible legislation. In extreme circumstances Parliament can enact legislation that overrides the Charter.⁴

Endnotes

1. *Charter of Human Rights and Responsibilities Act 2006*, s 28.
2. *Ibid* s 32.
3. *Ibid* s 38.
4. *Ibid* s 31 *Victoria's Charter of Human Rights and Responsibilities: Lessons for the National Debate*, Parl Paper No 46 (2006) <http://www.aph.gov.au/senate/~/~/~link.aspx?_id=A20FB46F919D44A68AF6D8CB54EE2076&_z=z>.

CHAPTER 2: HUMAN RIGHTS ISSUES IN 2017

The significant human right issues in 2017

This chapter explores the significant human rights issues that arose in 2017 and the consequences for Victorians. It is intended to encourage constructive dialogue on the status of human rights in Victoria, and whether progress was made towards fairer decisions and outcomes for all Victorians.

This chapter highlights the Charter's role in providing a framework for moving to a culture where people's human rights are thoughtfully considered and prioritised in everyday business, including in the development of laws and government policies, in the delivery of public services, and in government decision-making.

The significant human rights issues that arose in 2017 primarily fall under four main themes, which are explored in detail below:

- Human rights in closed environments
- Aboriginal cultural rights and self-determination
- The right to equality and non-discrimination
- Aligning Australia to international human rights standards.

Human rights in closed environments



Closed environments operating in Victoria include prisons, youth justice facilities, secure mental health and disability facilities, and secure child protection services. They also include places of temporary detention, such as police cells and prisoner transport vehicles.

People living in detention or residential care settings have limited control over their lives and are more vulnerable to having their human rights abused or

denied. Groups such as Aboriginal and Torres Strait Islander people, children and young people, and those with disabilities can be particularly at risk in closed environments. Senior Victorians are also particularly at risk while in care settings and have a right to live safely and have their wishes respected, including when they may lack capacity to make specific decisions.

This year in Victoria there were three human rights issues that arose in the context of closed environments:

- ratification of OPCAT
- respecting human rights in the youth justice system
- broadening powers to counter the threat of terrorism.

Ratification of OPCAT

In December 2017 the Australian Government took the positive step of ratifying the *United Nations Optional Protocol to the Convention Against Torture* (OPCAT).¹

Ratification of OPCAT presents a significant opportunity to improve the protection of human rights of people in closed environments in Australia. By ratifying OPCAT the government has committed to setting up a system for the independent scrutiny of all closed environments in Australia, and to allow the United Nations to inspect these places. Monitoring closed environments under the OPCAT framework will increase transparency and accountability in places of detention, and will significantly assist identification and prevention of human rights violations.

The Commission supports the creation of a comprehensive oversight system that covers all places of detention in Victoria, as required by OPCAT.

The Victorian Ombudsman reported on implementing OPCAT in Victoria in November 2017.² As part of that report the Ombudsman carried out an inspection of Victoria's main women's prison, the Dame Phyllis Frost Centre. The report warned that some practices, such as the use of force and restraint, prolonged solitary confinement and strip searches, could breach OPCAT standards if used improperly. In 2017, the Human Rights Law Centre described the practice of routine strip searching of women as "invasive, humiliating and, in many cases, re-traumatising" in its report *Total Control: Ending the routine strip searching of women in Victoria's prison*.³

Respecting human rights in the youth justice system

When children are involved the Victorian Government carries an even greater responsibility to protect human rights. Under the Charter every child has the right, without discrimination, to protection that is in their best interest and is needed by reason of them being a child.⁴ Children and young people also have special rights that are protected under international

treaties to which Australia is a party, such as the *Convention on the Rights of the Child*,⁵ which articulates all the basic conditions that children and young people need to thrive and flourish.

This additional layer of protection recognises the special status of children, who are undergoing crucial stages of social, psychological and neurological development. It also reinforces the idea that states should support children who have committed an offence, to help them get their lives back on track.

Throughout 2017 a spotlight was shone on the treatment of children caught up in the youth justice system in Victoria and in the other Australian states and territories.

The Victorian Government's obligation to protect the rights of children in detention was explored in *Certain Children v Minister for Families and Children & Ors (No 2)*⁶ (Certain Children 2). Chapter 4 contains a full description of this case.

In late 2016 a series of incidents occurred at the Parkville Youth Justice Precinct that resulted in substantial property damage and significantly reduced its capacity to house children. In order to accommodate children who could no longer be housed at Parkville, the government established the Grevillea unit of Barwon adult prison as a youth justice and remand centre under the *Children Youth and Families Act 2005* (Vic).

In May 2017 the Victorian Supreme Court again ruled that the Victorian Government had breached the human rights of the children and had acted unlawfully. Justice Dixon ruled that a number of the Victorian Government's decisions were incompatible with the children's human rights and best interests, including the orders establishing the Grevillea unit as a youth justice and remand centre, and the decision to transfer two of the children to the unit.

In March 2017, the Commission for Children and Young People released its report *The Same Four Walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*.⁷ The report detailed widespread isolation of children in Victoria's youth justice centres and found that isolation and 'lock-down' practices are used at unacceptable levels in Victoria.

The report also highlighted staff shortages and a lack of reliable information and transparency about the use of these practices. The use of isolation can contravene a child's Charter right to enjoy, without discrimination, such protection as is in his or her best interest and is needed by him or her by reason of being a child.⁸ The report also revealed that children and young people are denied access to fresh air, exercise, meaningful activities, education, support programs and visits, sometimes for extended periods.

The Department has advised the Commission that it has been implementing the report's recommendations including reporting daily on all use of isolation and force on young people in custody, as well as young people on separation plans. Regular updates on the implementation of the report's recommendations are provided to the Commission for Children and Young People, including these daily reports.

In 2017 the Department of Health and Human Services (DHHS) commissioned a comprehensive independent review of Victoria's youth justice system from Penny Armytage and Professor James Ogloff AM, *Youth Justice Review and Strategy: meeting the needs and reducing offending*. The report highlighted the significant challenges affecting the Victorian youth justice system at the community and custodial levels, and listed the various shortcomings of the underpinning legislative framework, governance and administration. It offered a suite of recommendations to recalibrate and refocus the system, to meet the health and education rights of young people and respond to their broader needs. In August 2017 the Victorian Government accepted or accepted in principle all of the recommendations in the report.

Outside Victoria, the Royal Commission into the Protection and Detention of Children in the Northern Territory released its report in November 2017, making a range of recommendations to keep children safe and reshape youth justice in the Northern Territory. The Royal Commission was prompted by an ABC Television *Four Corners* report about the shocking mistreatment of young people detained at Darwin's Don Dale Youth Detention Centre. The recommendations included raising the age of criminal responsibility to at least 12 years, closing Don Dale and investing in small, home-like facilities close to community, banning solitary confinement beyond 24 hours, cutting the number of children caught up in the criminal justice system and strengthening independent oversight of places of detention.

The Royal Commission's report called for a trauma-informed and rehabilitation-focused approach to youth justice that is consistent with international human rights standards and promotes the basic human rights of children protected under United Nations treaties to which Australia is a party. This has strong relevance to Victoria and the other Australian states and territories, as Australia moves to align itself more closely to international human rights standards, discussed further below.

Broadening powers to counter the threat of terrorism

The real and/or perceived threat of terrorism related incidents has prompted the Victorian Government to take action to ensure that the relevant government agencies and institutions have the ability to prevent, investigate, monitor and respond to terrorist attacks. However, it is also important to strike a balance between the public interest in enabling law enforcement authorities to protect our community, and the human rights of Victorians to a fair trial, process rights in criminal proceedings, and liberty and security of the person, particularly in relation to children.

In June 2017 the Victorian Government appointed an expert panel to review the laws currently available to prevent, investigate, monitor and respond to acts of terror in Victoria. The review was a response to the Brighton terror siege, in which Yacqub Khayre murdered one person and held another hostage. In a subsequent shoot-out with a police tactical unit, Khayre was killed and three police officers were wounded. The expert panel was led by former Chief Commissioner of Police, Ken Lay AO APM, and former Supreme Court of Appeal Justice, the Hon David Harper AM QC.

The review was completed in two parts.⁹ The first part focused on Victoria Police's powers in relation to counter-terrorism and the presumption against bail and parole. The second part extended its focus to include the full spectrum of policies and programs to counter the risk of terrorism. In total, the expert panel made 42 recommendations.

One of the recommendations is to extend the preventative detention order scheme to include children as young as 14, instead of 16 under current laws, who could be held without a Supreme Court order for up to 36 hours. The extension of the scheme would also enable the Supreme Court to make a preventative detention order for children aged 14 and 15 for up to 14 days. If passed into law, this may have significant implications on the rights of young people to a fair trial, liberty and security of the person, protection that is in their best interests and a procedure that takes into account their age.

Aboriginal cultural rights and self-determination



Human rights have a special importance for Aboriginal and Torres Strait Islander peoples, who have diverse spiritual, social, cultural and economic relationships with lands and waters.¹⁰

This year in Victoria there were three human rights issues that arose in the context of Aboriginal cultural rights and self-determination:

- the Victorian Government took steps to promote Aboriginal cultural rights
- the Supreme Court confirmed the importance of kinship connections to Aboriginal children in the youth justice system
- United Nations treaty bodies condemned the continuing inequality and discrimination against Aboriginal peoples.

The Victorian Government took steps to promote Aboriginal cultural rights

Cultural rights are protected under the Charter, including Aboriginal peoples' cultural rights to enjoy identity and culture, maintain and use language, maintain kinship ties and maintain their distinctive spiritual, material and economic relationship with the land and water and other resources with which they have a connection under traditional laws and customs.¹¹

In 2017 important issues arose in relation to Aboriginal cultural rights and self-determination.

At the First Nations National Constitutional Convention, convened by the Referendum Council, Aboriginal and Torres Strait Islander leaders from across Australia issued the *Uluru Statement from the Heart* (Uluru Statement), rejecting the idea of mere recognition in the Australia Constitution, instead calling for a representative body to be enshrined in the constitution and a 'Makarrata Commission' to supervise a process of 'agreement-making' and 'truth-telling' between governments and Indigenous peoples. The Australian Government rejected the Uluru Statement. In June 2017 the Australian Human Rights Commission and the Anti-Discrimination and Equal Opportunity and Human Rights Commissions from across Australia wrote an open letter to our political leaders, supporting the Uluru Statement and encouraging them to work

across party lines, and to implement real change, for the benefit of all Australians.

In 2017 the Victorian Government promoted and protected the cultural rights and self-determination of Aboriginal Victorians in two main ways.

Firstly, in contrast to the Australian Government's response to the Uluru Statement, the Victorian Government announced that a Victorian Treaty Advancement Commission would be set up in 2018 and charged with establishing an Aboriginal Representative Body to work with the Victorian Government to support future Treaty negotiations. At the time of writing this report the Victorian Government had passed legislation setting up a path for it to one day ratify agreements with Aboriginal peoples.

Secondly, progress was made in respect of programs that would see Aboriginal Community Controlled Organisations (ACCOs) and members of the Aboriginal community central to decisions about the care of Aboriginal children.

For example, changes were made to enable the Secretary of DHHS to authorise an Aboriginal principal officer of an appropriately trained, supported and resourced ACCO to make decisions about Aboriginal children on protection orders that would normally be made by DHHS.

The *Aboriginal Children in Aboriginal Care* program shifts the role of ACCOs from advisors to decision makers, allowing them to become responsible for case planning and culturally safe support. At present, two organisations are implementing the *Aboriginal Children in Aboriginal Care* program: the Victoria Aboriginal Child Care Agency and Bendigo and District Aboriginal Co-operative. A related program was also introduced in 2017 that aims to transfer the case management of Aboriginal children on child protection orders from DHHS and community service organisations to ACCOs.

These programs promote self-determination for Aboriginal Victorians and the rights of Aboriginal people to, with other members of their community, enjoy their identity and culture, maintain their kinship ties and maintain their distinctive spiritual, material and economic relationship with country.

The Supreme Court confirmed the importance of kinship connections to Aboriginal children in the youth justice system

In the context of the Victorian youth justice system, Aboriginal children continue to be over represented. Incarcerating Aboriginal children severely affects their connection to their kin, community, culture and country. Such connections are vital for the social and emotional wellbeing of Aboriginal children.

One case highlighted the importance of maintaining kinship connections. The case of *DPP v SE* involved a 17-year-old Aboriginal person with an intellectual disability who applied for bail after being arrested.¹² The court relied on the Charter to conduct the bail hearing in a way that was appropriate for an Aboriginal child with an intellectual disability. Victorian bail laws specifically require that Aboriginal cultural issues be taken into account when contemplating bail applications.¹³ The court considered this obligation together with the cultural rights of Aboriginal people under the Charter. One of the reasons the Supreme Court granted bail was on the basis that it would enable contact with the defendant's Aboriginal family, which would have a positive influence on rehabilitation.

United Nations treaty bodies condemned the continuing inequality and discrimination against Aboriginal peoples

Aboriginal peoples continue to be subjected to various forms of discrimination and inequality, particularly in the criminal justice system, and this has been the subject of international condemnation.

In December 2017 the United Nations Human Rights Committee expressed that it is

concerned about the significant overrepresentation of indigenous [*sic*] men, women and juveniles in prisons, with indigenous adult prisoners making up 27 per cent of the overall prison population as at 30 June 2016. The Committee notes with concern that mandatory sentencing and imprisonment for fine defaults might contribute to such disproportionately high rates of incarceration of indigenous Australians. It is also concerned that access to culturally appropriate legal assistance services, including interpretation and translation services, for marginalized and disadvantaged people such as Aboriginal and Torres Strait Islander peoples, remains insufficient.¹⁴



The Committee also noted with concern the limited funding for the National Congress of Australia's First Peoples and

the lack of a timeline for a referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples and the uncertain status of proposals for constitutional reform to render the Constitution fully compatible with the obligation to respect and ensure the equal rights of indigenous peoples.¹⁵

In addition, the UN Committee on Economic, Social and Cultural Rights expressed concern that

indigenous peoples do not have constitutional recognition and continue to experience high levels of disadvantage across all socioeconomic indicators, and that the Closing the Gap strategy has yielded limited progress in this regard.¹⁶

This Committee was also concerned about the inadequacy of meaningful consultation with Indigenous peoples in programs and policies that affect them.¹⁷

The right to equality and non-discrimination



Non-discrimination and equality rights are key features of the Charter and in 2017 were central to the public debate about human rights in Victoria.

This year in Victoria there were three human rights issues that arose in the context of the rights to equality and non-discrimination:

- equality for people with a disability
- equality for LGBTI Victorians
- gender equality and the #MeToo movement.

The most significant initiatives in 2017 that impacted on the rights of people with disabilities included:

- disability policy: changing frameworks and developments in oversight
- investigations into abuse of people with a disability
- the impact of bail laws on people with a disability
- equality for unrepresented litigants with a disability in court proceedings.

Equality for people with a disability

Discrimination based on the attribute of disability can prevent people from participating in community life and enjoying their human rights. Around one in five Victorians has a disability and most people will experience some kind of disability at some time in their lives.

Australia is a party to the *Convention on the Rights of Persons with Disabilities* (CRPD).¹⁸ The principles that underpin this international treaty – equal and full participation in society, non-discrimination and inherent dignity, autonomy and freedom of choice – represent leading practice standards and can be used to guide the application of rights in the Charter. This is especially relevant when drafting and implementing policies, programs and laws in relation to people with disabilities in Victoria.

Disability policy: changing frameworks and developments in oversight

In 2017 the Victorian Government's disability plan for 2017–20, *Absolutely everyone*, came into effect.

Absolutely everyone focuses on achieving greater inclusion for Victorians with a disability under four key pillars: inclusive communities; health, housing and wellbeing; fairness and safety; and contributing lives.

Absolutely everyone aims to work with communities to ensure that people with a disability are able to participate effectively with the National Disability Insurance Scheme (NDIS). The NDIS is a national scheme providing support for Australians with a disability, their families and carers, in order to build skills and capability so they can participate in the community and employment. It aims to shift service delivery from one-size-fits-all to an individualised approach.¹⁹ The Commission will continue to work with our partners to ensure that the protection of the Charter and other legal safeguards are not diminished with the transition to the full national NDIS.

In 2017 we also saw developments in the government's oversight of the use of restraint and seclusion in schools. While the *Education and Training Reform Regulations 2017* permit the use of restraint against children in certain circumstances,²⁰ in December 2017 the Victorian Government released its *Principles for the Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools* (Principles). The Principles are grounded in a rights-based approach, and were designed to guide staff on how to prevent student behaviour causing harm to self or others, and how to use effective, ethical and evidence-based responses where a student may be at risk of restraint or seclusion. While the Principles apply to all students (not only those with a disability), they remind teachers and relevant school staff that the behaviour that leads to physical harm to self or others can be associated with a student's disability. In March 2017 the government created a new Independent Office for School Dispute Resolution. As part of its broader functions, it is responsible for building knowledge and capability in reducing the use of restraint and seclusion in relation to students. It also provides information to all students (including those with a disability) and their families about their rights and how to make a complaint.²¹

Investigations into abuse of Victorians with a disability

In 2017 the Disability Services Commissioner and Mental Health Complaints Commissioner identified an increasing trend in the number of instances of abuse of Victorians with a disability, affecting their rights to protection from torture and cruel, inhuman and degrading treatment and liberty and security of person.

As part of its investigations in 2017 the Disability Services Commissioner identified a number of allegations of staff-to-client physical or sexual assault or abuse, client-to-client physical or sexual assault and a failure by providers to appropriately manage risks to the safety of people with a disability.²²

The Mental Health Complaints Commissioner carried out a project in 2017 to review issues of sexual safety in acute mental health inpatient environments. Sexual safety breaches are experiences where a person is not, or does not feel, sexually safe, including experiences of sexual activity, sexual harassment and alleged sexual assault. Through this project the Mental Health Complaints Commissioner identified the need for sexual safety to be recognised as a human rights issue and to receive priority attention, in accordance with Victoria's broader violence prevention strategies.



The work of the Mental Health Complaints Commissioner and the Disability Services Commissioner highlight the need for effective complaints and accountability mechanisms in order to ensure compliance with human rights. In August 2017 the *Disability Act 2006* (Vic) was amended to expand the Disability Services Commissioner's powers as an oversight body for the Victorian disability sector. This included the Disability Services Commissioner being able to initiate investigations into allegations of abuse or neglect (rather than only being able to investigate complaints made by others), the establishment of Authorised Officers with the power to conduct unannounced site inspections, and an annual review of and report on deaths in disability services. Effective oversight mechanisms promote human rights by reducing the risk of human rights violations which can arise in environments with little or no transparency.

The impact of bail laws on Victorians with a disability

In 2017 there was a review of Victoria's bail system (Bail Review) following the Bourke Street tragedy on 20 January 2017 when a car was driven into pedestrians in the Melbourne CBD, killing six and wounding around 30 others. The driver had been granted bail by an out-of-session bail justice just days before the incident.

The Bail Review was carried out by the former Director of Public Prosecutions and Supreme Court Justice, the Hon Paul Coghlan QC. Mr Coghlan was asked to advise the government on how Victoria's bail system should be reformed to best manage risk and to maximise community safety and to provide advice on practical legislative reform. Two reports were provided to the Victorian Government in April and May 2017, making 37 recommendations in total.²³ In response to the review the Victorian Government announced it would increase the number of offences which had a presumption against bail, toughen the requirements to satisfy a court to grant bail, and give police more powers to remand people.

While the focus of this review was on how to best manage risk and to maximise community safety, bail laws and remand powers have a heavy impact on Victorians with a disability. According to the Bail Review second report, 46 per cent of defendants on the Court Integrated Services Program (a bail support services program) were assessed to have either a mental illness, acquired brain injury or intellectual disability.²⁴

The difficulties faced by people with multiple vulnerabilities in bail decisions was highlighted in *DPP v SE*.²⁵ That case involved an Aboriginal child with an intellectual disability, who appealed a decision to refuse bail.

Justice Bell noted:

In the present case, SE is an Aboriginal person and a child and a person with an intellectual disability who possesses human rights under the Charter in all three of those capacities. In understanding what is at stake for SE as an individual and when applying these rights, it is necessary for the court to recognise that different forms of discriminatory disadvantage and vulnerability may be experienced by Aboriginal persons, children and persons with intellectual disability and that someone who is disadvantaged and vulnerable in all three discriminatory respects is in a position of exacerbation. The disadvantage and vulnerability suffered by persons who experience discrimination on multiple grounds, or who experience discrimination upon multiple grounds which intersect, are commonly different and greater in nature than is the case with discrimination upon a single ground. In adopting procedures and making determinations under the Bail Act that take account of SE's age, Aboriginality and intellectual disability, I have therefore borne in mind that the different forms of SE's discriminatory disadvantage and vulnerability likely cumulate and interact, making accommodation even more necessary.²⁶

In a bail decision, the risk to community safety needs to be carefully balanced against the human rights of liberty and freedom of movement, and the presumption of innocence, particularly when the decision concerns someone with one or more vulnerabilities.

Equality for unrepresented litigants with a disability in court proceedings

Disability can also prevent people from participating in court proceedings on an equal basis with others. This issue was considered in *Matsoukatidou v Yarra Ranges Council*.²⁷ Chapter 4 contains a full description of this case.

Maria Matsoukatidou and her mother, Betty Matsoukatidou, represented themselves in the County Court in an application to reinstate their appeals in relation to fines imposed on them by the Ringwood Magistrates Court for failing to secure and demolish their home after it was destroyed following an arsonist attack, in breach of the *Building Act 1993* (Vic). Maria and Betty struggled to present their case and the County Court judge dismissed their applications without explaining the relevant procedure or applicable legal test.

Maria and Betty then sought judicial review in the Supreme Court of the orders to dismiss their applications for reinstatement. In February 2017 the Supreme Court of Victoria found that Maria and Betty were not able to participate effectively and were not given a fair opportunity to put forward their

case, in breach of their rights to equality and fair hearing, protected under sections 8(3) and 24(1) of the Charter, respectively. This case confirmed the obligations on courts and tribunals to apply the rights to equality and fair hearing to self-represented litigants and, in particular, those with a learning disability.

In his Honour's judgment, Justice Bell referred to the *Disability Access Bench Book*, developed by the Judicial College of Victoria in partnership with the Commission, which provides guidance for Judicial Officers on their role for making the justice system more accessible for people with disabilities.²⁸ He cited the *Disability Access Bench Book* to support his conclusions about the issues that may need to be considered by courts and tribunals when the right to equality under the Charter is engaged: equal participation; equal understanding of proceedings; equal capacity to exercise decision-making; equal access (modifications or adjustments); and equal treatment of evidence.²⁹

Equality for LGBTI Victorians

2017 was a historic year for our LGBTI communities. In December 2017 marriage equality was passed into law, allowing all couples – regardless of their sex – to marry in Australia for the first time.

The path to marriage equality included a voluntary, non-binding postal survey, in which the Australian people were asked to respond 'Yes' or 'No' to the question: "Should the law be changed to allow same-sex couples to marry". In November 2017 Australians delivered a 61.6 per cent 'Yes' result, with 64.9 per cent of Victorians voting 'Yes' (more than three per cent above the national average). 133 out of 150 electorates voted 'Yes', with 35 out of 37 in Victoria.

Following this overwhelming 'Yes' result, in December 2017 the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 was passed into law, amending the definition of marriage from the union of 'a man and a woman' to a union of 'two people'.

In December 2017 the United Nations Human Rights Committee reflected on the process that led to marriage equality and expressed concern that the postal survey sent a message to LGBTI people that their rights were to be decided by a public vote:³⁰

The Committee is of the view that to resort to public opinion polls to facilitate upholding rights under the Covenant in general, and equality and non-discrimination of minority groups in particular, is not an acceptable decision-making method and that such an approach risks further marginalizing [sic] and stigmatizing members of minority groups.

In Victoria, as in other states and territories, the lead-up to the postal survey left many LGBTI people feeling

vulnerable and distressed, evidenced by a sharp rise in demand for wellbeing and support services by LGBTI Victorians during this period. In response the Victorian Government decided to fund additional services for LGBTI Victorians.³¹

The marriage equality debate engaged multiple rights, including the right to equality and non-discrimination. Questions were also raised about how marriage equality would affect the religious freedoms of those with differing religious and doctrinal views of marriage. The Charter enables us to balance rights and competing public interest considerations. Protecting all human rights in our society is important and rights must be exercised in a way that respects the rights of others. Marriage between same-sex couples will generally not interfere with the fundamental freedom of everyone to demonstrate their religion in worship, observance, practice and teaching. That said, there are circumstances where the enjoyment of a right may interfere with another right. Our laws are flexible and enable us to balance rights and competing public interest considerations. Striking the appropriate balance of rights is a central task for the Victorian Government. The law can allow same-sex couples to marry while simultaneously allowing religious bodies to adhere to their beliefs and balance these rights.

In 2017 there were a number of other positive developments towards equality for LGBTI Victorians:

- The Gender and Sexuality Commissioner, Ro Allen, continued their LGBTI Equality Roadshow across rural and regional Victoria, working with local LGBTI communities, key stakeholders and allies in a series of workshops, community dinners, networking opportunities and other community events.
- In May 2017 the Victorian Government approved the business case for the Victorian Pride Centre, which will become a home for Victoria's LGBTI communities. A \$15 million contribution to the centre was included in the state budget.
- In *Re Kelvin*,³² the Family Court of Australia cleared the way for young trans and gender diverse people to access Stage 2 hormone treatment without court authorisation, where parents, medical practitioners and the young person all agree with the proposed treatment.
- Since marriage equality was passed into law, the Victorian Government has passed legislation to allow transgender Victorians to stay married to their spouse when they change the gender on their birth certificate.

Notwithstanding this significant progress, LGBTI Victorians continue to report discrimination to the Commission on the basis of their sexual orientation. While many of the remaining areas of discrimination don't have the same level of visibility as marriage equality, we must ensure that LGBTI Victorians have equality under all of our laws.

In December 2017 the UN Human Rights Committee also raised a number of matters of concern, including that

infants and children born with intersex variations are sometimes subject to irreversible and invasive medical interventions for purposes of gender assignment, which are often based on stereotyped gender roles and are performed before the children concerned are able to provide fully informed and free consent.³³

In March 2017 intersex organisations and advocates released the *Darlington Statement*, setting out the priorities and calls by the intersex human rights movement in Australia and New Zealand, focusing on law reform, health and wellbeing, peer support, allies, education, awareness and employment.

Gender equality and the #MeToo movement

In December 2016 the Victorian Government launched its landmark Victorian Gender Equality Strategy, *Safe and Strong*, which was informed by diverse voices and experiences of more than 1200 Victorians. Actions implemented in 2017 include commitments to reducing violence against women; developing gender equality baseline and targets; lifting women's leadership; embedding strong governance structures; legislative change; modelling gender equality in the public sector; gender impact analysis; gender ethical procurement; addressing economic dimensions of gender inequality and advocacy to the Commonwealth. The government also commenced consultations on a Victorian Gender Equality Bill during this time.

As part of the Gender Equality Strategy, the Victorian Government established the Equal Workplaces Advisory Committee which has a focus on pay equity and the Ministerial Council on Women's Equality.

In May 2017 the Victorian Government also released its strategy to prevent family violence and all forms of violence against women, *Free from Violence*. The Victorian Government had committed to implementing all of the 227 recommendations of the 2016 Royal Commission into Family Violence report, and the prevention strategy fulfils recommendation 187. The prevention strategy is also an integral element of the Victorian Government's broader family violence system reform and a key part

of the 10-year plan *Ending family violence: Victoria's Plan for Change*, launched in late 2016, which sets out the government's approach to stopping violence.

In *Free from Violence* there is greater detail and focus on how to address the attitudes and behaviour leading to violence, both family violence and violence against women more broadly. While family violence takes many forms and affects many in the community, structural inequalities and unequal power relations between men and women mean women are more likely to experience family violence. The strategy is a long-term agenda that focuses on the underlying causes of violence, namely gender inequality and discrimination. To support this work the government has established the Ministerial Taskforce on the Prevention of Family Violence and other forms of Violence Against Women. These actions protect and promote the right to non-discrimination and equality for women by addressing the gender power imbalances and structural inequalities between men and women that can manifest in men's violence against women.

The fundamental importance of workplace equality and respect also received widespread media attention in 2017 with the issue of sexual harassment within the Hollywood film industry, high profile cases in Australia and the social media #MeToo movement. The Commission has seen an increase in complaints of sexual harassment since the #MeToo movement gained momentum.

There is a strong momentum to 'press for progress' in both preventing sexual harassment and pushing for Gender Equality more broadly, with the World Economic Forums 2017 Global Gender Report indicating that Gender Equality is 200 years away. Women continue to be subjected to various forms of discrimination and inequality. While the #MeToo movement exposed gender power imbalances in the workplace, there is still work to be done before we see lasting change to sexual harassment and gender equality.

Aligning Australia to international human rights standards



Following World War II Australia, together with many of the world's sovereign states, signed the Charter of the United Nations. Today 193 sovereign states are a party to the UN Charter. To give substance to the term 'human rights' in the UN Charter, the Universal Declaration of Human Rights and other international human rights instruments were adopted.

Australia is a party to a number of these international human rights instruments, including the *International Covenant on Economic Social & Cultural Rights* (ICESCR),³⁴ the *International Covenant on Civil and Political Rights* (ICCPR),³⁵ the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD),³⁶ the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),³⁷ the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT),³⁸ the *Convention on the Rights of the Child* (CRC)³⁹ and the *Convention on the Rights of Persons with Disabilities* (CRPD),⁴⁰ as well as a number of Optional Protocols, and other specialised conventions, declarations and procedures.

However, while the global human rights framework should influence our government's laws, policies and programs, these treaties aren't enforceable under Australian law. Australia is one of the few western democracies without a national Human Rights Act. In Victoria, the Charter is our expression of the ICCPR.

In 2017 the Australian Government expressed its desire to bring Australia in line with international human rights standards. In October 2017 Australia was elected unopposed to the United Nations Human Rights Council, the United Nations body responsible for protecting the rights and dignity of people all over the world. Foreign Minister Julie Bishop stated that during Australia's three-year term it will focus on "gender equality, freedom of expression, good governance and robust democratic institutions, human rights for indigenous [*sic*] peoples and strong national human rights institutions".

As noted previously, in December 2017 the Australian Government ratified the *United Nations Optional Protocol to the Convention Against Torture*. That same month, the Joint Standing Committee on Foreign Affairs, Defence and Trade released its report *Hidden in Plain Sight*, recommending that the Australian Government introduce a Modern Slavery Act in Australia. The report recommended that the Act include measures to address modern slavery, such as a mandatory supply chain reporting requirement that requires entities with an annual revenue of at

least \$50 million to report on modern slavery risks in their supply chains; measures to support victims of modern slavery; the establishment of an Independent Anti-Slavery Commissioner; and measures to improve criminal justice responses to modern slavery.⁴¹ The Australian Government has not yet indicated whether it will action the recommendations.

As outlined above, in 2017 there were a range of recommendations from United Nations treaty bodies about various significant human rights issues in Australia, including the Human Rights Committee (which monitors implementation of the ICCPR),⁴² the Committee on the Elimination of Racial Discrimination (which monitors implementation of the CERD)⁴³ and the Committee on Economic Social and Cultural Rights (which monitors implementation of the ICESCR).⁴⁴

The recommendations from these UN committees focused on human rights issues such as our Australian Government's laws, policies and programs which have a harmful impact on or disadvantage Aboriginal and Torres Strait Islander peoples, our LGBTI community, people with disabilities and refugees and asylum seekers detained on Manus Island, Papua New Guinea, or Nauru.

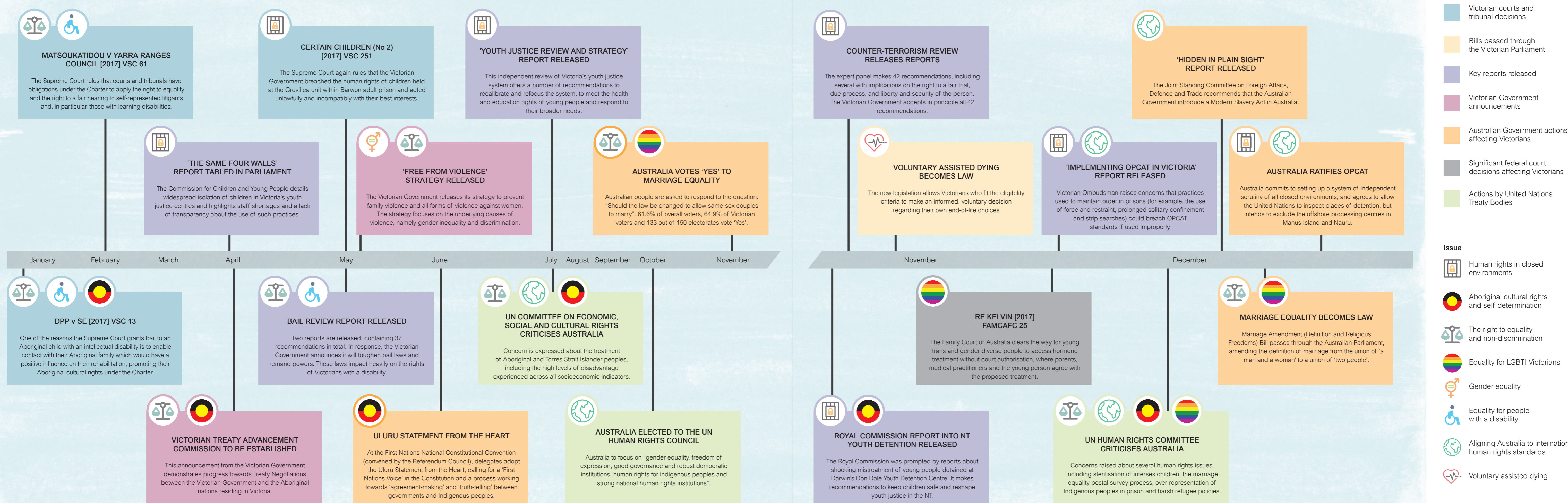
Many recommendations have not yet been implemented. In October 2017 Professor Yuval Shany, Chair of the United Nations Human Rights Committee, described Australia's record as one of "chronic non-compliance" with its international human rights treaty obligations.⁴⁵ In December 2017 the United Nations Human Rights Committee noted that Australia has gaps in its application of human rights and recommended that Australia adopt "comprehensive federal legislation giving full legal effect to all Covenant provisions across all state and territory jurisdictions".⁴⁶



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A SUMMARY OF THE KEY HUMAN RIGHTS ISSUES IN 2017





Endnotes

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10. *Charter of Human Rights and Responsibilities Act 2006* (Vic), Preamble.
11. *Ibid* s 19(2).
12. *DPP v SE* [2017] VSC 13.
13. *Bail Act 1977* (Vic), s 3A.
14. CCPR/C/AUS/CO/6 at [39].
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16. E/C.12/AUS/CO/5 at [15].
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18. *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008).
19. Speech by the honourable Jane Prentice MP, Assistant Minister for Social Services and Disability Services, 16 November 2017 <<https://ministers.dss.gov.au/speeches/2551>>.
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21. Found at: <<http://www.schoolresolution.vic.gov.au/>>.
22. Statement regarding the abuse of people with a disability, Laurie Harkin AM, Disability Services Commissioner, 2 February 2018 <<http://www.odsc.vic.gov.au/2018/02/02/statement-regarding-abuse-people-disability/>>.
23. The review into Victoria's bail system focused on legislative and practical reforms to manage risk and maximise community safety, led by former Director of Public Prosecutions and Supreme Court Justice, the Hon Paul Coghlan QC, Reports 1 and 2, Melbourne: Government Printer, May 2017.
24. *Ibid*, Report 2, at p33.
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26. *Ibid* at [28].
27. *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61.
28. *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 at [109]; Judicial College of Victoria, *Disability Access Bench Book* (2016).
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30. CCPR/C/AUS/CO/6 at [29].
31. See: <<https://www.premier.vic.gov.au/lgbti-services-to-expand-in-response-to-high-demand/>>.
32. *Re Kelvin* [2017] FamCAFC 25.
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CHAPTER 3:

HUMAN RIGHTS IN LAW MAKING

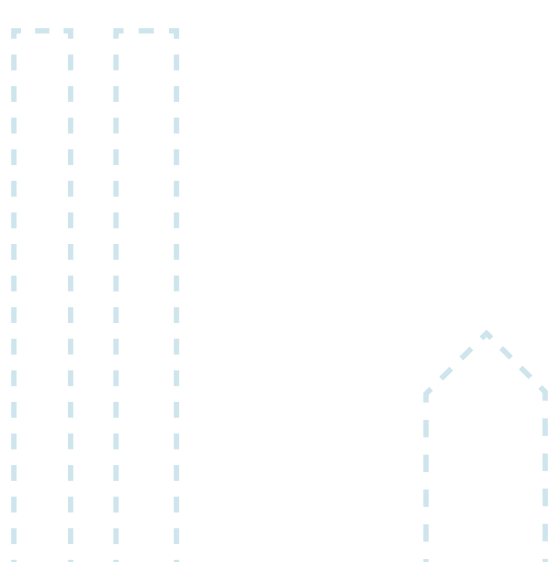
The role of the Charter in law making

In the context of law making, the dialogue model of human rights plays an important role ensuring that human rights are considered during the development of all Victorian laws.

The model requires a member tabling a Bill in Parliament to set out the Bill's potential human rights impacts in a statement of compatibility (or where relevant, a statement of partial incompatibility). These statements alert Members of Parliament to rights that may be limited or promoted by a Bill and why any proposed limitations are reasonable and justified. Members of Parliament can review the statement of compatibility and express any concerns they may have in second reading debate on the Bill.

The Charter requires the Parliament's Scrutiny of Acts and Regulations Committee (SARC) to assist with this process by preparing a report on any Bill tabled in Parliament, highlighting whether SARC considers a Bill to be incompatible with human rights. These reports are accessible in Alert Digests on SARC's website.

Public submissions may be made to SARC and these are also published on SARC's website.¹ In this way the human rights impact of a proposed law can be thoroughly scrutinised. As a consequence, the dialogue model offers the opportunity for close contemplation of the human rights implications of proposed legislation.



Statements of compatibility

Bills tabled in Parliament must be accompanied by a statement of compatibility detailing whether the Bill is compatible with human rights and the nature and extent of any incompatibility.² This promotes rigorous scrutiny, ensuring that Charter incompatibility is identified, debated and, where appropriate, addressed by Parliament.

A minister or member can table a statement of partial incompatibility if provisions of a Bill are incompatible with human rights.

In 2017 a statement of partial incompatibility was prepared regarding two Bills, the Firearms Amendment Bill 2017 and the Justice Legislation Amendment (Protective Services Officers and Other Matters) Bill 2017.

FIGURE 2: FORMAL STATEMENTS OF PARTIAL INCOMPATIBILITY

Year	2017 ³	2016 ⁴	2015 ⁵	2014	2013	2012
Statements of incompatibility	2	1	1	0	0	0

Firearms Amendment Bill 2017

The Firearms Amendment Bill 2017 established a firearm prohibition order (FPO) scheme of offences associated with possessing and using firearms and new powers to seize firearms, search and detain individuals subject to an FPO, their premises, vehicles and people accompanying them.⁶ The Bill did not require a person be given advance notice or an opportunity to be heard before an FPO is imposed for up to 10 years. These powers would be exercised without a warrant.

The minister tabled a statement of partial incompatibility, which acknowledged that the Bill was partially incompatible with the right to privacy and protection of children's best interest. The power to arbitrarily search individuals subject to FPOs can occur without a warrant, consent or reasonable grounds to suspect the commission of an offence. This power may significantly interfere with their privacy. FPOs can apply to children aged 14–17 years.

The statement, however, emphasised that FPOs were considered appropriate measures to address firearm offending and ensure community protection.

SARC reported on the Bill in Alert Digest No 14 of 2017, observing the incompatibility of the Bill with the right to privacy, permitting an individual to be subject to a decade of arbitrary searches without a warrant, consent or reasonable grounds to suspect the commission of an offence, if doing so is in the public interest.⁷ SARC did not report on the Bill's impact on children but observed that the Bill may:

- limit the privacy rights of other individuals by allowing police to search premises (especially residential premises) that other people share with a person subject to an FPO
- allow police to search a vehicle that other people share with the person
- permit the police to search anyone's body or possessions, without expressly limiting that power to the person under an FPO.

SARC sought clarification from the minister in relation to these issues. The Minister for Police responded to SARC, confirming her view that there are no less restrictive means reasonably available to protect third party privacy rights without compromising the Bill's objectives. The Bill's objectives include to provide police with sufficient tools to ensure that a FPO subject is not in contravention of the Firearms Act and to ensure that such searches are not frustrated by allowing a FPO subject to conceal firearms through third parties. No public submissions were made to SARC regarding this Bill. The Firearms Amendment Bill 2017 passed in December 2017.

Justice Legislation Amendment (Protective Services Officers and Other Matters) Bill 2017

The Justice Legislation Amendment (Protective Services Officers and Other Matters) Bill 2017 was passed in September 2017. It expanded the powers of protective services officers (PSOs), without a warrant, to randomly stop and search people (including children) at designated places for weapons or drugs of dependence, search vehicles and to arrest a person whose parole has been breached or cancelled. The Bill would authorise PSOs to detain someone for as long as reasonably necessary to conduct a search.

The minister tabled a statement of partial incompatibility with the right to privacy – under section 13(a) of the Charter and protection of children's best interests under section 17(2) of the Charter.⁸

SARC's report on the Bill⁹ observed that the Bill did not extend the scope of provisions that an earlier Committee in 2010 had considered could be incompatible.¹⁰ This earlier Bill, the Control of Weapons Amendment Bill 2010 had broadened the capacity for police officers to undertake random searches in designated areas without notice or any threat of violence or disorder and permitted weapons searches of children and people with "impaired intellectual functioning".

SARC observed in 2010 that sections of the Bill were incompatible with the right to privacy, liberty and the protection of children. SARC noted that these powers are typically only made available during major public emergencies.¹¹

The new provisions will allow PSOs, under the operational supervision of police, to perform the searches.

SARC concluded that these new provisions are compatible with the Charter, despite acknowledging that SARC had previously found the provisions of the 2010 Bill to be incompatible with the Charter.¹² SARC noted that PSOs, like police officers, are state-employed public authorities under the Charter and are subject to the same regulations as to the exercise of any powers.

With respect to the scrutiny process established by the Charter, the Commission maintains it is important that the human rights impacts of proposed laws are considered in the context of their making. PSOs currently receive less training than police officers to undertake their role.¹³ Where impacts on human rights are identified, any incompatibility is not remedied by previous considerations of similar clauses.

The Justice Legislation Amendment (Protective Services Officers and Other Matters) Bill 2017 passed in September 2017. Four public submissions were made to SARC regarding this Bill¹⁴ and SARC noted that it considered these public submissions in forming its views.¹⁵

The Scrutiny of Acts and Regulations Committee

SARC is a bipartisan parliamentary committee required under the Charter to report to Parliament regarding whether a Bill or statutory rule is incompatible with human rights. SARC publishes its Charter reports on Bills in Alert Digests tabled each parliamentary sitting week.

This model facilitates vital independent scrutiny of legislation for compatibility with human rights and is particularly important when a statement of compatibility has not considered human rights impacts. A SARC Charter report can highlight

Override declarations

The Charter permits Parliament in exceptional circumstances to declare that a law or part of a law has effect despite being incompatible with human rights.¹⁶ This is known as an 'override declaration'. The override declaration signals to courts, public authorities and the community that the legislation does not have to be interpreted in accordance with the Charter and that public authorities do not need to act compatibly with human rights when implementing it.

An override declaration is intended to be used in exceptional circumstances only.¹⁷ In its report recommending the creation of the Charter, the Human Rights Consultative Committee referred to the *International Covenant on Civil and Political Rights* (ICCPR) in setting out the circumstances when an override might apply.¹⁸ Article 4 of the ICCPR states that governments should only act incompatibly with human rights "in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed".¹⁹

The Human Rights Consultative Committee also strongly stated, echoing the ICCPR, 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.²⁰

As stated in previous Charter Reports, the Commission's view is that the use of the override should only occur in extreme situations, where there is an evidence base and urgent serious risk to public security or a state of emergency.²¹

There were no override declarations made in 2017.

aspects of a Bill that may limit human rights, raise questions for the minister or member who tabled the Bill or draw Parliament's attention to areas for broader consideration. Parliament and the executive have the opportunity to closely contemplate matters raised by SARC. The SARC process also allows public submissions to be made about Bills by community organisations and individuals. This mechanism enables valuable human rights dialogue between SARC, the Parliament and executive as well as between the community and government.

A snapshot of SARC Charter reporting

SARC produced reports on 62 of the 82 Bills introduced into Parliament in 2017.²² SARC identified and substantively reported on human rights issues in 28 Bills.

In 2017 SARC reported that only one Bill was incompatible with the Charter, the Firearms Amendment Bill 2017.²³ The past two years have represented a significant decrease in the number of Bills SARC is identifying as Charter incompatible.

FIGURE 3: NUMBER OF BILLS SARC FOUND TO BE POTENTIALLY INCOMPATIBLE WITH THE CHARTER

Year	2017	2016	2015	2014	2013	2012
Bills	1	4	23	16	14	19

SARC referred questions regarding human rights set out in the Charter to a specific member or minister in relation to 19 Bills tabled in 2017 and received responses regarding all of them.²⁴

SARC referred questions regarding human rights to Parliament in relation to three Bills it reported on in 2017.

Two Bills were referred to Parliament regarding whether a provision was a suitable, necessary and proportionate limitation on the implied freedom of political communication:

- the Children and Justice Legislation Amendment (Youth Justice Reform) Bill 2017, allowing young people subject to Youth Control Orders to be barred from social media, and a person to be barred from communicating with the child when there was evidence the child was at risk of sexual exploitation²⁵
- the Crimes Legislation Amendment (Public Order) Bill 2017, giving Police power to direct a person wearing a face covering to leave a designated area in certain circumstances and to direct a person to leave a designated area if the officer reasonably believes the person intends to commit an offence.²⁶

On the third occasion, the Corrections Legislation Further Amendment Bill 2017, SARC referred to Parliament the question of whether a bar on parole for certain prisoners imprisoned for murder is incompatible with their right to humane treatment and whether the retrospective effect of the provisions is justified in the circumstances.²⁷

There appears to have been no direct parliamentary response to the human rights questions raised about the three Bills. However, members are not required to formally respond to questions SARC refers broadly to Parliament but are directed to do so if questions are addressed to them individually. This represents an important opportunity for Parliament to contemplate the human rights impacts of proposed legislation and make amendments when appropriate, furthering the Charter's dialogue model.

During 2017 parliamentarians referred to SARC reports on Bills in a number of instances. For example, parliamentary debate included reference to SARC's human rights analysis on the following Bills:

- the Voluntary Assisted Dying Bill 2017 (discussed below)²⁸
- the Firearms Amendment Bill 2017. A member expressed concern about stops and searches of people subject to a Firearms Protection Order and their associates, who could include a family member or acquaintance completely unaware of the situation, caught up in a tactical stop and search imposed without a warrant²⁹
- the Justice Legislation Amendment (Protective Services Officers and Other Matters) Bill 2017. It was noted that key stakeholders were apprehensive about aspects of the Bill.³⁰ The Centre for Excellence in Child and Family Welfare made a submission to SARC expressing deep concern with the Charter incompatibility of the power to randomly search children in public places within designated areas, even if a PSO has not formed a reasonable suspicion that a child is carrying a weapon.³¹

It is encouraging that parliamentarians are, at times, contemplating human rights matters raised by SARC during parliamentary debates regarding proposed legislation, as this is consistent with the dialogue model.

The 2015 independent Review of the Charter's operation, undertaken by Michael Brett Young (2015 Review) recommended improvements to the parliamentary scrutiny process. The Commission has noted the status of the implementation of these recommendations in Chapter 6 of this report.

House amendments to Bills

Members of Parliament can propose amendments to Bills during parliamentary debate. Although amendments may raise unique human rights issues, there is presently no requirement for a new statement of compatibility to be prepared or an updated statement to be provided for amendments to Bills.

FIGURE 4: HOUSE AMENDMENTS RESULTING FROM SARC REPORTS

Year	2017	2016	2015	2014	2013	2012
Amendments	2	0	3	3	0	1

Members of Parliament sometimes highlight SARC reports on Bills when they table amendments to Bills. In 2017 the Commission identified certain Bills where House amendments have referenced human rights questions raised in SARC reports, specifically, the Voluntary Assisted Dying Bill 2017 and the Justice Legislation Amendment (Body-worn Cameras and Other Matters) Bill 2017.

The Commission notes that the 2015 Review recommended that Members of Parliament be encouraged to provide a short statement on the human rights compatibility of their proposed House amendments to Parliament, when time permits.³²

Voluntary Assisted Dying Bill 2017 – Historic legislation promoting agency at the end of life

In 2017 Victoria became the first Australian state to legislate voluntary assisted dying by a self-administered lethal dose of medication for Victorian adults with decision-making capacity suffering from a serious incurable condition. The Bill aims to promote the right to privacy and the right to liberty and security of person by allowing Victorians suffering a terminal illness in very limited circumstances to choose to end their life according to their own preferences.³³

Members in favour of the Bill argued that supporting voluntary assisted dying is a human rights issue – allowing people the choice to die with dignity, under the safest and most rigorous framework possible.³⁴ Other members expressed reservations regarding safeguards surrounding the Bill. It was emphasised in parliamentary debate that SARC had observed that the statement of compatibility did not expressly discuss whether the Bill limited the ‘right not to be arbitrarily deprived of life’ and that the deprivation of life by assisted dying may be ‘arbitrary’ if the person’s consent is the result of outside pressure, irrationality or depression.³⁵ SARC also noted regarding the issue of arbitrariness that the Bill as tabled did not require that all patients be assessed by a specialist psychologist, psychiatrist or social worker, or an expert in palliative care.³⁶ A subsequent amendment required a co-ordinating medical practitioner to specifically refer a person to a registered health practitioner with appropriate skills and training “such as a psychiatrist in the case of mental illness”.³⁷

Justice Legislation Amendment (Body-worn Cameras and Other Matters) Bill 2017

The Justice Legislation Amendment (Body-worn Cameras and Other Matters) Bill 2017 permitted body-worn cameras to be used by Victoria Police and other emergency service personnel (for example ambulance officers).

A House amendment clarified that information obtained via body-worn cameras can be used in prosecutions, as evidence at internal disciplinary proceedings and for training purposes. Those amendments were developed following a query from SARC raising a question whether clauses permit communication of public information from body-worn cameras for investigations, prosecutions and police complaints.³⁸

SARC observed that, if the Bill prohibited most communication of information captured by the cameras, it could engage the right to freedom of expression, security of the person and right to a fair hearing. For example, if a person alleging police violence is prevented from obtaining information from a body-worn camera, this could limit the person’s ability to seek a court remedy for police violence or defend themselves in a criminal prosecution.³⁹

It is encouraging to see Parliament sometimes responding to the advice of SARC and highlighting SARC Charter reports when they table amendments to Bills.

Public submission process

An essential part of maintaining public accountability in the law-making process is the capacity for organisations and individuals to contribute submissions to SARC regarding the human rights implications of Bills.

SARC normally has about two weeks to table a Charter report in Parliament, (from the time a Bill is presented until its debate) however, sometimes circumstances of urgency mean that a Bill is passed more quickly through Parliament, which reduces the timeframe for community organisations and individuals to make public submissions to SARC. When time permits, it is vital that SARC Charter reports to Parliament reflect an analysis of public submissions when these submissions draw attention to key areas where a Bill may limit human rights. This can both promote public engagement with the dialogue model and enhance parliamentary scrutiny of human rights impacts of legislative reforms.

In 2017 14 public submissions were made to SARC regarding three Bills, the Voluntary Assisted Dying Bill 2017, the Children and Justice Legislation Amendment (Youth Justice Reform) Bill 2017 and the Justice Legislation Amendment (Protective Services Officers and Other Matters) Bill 2017. These submissions are available on SARC's website.⁴⁰

FIGURE 5: NUMBER OF PUBLIC SUBMISSIONS TO SARC

Year	2017	2016	2015	2014	2013	2012
Submissions	14	5	14	15	21	0

During 2017 there were many instances of Parliament actively engaging with the Charter and contemplating human rights issues during parliamentary debates and throughout the law-making process. These are examples of the dialogue model operating effectively. The Commission encourages all participants in the law-making process to adopt the Charter's dialogue model consistently to ensure human rights are considered during the development of all Victorian laws.



Endnotes

1. See: <<https://www.parliament.vic.gov.au/sarc/>>.
2. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28.
3. 123 Bills were presented to the Victorian Parliament in 2017, according to the Bills Status List archive, found <<http://www.legislation.vic.gov.au>>.
4. 124 Bills were presented to the Victorian Parliament in 2016, according to the Bills Status List archive, found <<http://www.legislation.vic.gov.au>>.
5. 102 Bills were presented to the Victorian Parliament in 2015, according to the Bills Status List archive, found <<http://www.legislation.vic.gov.au>>.
6. Victoria, Parliamentary Debates, Legislative Assembly, 21 September 2017, 2955 (Lisa Neville).
7. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No. 14 (2017) 13–15.
8. Victoria, Parliamentary Debates, Legislative Assembly, 25 May 2017, 2955 (Lisa Neville).
9. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No.8 (2017).
10. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No.8 (2010) 30.
11. Ibid 11.
12. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No.8 (2017) 29–30.
13. PSOs receive 12 weeks, training compared with the more extensive 31 week training program undertaken by new police recruits. PSOs also attend compulsory post-deployment training 12 months and 18 months after their initial deployment as well as programs addressing respectful behaviours and communicating with vulnerable people. IBAC, *Transit Protective Services Officers: An exploration of corruption and misconduct risks*, (December 2016) 8, 23 (<<http://www.ibac.vic.gov.au/docs/default-source/research-documents/transit-protective-services-officers---an-exploration-of-corruption-and-misconduct-risks.pdf?sfvrsn=4>>) See also further info re PSO training on Victoria Police website: <<http://www.policecareer.vic.gov.au/ps0/about-the-role/at-the-academy-psy>> Victoria Police training for general duties: <<http://www.policecareer.vic.gov.au/campaign/training-at-the-academy>>.
14. Found: <<https://www.parliament.vic.gov.au/sarc/article/916>>.
15. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No.8 (2017).
16. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31(1).
17. Human Rights Consultation Committee, 'Rights, Responsibilities and Respect' (Report, 30 November 2005) 75.
18. Ibid. See also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1, 21.
19. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 13 November 1980) art 4.
20. Human Rights Consultation Committee, 'Rights, Responsibilities and Respect' (Report, 30 November 2005) 75.
21. Victorian Equal Opportunity and Human Rights Commission, *2014 report on the operation of the Charter of Human Rights and Responsibilities* (Report, June 2015) 62.
22. Note that SARC will report on many Bills tabled towards the end of the year in the early months of 2018.
23. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No.14 (2017) 13.
24. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No .18 (2017) 19–21. This required looking at the list of correspondence between SARC and Members in Alert Digest 18 and then checking each Bill reported on in earlier 2017 Alert Digests. (Eight Bills SARC raised questions about concerned other matters than Charter rights, for example a delay between a Bill's passage through Parliament and its commencement date). The total number of Bills involving some correspondence was 27, with 25 responses.
25. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No. 8 (2017) 10.
26. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No. 5 (2017) 3.
27. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No.13 (2017) 2, 4.
28. Victoria, Parliamentary Debates, Legislative Council, 14 November 2017, 5826 (Richard Dalla Riva), Victoria, Parliamentary Debates, Legislative Council, 2 November 2017, 5693 (Richard Dalla Riva).
29. Victoria, Parliamentary Debates, Legislative Council, 30 November 2017, 6559 (Jeffrey Bourman).
30. Victoria, Parliamentary Debates, Legislative Council, 19 September 2017, 4734, 4735 (Sue Pennicuik).
31. Centre for Excellence in Child and Family Welfare, 'Submission regarding Justice Legislation Amendment (Protective Services Officers and Other Matters) Bill 2017', (2 June 2017) 1.
32. Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (Report, 1 September 2015), Recommendation 43.

33. Victoria, Parliamentary Debates, Legislative Assembly, 21 September 2017, 2945 (Jill Hennessy).
34. Victoria, Parliamentary Debates, Legislative Assembly, 17 October 2017, 3115 (Ros Spence).
35. Victoria, Parliamentary Debates, Legislative Council, 14 November 2017, 5826 (Richard Dalla Riva).
36. Victoria, Parliamentary Debates, Legislative Council, 2 November 2017, 5693 (Richard Dalla Riva). Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No. 14 (2017) 29-31.
37. Victoria, Parliamentary Debates, Legislative Council, 21 November 2017, 6274 (Gavin Jennings). See also *Voluntary Assisted Dying Act 2017*, section 18.
38. Victoria, Parliamentary Debates, Legislative Council, 31 October 2017, 3500 (John Pesutto).
39. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No.11 (2017) 10, 11.
40. Found: <<https://www.parliament.vic.gov.au/sarc/article/916>>.



CHAPTER 4:

HUMAN RIGHTS IN COURTS AND TRIBUNALS

The Charter as an effective litigation tool

Litigation brought before courts and tribunals provides an important platform to illustrate the effective operation and development of Victoria's human rights framework.

In 2017 the Charter of Human Rights and Responsibilities (the Charter) was raised or considered in more than 40 cases in Victoria's higher courts (see Annexure 1, end of the chapter), including the Supreme Court and County Court. These cases reflect a broad cross section of issues, ranging from access to information and suppression orders, to the delayed prosecution of a child who finds themselves an adult by the time they are tried, to the treatment of people with a disability before the courts.

In 2017 there were some clear themes to the human rights litigation. This chapter focuses on cases that involved:

- the right to a fair hearing and natural justice
- best interests of the child and children's rights
- the right to housing and privacy
- freedom of expression.

In addition to exploring these key themes, this chapter examines two leading cases in detail; *Certain Children v Minister for Families and Children & Ors (No 2)*¹ (Certain Children 2) and *Matsoukatidou v Yarra Ranges Council*² (Matsoukatidou), both of which outlined clear standards and obligations to ensure that human rights of vulnerable people in Victoria are protected. The Charter is being used as an effective litigation tool across a range of legal issues, and has been strengthened by the courts further clarifying the broad scope of issues that the Charter affects.

Right to a fair hearing and natural justice

In addition to cases that specifically allege there has been a breach of the Charter by a public authority, the Charter also requires that courts and tribunals themselves must interpret Victorian laws in line, or 'compatibly' with human rights (so far as it is possible to do so consistently with the law's purpose).³ There is also a requirement that administrative functions of the court (including the issuing of warrants, listing cases for hearing and conducting committal proceedings) be performed compatibly with human rights.⁴

As *Matsoukatidou* clarified (discussed in detail below), courts also have clear obligations under section 6(2)(b) of the Charter to act compatibly with those rights that affect court proceedings, including the right to equality before the law, the right to a fair hearing and the rights in criminal proceedings.⁵

There are three possible interpretations of section 6(2)(b): narrow, intermediate and broad.⁶ The prevailing approach is the 'intermediate' approach, which is that the Charter requires courts or tribunals to apply and enforce the human rights that relate to legal proceedings.⁷

In *Harkness v Roberts; Kyriazis v County Court of Victoria (No 2)* the Supreme Court considered the obligations of courts under the Charter and common law in matters where people charged with criminal offences are self-represented.⁸

In the case of Mr Harkness, this was argued on the basis of the common law by reference to the rules of natural justice and the right to a fair hearing protected under section 24(1) of the Charter. The original trial judge for Mr Harkness refused to hear oral submissions, dismissed his case on the basis of the form of notice and removed him from the courtroom due to alleged misbehaviour and continued to conduct the proceeding in his absence. The judge for Mr Kyriazis engaged in a heated exchange with the applicant throughout the proceedings and, at one point, publicly denigrated him.⁹

In relation to Mr Harkness, the Supreme Court found that his right to a fair hearing under section 24(1) of the Charter had been violated by rejecting his objections to jurisdiction without first hearing his oral submissions, and by failing to provide him with due assistance in relation to those submissions, having regard to his position as a self-represented litigant.¹⁰ By doing so, the Supreme Court found that the original trial judge had breached the rules of natural justice and Mr Harkness' right to a fair hearing under the Charter, and discussed the scope of the obligation on courts to apply the right to fair hearing to self-represented litigants.¹¹ The Supreme

Court also provided some guidance on how the proceedings could have been adapted to ensure that the appellant's rights had been upheld, including:

- inquiring into the capability that the applicant possessed so that a judgment could be made as to how much assistance was required
- explaining the procedure that would be followed during the course of the hearing and his options in relation to giving and not giving evidence
- directing his attention to the legal and factual questions that were in issue
- explaining his right to remain silent and not give evidence or to give evidence if he wished
- informing him that the prosecution was required to prove the offences beyond reasonable doubt and explain what this meant if required
- discussing the procedure for producing the documents under the subpoenas and how these would be inspected.¹²

This case highlights the rights and level of assistance owed to self-represented litigants, even where they do not have a disability. At the time of publication, this decision is subject to an appeal.

In *Rich v Howe* a prisoner sought to challenge a prison's decision to refuse his request for internet access to various case law publications.¹³ The prisoner wanted the publications for a potential legal appeal against his previous conviction and sentence for murder and armed robbery.¹⁴ The applicant alleged a breach of his right to a fair hearing under section 24 of the Charter and his rights in criminal proceedings under section 25 of the Charter.¹⁵

The Supreme Court considered whether any human rights were engaged by the prison's decision, noting that no proceeding was actually pending. The Supreme Court was not satisfied that the applicant's right to a fair hearing under section 24 of the Charter had been breached because it found the state had more than adequately provided access to extensive research and computer facilities¹⁶ and accordingly any limitation on his internet access was reasonable and justified.¹⁷

In *PRQ v Secretary, Department of Justice and Regulation (No 1)* the applicant was refused a Working with Children Check on the basis of his previous drug trafficking conviction.¹⁸ The applicant appealed to the Supreme Court for a review of the refusal decision, and sought a suppression order to ensure that his name was not reported by the media to prevent his partner and children from suffering

embarrassment and distress. The Supreme Court discussed how the making of suppression orders may affect the proper administration of justice. In relation to the Charter, the Supreme Court considered that the requirement for a fair and public hearing reinforces the requirement for a decision by a competent, independent and impartial court or tribunal.

The Supreme Court also observed that pseudonym and suppression orders engage rights, including:

- the right to freedom of expression, because such orders may limit a person's capacity to report facts and express views, and to obtain and impart information about a legal proceeding
- the right to a fair and public hearing, because such orders operate to reduce the public nature of hearings and, therefore, a person's capacity to report facts and express opinions, about the proceeding.¹⁹

The Supreme Court stated that while the principles of open justice and free communication of information are of fundamental importance under the Australian Constitution, common law and the Charter, they are not absolute. Subject to certain safeguards, pseudonym orders and suppression orders may be made in circumstances of necessity. The Supreme Court did not grant the suppression order on the basis that the applicant had not demonstrated that the order was necessary to prevent a real and substantial risk to the proper administration of justice.

These cases highlight the different experiences people have dealing with the Victorian justice system, and the role of the Charter in promoting the rights and standards the public can expect when engaging with the courts.

Best interests of the child and children's rights

Throughout 2017 there were several cases²⁰ that drew from the jurisprudence offered in the Certain Children litigation (summarised in detail below) when considering what duties are owed to children, the scope of the best interests of the child, and the way children should be dealt with before the courts themselves.²¹

In *Baker (a Pseudonym) v DPP* the applicant was charged with a number of serious child related offences, including the sexual penetration of a child under 16, knowingly possessing child pornography and using online information to transmit child pornography.²² Baker was himself aged 17 at the time of the alleged offences. By the time the police elected to prosecute and formally charge Baker, he was aged 19.²³ Baker argued that the delay in bringing proceedings against him meant that he had now lost his right to have the charges dealt with in a Children's Court and argued this was a breach of his right to be tried without unreasonable delay under section 25(2)(c), as well as a contravention of his right as a child to protect his best interests under section 17(2) and his right to a fair hearing under section 24(1).

The Court of Appeal found that it was more relevant to consider when the charges were laid, as opposed to when the alleged offences occurred.²⁴ It said that the status of a young offender is taken into account throughout the system of criminal punishment and is not confined to the processes of the

Children's Court²⁵ and accordingly found no breach of the Charter.

*DPP v SE*²⁶ raised issues about the procedure to be adopted when a court hears and determines applications for bail by an Aboriginal child, and assesses appropriate conditions for bail having regards to human rights.²⁷ The applicant was a 17-year-old Aboriginal person with an intellectual disability who applied for bail while waiting for a sentencing hearing.

The Supreme Court found the *Bail Act 1977 (Vic)* required it to take into account the applicant's age, Aboriginality and intellectual disability. In doing so, the Supreme Court could consider how disadvantage and vulnerability may interact.²⁸ Accordingly, the Supreme Court made directions regarding the applicant's hearing requiring that they were not to be handcuffed or detained with adult prisoners, could sit with counsel and their support persons, the judge and counsel would not robe, they would speak in understandable language, they would explain what was going on at all times and they would ensure that SE familiarised themselves with the surroundings.²⁹

Right to housing and privacy

In *Alsindi v Director of Housing (Residential Tenancies)* the wife of a tenant of public housing who was in jail applied to VCAT for an order requiring the landlord, the Director of Housing, to allow her to become the tenant and accordingly secure her home.³⁰ Submissions were made to VCAT that, as a public authority, it must take into consideration her right to privacy and home protected under the Charter.³¹ VCAT acknowledged that the decision whether to make a tenancy agreement clearly engaged the applicant's human rights because she may become homeless without one, which could have affected the ability of her son to live with her and considered whether the limit or intrusion on the human rights engaged were justified.³²

VCAT considered the unfairness of Ms Alsindi effectively jumping the public housing waitlist queue when there were other people already approved and waiting to be allocated. On balance, VCAT found that the effect of this would be to interfere with the Director of Housing's equitable administration of the waiting lists which constituted a greater detriment than to the hardship Ms Alsindi would individually suffer.³³

In *AVW v Nadrasca Ltd (Residential Tenancies)* VCAT considered the legality of a notice to vacate issued against a disabled, long-term supported accommodation resident.³⁴ The VCAT member considered that as Nadrasca was a provider of residential services that were publicly funded, it

was acting as a public authority and the Charter therefore applied.

Accordingly, Nadrasca was required to give proper consideration to AVW's rights when making a decision to issue a notice to vacate including pursuant to section 13 of the Charter, which relates to the right not to have their privacy, family or home unlawfully or arbitrarily interfered with.³⁵ Importantly, VCAT considered whether Nadrasca, as an experienced service provider with strong knowledge of the applicant's complex dual disability and needs, had adequately provided the applicant with support and management.³⁶

The VCAT member considered that, in circumstances where the applicant was a disabled person and the making of the possession order would have a significant impact on the applicant and the 'right to home is particularly important to a person with a dual disability', Nadrasca did not take reasonable steps in attempting to resolve the applicant's behaviours.³⁷ VCAT subsequently found that the Notice to vacate was invalid and could not form a basis for possession.

Both these key cases considered the rights of Victorians living in public housing with two different outcomes, which highlights that the courts will consider each case on its own factual merit when assessing the application of the Charter.

Freedom of expression

The line of what constitutes freedom of expression and its relationship to the Charter was considered by two cases based on very different facts.

In *McDonald v Legal Services Commissioner* Mr McDonald, a lawyer, made a number of allegedly discourteous remarks in correspondence with legal colleagues, which were reported to the Legal Services Commissioner.³⁸ The Commissioner subsequently brought disciplinary proceedings against Mr McDonald based on the *Legal Profession Act 2004* (Vic) and the governing legal professional rules.³⁹ The Supreme Court considered the right to freedom of expression outlined in section 15 of the Charter in light of those professional obligations.

In his judgment, his Honour Justice Bell noted that freedom of expression is a 'deeply ingrained principle of the common law' with 'special importance for lawyers because it is their professional responsibility to make representations on behalf of clients' as well as more generally for the

importance of maintaining the independence of the legal profession and the administration of justice.⁴⁰ Lawyers, his Honour noted, 'have the human right freely to express themselves, whatever be the form of their communications, both when representing clients in the course of their professional work and when engaging in public debate about legal, political and social issues'.⁴¹

His Honour noted that the Charter provides for limitations to the general protection of human rights under section 15(2), such as for the protection of public order and public health,⁴² as well as more generally under section 7(2) of the Charter. His Honour clarified that while the choice of Mr McDonald's confrontational advocacy style may not have been an effective method, it did not amount to unsatisfactory professional misconduct,⁴³ and, based on the circumstances and tone of the litigious correspondence between the lawyers in the robust advocacy of their clients, was a path open to Mr McDonald to take.

In *Minogue v Dougherty* the plaintiff (a prisoner) argued that the administration of a policy relating to prisoner correspondence unreasonably limited his freedom of expression.⁴⁴ In considering the case, the Supreme Court noted that the defendant, as a manager of a prison, is a public authority and is bound by section 38(1) of the Charter, which makes it unlawful for a public authority to act in a way that is incompatible with human rights, or in making a decision, fail to give proper consideration to a relevant human right. The court relied on the road map for assessing human rights outlined in the *Certain Children v Minister for Families and Children & Ors (No 2)*.⁴⁵

The court found that the defendant, as a public authority, had not given proper consideration to the plaintiff's relevant human rights when a decision was made to return the plaintiff's correspondence back

to the sender. Instead, the court found that there had been a blanket application of a non-existent rule, which in this case was a prison policy providing that prisoners are only able to receive correspondence or property from people on their approved visitors list. The court stated that this policy had been applied without any consideration of the plaintiff's right not to have his correspondence unlawfully or arbitrarily interfered with or his right to freedom of expression to receive information and ideas of all kinds in print under the Charter.

The court made a declaration that in deciding to return to the sender, the letter and accompanying book that had been sent to the plaintiff, the prison mail officer had failed to give proper consideration to the plaintiff's human right of privacy under section 13(a) and of freedom of expression under sections 15(2)(b) and (c) of the Charter.

Key cases

Certain Children v Minister for Families and Children & Ors (No 2)⁴⁶ (Certain Children 2)

One of the key Charter cases in 2017 involved litigation regarding the legality of detaining young people within a former adult maximum security prison. The case demonstrated the power of the Charter to protect children, even in circumstances involving emergencies and complex policy challenges for the state. Furthermore, the case demonstrated the power of the Charter as an effective litigation tool to not only bring proceedings concerning substantive rights to bear, but to also independently provide effective remedies for its applicants where such remedies may be sought on non-Charter grounds. In doing so, the case is one of the most significant Charter cases in several years and provides the Victorian Government with useful and practical guidance on the human rights legal standards expected to be met when dealing with children.

Summary

The plaintiffs were children and young people aged between 15 and 18 (the plaintiffs), who were detained at the remand centre and youth justice centre at the Grevillea unit (Grevillea) within the Barwon adult maximum security prison. The defendants were the Minister for Families and Children, the Secretary to the Department of Health and Human Services, the Minister for Police and the state of Victoria (collectively referred to below as the state). The plaintiffs sought orders for their removal from Grevillea based on a range of legal grounds,

including that the defendants had failed to give proper consideration to their human rights.

In May 2017 his Honour Justice John Dixon found that the state had failed to provide proper consideration to the plaintiff's human rights when making the decision to transfer them, and had also unlawfully limited their human rights.

Background

A series of complex events and litigation preceded this 2017 case.⁴⁷ In October and November 2016 children being lawfully held at the purpose built Parkville Youth Justice Precinct (Parkville) caused damage at the facility and infrastructure capacity at Parkville was heavily reduced. In response to this event and the Victorian Government's belief that there were no existing alternative facilities for the children to be safely held in, the government elected to gazette part of Barwon Prison (Barwon), an adult maximum security prison, as a youth justice facility pursuant to requirements under the *Children, Youth and Families Act 2005* (Vic) (CYFA). The state announced that children would be temporarily transferred to the Grevillea facility at Barwon while repair works were completed at Parkville.

Litigation was brought on behalf of the children being held at Barwon and, on 21 December 2016, Justice Garde found against the state.⁴⁸ The state unsuccessfully appealed the decision to the Victorian Court of Appeal, confirming Justice Garde's decision that the Orders in Council were invalid and ordering that the Children be released from Grevillea.⁴⁹

Soon after, the state recommended that the Governor in Council make revised Orders, again establishing Grevillea as a remand centre and youth justice centre. On 29 December 2017 the Governor in Council made the revised Orders (Grevillea Orders), enabling the state to continue to detain children at Grevillea, a separate unit within Barwon.

The Certain Children 2 case

In 2017 further litigation commenced on behalf of the children. This new case considered whether the state had given proper consideration to human rights pursuant to section 38(1) of the Charter when deciding to transfer each child to Barwon, and in making the revised Orders to establish Grevillea as a youth justice facility. The case also considered whether any limitation on the human rights of the children was reasonable and justified pursuant to section 7(2) of the Charter.

In effect, the new case alleged that the Grevillea facility could never have constituted a lawful place of detention for children, and also included new allegations about the conditions of detention, including the use of oleoresin capsicum spray (OC spray) and extendable batons within Barwon (the weapons exemption).

In delivering judgment on 11 May 2017 his Honour Justice Dixon found that the plaintiffs were unsuccessful on their administrative law grounds but were successful on their Charter grounds. The Court found that each of the plaintiff's rights to protection⁵⁰ under section 17(2) and 22(1) had been breached in respect of the Grevillea Orders and the transfer decisions (but not the weapons exemption). His Honour's decision provides clear authority; a public authority must comply with and have regard to rights enshrined in the Charter.

His Honour did not accept the state's arguments that it gave proper consideration in the re-gazettal and transfer of the children.⁵¹ Specifically, Justice Dixon noted that the Minister for Families and Children had failed to consider the risk to or exacerbation of the plaintiffs' mental health from being in the built environment at Grevillea, and had failed to consider how the continued use of 23-hour isolation lockdown and handcuffing had adversely affected the plaintiffs' human rights.⁵²

Furthermore, his Honour found that the limitation on the plaintiff's rights was not proportionate and had not been demonstrably justified by the State. His Honour was not convinced that the material put before him demonstrated the Minister applied the correct and thorough balancing of competing private and public interests, and the Minister was further hampered by a briefing with incorrect information regarding lock down and other conditions.

The test for proper consideration

Justice Dixon referred to the task required by section 38 of the Charter, noting both the 'substantive limb' (concerned with whether an act of a public authority is incompatible with human rights) and the 'procedural limb' (the decision-making process that was undertaken) which had been previously described by the Supreme Court in the case of *Bare v Independent Broad-based Anti-Corruption Commission*.⁵³

His Honour elaborated on this test, particularly in relation to the first limb, and noted the substantive limb requires that identifying whether or not a decision or action limits human rights should involve:

- Establishing the relevant rights which may be limited by the proposed action (including an assessment of the significance and quality of that right)
- Consideration of whether the proposed action has failed to do or done something that limit the rights identified
- If so, is the action nonetheless still reasonable and justifiable in accordance with section 7(2)?
- Was the act or decision made according to a law or instrument that gave the public authority no discretion to make the act or decision, such that there was an inevitable infringement of the right?
- If no, then the action is incompatible with the Charter and thus unlawful.

While the second limb of the section 38 test had already been the subject of much judicial reflection in other judgments, Justice Dixon summarised that the decision maker's consideration of the decision should:

- be serious, and, in this case, may have included an examination of alternatives
- identify how rights are impacted, including an assessment of the possible implications for the person affected.⁵⁴

Significantly, his Honour granted the plaintiffs' a remedy on the success of their Charter arguments alone, and ordered that the decisions to transfer children to Barwon and the weapons exemption regarding the use of OC spray were unlawful. His Honour made orders which prevented any future children being held at Barwon.

The *Certain Children* series of litigation provides a clear message for public authorities: when dealing with children in urgent or ‘emergency’ situations, the state must be particularly mindful of its human rights obligations under the Charter. In the words of Justice Dixon (concerning the transfer decisions), “giving lip-service to the Charter whilst working towards a pre-determined outcome does not amount to proper consideration”.⁵⁵ Justice Dixon’s judgment rigorously assessed the state’s resource allocation submissions, including what considerations to alternatives were given. The judgment suggests that robust evidence of these considerations must be presented in order for the courts to consider it as a reasonable limitation under section 7(2) of the Charter.

Matsoukatidou v Yarra Ranges Council [2017] VSC 61

In February 2017 the Supreme Court of Victoria confirmed the obligations on courts and tribunals to apply the rights to equality and fair hearing to self-represented litigants and, in particular, those with a learning disability. This is an important ruling not just for the rights it considers but also its implications for administrative processes and practices in Victorian courts.

Background

Maria Matsoukatidou and her mother, Betty Matsoukatidou, represented themselves in the Ringwood Magistrates’ Court to defend charges under the *Building Act 1993 (Vic)* for failing to secure and demolish their home after it was destroyed following an arsonist attack. Maria has a learning disability and her mother Betty’s first language is not English. In December 2013 the Magistrates’ Court imposed fines on both Maria (without a conviction) and Betty (with a conviction).

Maria and Betty appealed to the County Court and were again self-represented. The County Court judge did not explain the relevant procedure or applicable legal test. Maria and Betty struggled to present their case and the County Court judge dismissed their applications. Maria and Betty then sought judicial review in the Supreme Court of the orders to dismiss their applications for reinstatement on the grounds that, in the way that the hearing was conducted, the County Court judge failed to uphold their rights to equality and fair hearing, protected under sections 8(3) and 24(1) of the Charter, respectively.

Human rights affected

Justice Bell considered whether a judge in the County Court is required to apply the right to equality,⁵⁶ as well as the right to a fair hearing⁵⁷ when hearing and determining legal proceedings.

In relation to the obligation to apply the right to equality, the Supreme Court drew a distinction between Maria and Betty, because Maria has a disability (defined by reference to the *Equal Opportunity Act 2010 (Vic)*) and accordingly her disadvantage in the hearing was not only due to her being self-represented but was also substantially due to her having a disability. In regard to Betty, her disadvantage in the hearing was due to her being self-represented.⁵⁸ Justice Bell found that the County Court judge was obliged to ensure that the hearing was conducted so that both Maria and Betty were equal before the law and also that Maria was protected by the law without discrimination.

In considering the right to a fair hearing, Justice Bell maintained that a proceeding with self-represented parties created a serious risk of unfairness because of their potential ineffective participation in the proceeding, and the lack of participatory equality with the other party. The Supreme Court held this risk was exacerbated when a self-represented party had a disability that renders them vulnerable to discrimination.⁵⁹

The Supreme Court reflected that obligations of courts and tribunals under the Charter to apply the rights to equality and fair hearing in proceedings are very close both in content and application to obligations under the common law to give self-represented parties advice and assistance and ensure a fair trial.

The Supreme Court upholds human rights

The Supreme Court found that Maria and Betty were not able to participate effectively and were not given a fair opportunity to put forward their case, in breach of their rights to equality and fair hearing under the Charter.

Justice Bell held that, as a self-represented litigant, it should have been readily apparent to the judge that Maria’s disability diminished her capability to participate in the proceeding. Justice Bell held the County Court judge was required to give Maria and Betty assistance to ensure their effective participation in the hearing and equality with the other party and, in order for Maria to be equally and effectively protected from and against discrimination, the judge was obliged to make reasonable adjustments and accommodations to compensate for Maria’s disability. Importantly, Justice Bell held that this was regardless of whether his Honour was actually aware of Maria’s disability.

Justice Bell also found that the hearing was conducted too quickly, and that the judge did not adequately assess Maria and Betty's ability to comprehend English, which compounded the disadvantage they experienced. Further, Justice Bell found Maria and Betty should have been free to explain how the loss of their home to arson had affected their participation in the criminal legal process.

Justice Bell set aside the orders of the County Court judge and remitted Maria and Betty's applications to a different judge for hearing and determination. In doing so, Justice Bell affirmed that the rights to equality and fair hearing are "values of foundational significance in democratic society and not just matters of manner and form".⁶⁰

The Commission's power to intervene

The Victorian Equal Opportunity and Human Rights Commission (the Commission) has the power to intervene in, or may be joined as a party to, any proceeding in which a question of law arises that relates directly to the application of the Charter, or, where there is a broader question regarding correct statutory interpretation in relation to the Charter.⁶¹ The Attorney-General similarly has the right to intervene in cases that raise the Charter.⁶² In this regard, the Commission acts as the advocate of the law in cases where there are potentially difficult, serious, or novel interpretations of the Charter to be determined.

Of the 18 notified cases in 2017 the Commission elected to formally intervene in the following:⁶³

- *Cemino v Cannon & Ors*⁶⁴
- *Baker v DPP* [2017] VSCA 58
- *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251.

In 2017, the Attorney General formally intervened in the following:

- *ZD (A Pseudonym) v Department Of Health And Human Services* [2017] VSC 806
- *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89
- *Director of Public Prosecutions (on behalf of Mark Adam Vetter) v Shaun Rayment*⁶⁵



ANNEXURE 1: CASES RAISING OR CONSIDERING THE CHARTER IN 2017*

Case	Date	Court
<i>Matsoukatidou v Yarra Ranges Council</i> [2017] VSC 61	28 Feb 2017	Supreme Court
<i>Certain Children v Minister for Families and Children & Ors (No 2)</i> [2017] VSC 251	11 May 2017	Supreme Court
<i>ZD v Secretary to the Department of Health and Human Services</i> [2017] VSC 806	22 Dec 2017	Supreme Court
<i>United Firefighters' Union v VEOHRC & Anor</i> [2017] VSC 773	15 Dec 2017	Supreme Court
<i>Baker (a Pseudonym) v DPP</i> [2017] VSCA 58	22 Mar 2017	Court of Appeal
<i>Application for Bail by H L (No 2)</i> [2017] VSC 1	6 Jan 2017	Supreme Court
<i>DPP v SE</i> [2017] VSC 13	31 Jan 2017	Supreme Court
<i>McDonald v Legal Services Commissioner (No 2)</i> [2017] VSC 89	14 Dec 2017	Supreme Court
<i>Minogue v Dougherty</i> [2017] VSC 724	06 Dec 2017	Supreme Court
<i>Alsindi v Director of Housing (Residential Tenancies)</i> [2017] VCAT 1882	17 Nov 2017	VCAT
<i>Harkness v Roberts; Kyriazis v County Court of Victoria (No 2)</i> [2017] VSC 646	26 Oct 2017	Supreme Court
<i>Dudley v Hopkin Correctional Centre & Ors</i> [2017] VSC 580	20 Sep 2017	Supreme Court
<i>Rich v Howe</i> [2017] VSC 483	14 Sep 2017	Supreme Court
<i>AWW v Nadrasca Ltd (Residential Tenancies)</i> [2017] VCAT 1462	14 Sep 2017	VCAT
<i>VPZ v Victoria Police (Human Rights)</i> [2017] VCAT 1398	6 Sep 2017	VCAT
<i>Maiga v Port Phillip Housing</i> [2017] VSC 441	25 Jul 2017	Supreme Court
<i>B A v Attorney-General</i> [2017] VSC 259	23 May 2017	Supreme Court
<i>VCAT v Smeaton (Review and Regulation) (Corrected)</i> [2017] VCAT 659	15 May 2017	VCAT
<i>Rein v Australian Health Practitioner Regulation Agency (Human Rights)</i> [2017] VCAT 452	31 Mar 2017	VCAT
<i>Knight v General Manager, HM Prison Barwon</i> [2017] VSC 135	31 Mar 2017	Supreme Court
<i>PQR v Secretary of DJR (No 1)</i> [2017] VSC 513	26 Sep 2017	Supreme Court
<i>Secretary to the Department of Justice and Regulation v Fletcher (No 4)</i> [2017] VSC 32	8 Feb 2017	Supreme Court

ANNEXURE 1: CASES RAISING OR CONSIDERING THE CHARTER IN 2017*

Case	Date	Court
<i>Pumpa v Victorian Legal Services Board & Anor</i> [2017] VSC 629	13 Oct 2017	Supreme Court
<i>D'Arcy v Lee (residential tenancies)</i> [2017] VCAT 98	14 Jan 2017	VCAT
<i>Pavlovic v Commonwealth Insurance Ltd</i> [2017] VSC 252	2 May 2017	Supreme Court
<i>Raptis v City of Melbourne & Anor</i> [2017] VSC 247	10 May 2017	Supreme Court
<i>Curran v Loddon Campaspe Centre Against Sexual Assault (Human Rights)</i> [2017] VCAT 999	14 July 2017	VCAT
<i>SDH (Guardianship)</i> [2017] VCAT 1919	21 Nov 2017	VCAT
<i>Rossi Homes Pty Ltd v Dun and Bradstreet (Australia) Pty Ltd (Civil Claims)</i> [2017] VCAT 1839	17 Nov 2017	VCAT
<i>Victoria Police v Santucci</i> [2017] VMC 17	16 Oct 2017	Magistrates' Court
<i>Gembrook Views Estate Pty Ltd v Cardinia SC (Red Dot)</i> [2017] VCAT 604	4 May 2017	VCAT
<i>Director of Housing v WWM (Residential Tenancies)</i> [2017] VCAT 369	28 Mar 2017	VCAT
<i>MNE v Secretary to the Department of Justice and Regulation (Review and Regulation)</i> [2017] VCAT 328	03 Mar 2017	VCAT
<i>Minogue v Shuard</i> [2017] VSCA 267	22 Sep 2017	Supreme Court
<i>Secretary to the Department of Justice and Regulation v Fletcher (No 4)</i> [2017] VSC 32	8 Feb 2017	Supreme Court
<i>Minogue v Gloster</i> [2017] VSC 523	6 Dec 2017	Supreme Court
<i>Xuarez & Vitela (No 2)</i> [2017] FamCA 1028	30 Nov 2017	Family Court
<i>Bogdanovic v Magistrates' Court of Vic</i>	27 Nov 2017	Supreme Court
<i>Petrou v Bupa Aged Care Australia Pty Ltd</i> [2017] VCAT 1706	18 Oct 2017	VCAT
<i>Knight v Commonwealth of Australia (No 3)</i> [2017] ACTSC 3	13 Jan 2017	Supreme Court
<i>Certain Children v Minister for Families and Children & Ors (No 1)</i> [2017] VSC 153	20 Feb 2017	Supreme Court
<i>Richards (a Pseudonym) v The Queen (No 2)</i> [2017] VSCA 174	30 Jun 2017	Court of Appeal

* This table includes published decisions reported at austlii.edu.au. Not all court and tribunal decisions are reported on Austlii.

Endnotes

1. [2017] VSC 251.
2. [2017] VSC 61.
3. *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32. The Commission notes that there are a number of key resources to assist the Judiciary in its consideration of human rights law. Specifically, the Judicial College of Victoria's *Charter of Human Rights Bench Book* and the *Disability Access Bench Book* provide useful reference to key cases, statutory interpretation guidance and international jurisprudence. Both of these resources are publicly available and are also a useful guide for government and human rights practitioners alike.
4. *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(j).
5. [2017] VSC 61 (28 February 2017) [109].
6. *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 61–4 [241]–[254] (Bell J).
7. *Victorian Police Toll Enforcement v Taha* (2013) 49 VR 1, 80–81[246]–[248]; *Momcilovic v R* (2011) 245 CLR 1, 204 [525] (Crennan and Kiefel JJ); *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 [32] and cases cited in footnote 12 to that paragraph; *DPP v SL* [2016] VSC 714; *DPP v SE* [2017] VSC 13.
8. [2017] VSC 646.
9. *Ibid* 15.
10. *Harkness v Roberts*, [2017] VSC 646, 32.
11. [2017] VSC 61 (28 February 2017) [109].
12. *Ibid* 58.
13. [2017] VSC 483.
14. *Ibid* 3.
15. *Ibid* 12.
16. *Ibid* 153.
17. *Ibid* 170.
18. [2017] VSC 513.
19. *Ibid* 37.
20. See also, for instance, *Application for Bail by HL* (No 2) [2017] VSC 1 (6 January 2017).
21. *Certain Children v Minister for Families and Children & Ors* (No 2) [2017] VSC 251.
22. [2017] VSCA 58.
23. *Ibid* 4.
24. *Ibid* 22–23.
25. *Ibid* 122.
26. [2017] VSC 13.
27. *DPP v SE* [2017] VSC 13, 2.
28. *Ibid*.
29. *Ibid* 16.
30. [2017] VCAT 1882 (17 November 2017).
31. Protected by section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
32. Engaging section 17 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
33. *Ibid* 57.
34. [2017] VCAT 1462.
35. *Ibid* 80.
36. *Ibid* 126.
37. *Ibid* 117.
38. (No 2) [2017] VSC 89.
39. *Professional Conduct and Practice Rules 2005* (Vic) r 21.
40. *McDonald v Legal Services Commissioner* (No 2) [2017] VSC 89, 15.
41. *Ibid* 26.
42. Section 15(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
43. *McDonald v Legal Services Commissioner* (No 2) [2017] VSC 89, 52.
44. [2017] VSC 724.
45. [2017] VSC 251.
46. *Ibid*.
47. See further discussion in the Victorian Equal Opportunity and Human Rights Commission's 2016 report on the operation of the *Charter of Human Rights and Responsibilities*, 47.
48. *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796.
49. *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343.
50. That is in their best interests and is needed by reason of being a child.
51. *Certain Children v Minister for Families and Children & Ors* (No 2) [2017] VSC 251 [190].
52. *Ibid* 492–505, 509–515.
53. *Bare v Independent Broad-based Anti-Corruption Commission* (2015) 48 VR 129, at 176–181.
54. *Certain Children v Minister for Families and Children & Ors* (No 2) [2017] VSC 251, 221.
55. *Ibid* 515.
56. *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8(3).
57. *Ibid* s 24(1).
58. *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 at [48].
59. *Ibid* at [119].
60. *Ibid* at [130].
61. *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 40.
62. *Ibid* s 34.
63. Notified by receipt of a Notice pursuant to s 35 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
64. Before the Supreme Court at time of publication.
65. Before the Supreme Court at time of publication.

CHAPTER 5:

GROWING A HUMAN RIGHTS CULTURE IN PUBLIC AUTHORITIES

The importance of a human rights culture in public authorities

Human rights cultural change involves more than simply making practices more compliant with human rights standards. It requires changing the underlying attitudes and values that influence behaviour in an organisation, and moving to a culture where the human rights of Victorians are thoughtfully considered and prioritised in everyday business.

Growing a human rights culture is an ongoing and incremental process that requires a sustained commitment. Public authorities should reflect on how they operate and govern, and then consider what improvements can be made to best protect and promote the human rights of the people they serve.

The Charter provides public authorities with an effective framework for driving human rights cultural change, by helping people across government consider how best to promote and protect human rights *before* decisions are made and *when* services, policy and programs are designed and delivered.

Over the past decade the Commission has seen the government's human rights culture grow. However, the Commission has also seen it stall in recent years. This observation is reflected in the findings from the

2015 independent Review of the Charter's operation, undertaken by Michael Brett Young (2015 Review).¹

The focus of the first 11 recommendations of the 2015 Review was the need to build a strong human rights culture, including the need for public authorities "to give life to human rights in their everyday work".²

The 2015 Review suggested three cultural influences that can help grow a human rights culture and that are currently underused by government:

- **Senior leadership and organisational vision:** the role of senior leaders, the law, and vision and values at the whole of organisation level
- **Operational capacity:** operational policies and procedures, supervisors and team behaviours, recruitment and promotion and building the knowledge and capability of staff, and
- **External input and oversight:** community attitudes and expectations, key advisers in the legal sector, and external accountability and oversight.³

BENEFITS OF A HUMAN RIGHTS CULTURE

For government

- Builds relationship with the community
- Identifies problem areas
- Improves democratic legitimacy by demonstrating to the Victorian community a genuine commitment to human rights
- Connects Victoria with international efforts to translate human rights goals and standards into results for the people of Victoria
- Reinforces other work, for example safety, equality, multiculturalism

For community members and advocates

- Assists government to make decisions that consider rights
- Establishes clear non-negotiable standards
- Strengthens cases where change is needed
- Empowers individuals
- Contributes to a fairer and more inclusive society
- Encourages community participation in decision-making

For public authorities

- Improves quality of service design, in particular for the most marginalised, excluded and disadvantaged in our community
- Improves decision-making by providing a framework to identify, assess and balance human rights against other rights and interests
- Helps manage organisational risks, such as litigation
- Builds reputation and credibility
- Creates a framework for solving problems

For staff

- Inspires staff
- Reconnects staff with core public service values
- Gives staff a framework to act with a moral compass when dealing with people



The government's recommitment to growing a human rights culture

Last year, the Commission surveyed public authorities and community organisations to understand what activities took place in 2016 to strengthen the Victorian Government's human rights culture. The data collected indicated that public authorities are taking steps to improve their human rights culture, but that they could be doing more. For example, only half (54 per cent) of public authorities surveyed reported changing their approach in 2016 to human rights compliance or making efforts to improve their human rights culture as a result of the 2015 Review.

In 2017 the Victorian Government recommitted to strengthening its human rights culture across the Victorian public sector and to making the Charter more effective, accessible and practical.

This recommitment builds on the Victorian Government's response to the 2015 Review, in which it stated that a major focus was "to ensure that an appropriate human rights culture continues

to be built in the Victorian public sector".⁴ The Victorian Government advised that to achieve this it would prioritise human rights training and education for public sector employees.⁵ To this end, the Department of Justice and Regulation (DJR) provided \$1.8 million funding to its Human Rights Unit (HRU) and the Commission to deliver renewed education and capacity building across the Victorian public sector to ensure that human rights is not just a compliance function, but is part of the culture of public decision-making. The Charter Education Project has been highly successful to date. Approximately 3000 officers across the public sector have received tailored human rights education and feedback has been overwhelmingly positive.

VICTORIAN SECRETARIES BOARD SUPPORTS CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

Dear colleagues,

The Victorian Secretaries Board has reconfirmed its commitment to strengthening a human rights culture across the Victorian Public Sector.

Over 10 years ago, Victoria became the first Australian state to adopt a Charter of Human Rights and Responsibilities. The Charter protects 20 human rights that aim to ensure everyone is able to live in freedom, and be treated with respect, equality and dignity in our community. These rights include fundamental liberties such as the right to be protected from discrimination, the right to vote, the right to a fair trial and the protection of families. Human rights under the Charter apply to all citizens in Victoria.

The Charter reflects the values that underpin the relationship between the Victorian Government and the Victorian community. The Charter keeps the work that we do focused on the people we serve, and, in doing so, it strengthens our relationship with the community.

Across the public sector, it is expected that all staff should protect and promote human rights in delivering high quality services to Victorians and supporting a safe, just, innovative and thriving Victoria. The Charter requires that human rights should be considered when making decisions and developing legislation, policies, plans and procedures. It also requires that your actions should be consistent with human rights when performing public functions, handling complaints and delivering services.

The Charter Education Project has commenced to help build a stronger culture of human rights. The Project is being delivered by the Human Rights Unit within the Department of Justice and Regulation in partnership with the Victorian Equal Opportunity and Human Rights Commission. The Project is supporting teams and business units to build knowledge of human rights and the capacity to use the Charter as a progressive and dynamic framework to make human rights part of the everyday business of government. The Project is achieving this by designing and delivering targeted and customised education and resources across the public sector.

I encourage you to learn more about the Charter and its relevance to your work by contacting DJR's Human Rights Unit on 8684 0836 or email matthew.downey@justice.vic.gov.au, or by contacting the Victorian Equal Opportunity and Human Rights Commission on 9032 3423 or email lauren.matthews@veohrc.vic.gov.au.

Regards,

Greg Wilson
Secretary

In order to make human rights principles a core part of public sector culture, a lasting, ongoing commitment from the Victorian Government is required.

The state of human rights knowledge, awareness and culture within the Victorian public sector

A commitment to human rights is a Victorian public sector value and is included within the Victorian public sector Code of Conduct:

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.⁷

Including human rights as a value within the Victorian public sector Code of Conduct helps to strengthen a human rights culture because it sets the expectation on all public sector staff to consider human rights as part of their everyday work. It also has the potential to inspire staff by providing purpose within their work, as well as offering value for the community as a transparent and accountable set of standards.

Connected to the Victorian public sector Code of Conduct, the annual Victorian Public Sector Commission (VPSC) People Matter survey provides useful data for assessing the state of human

rights knowledge, awareness and culture within the public sector.

The VPSC surveys public sector employees annually for their views on how values and employment principles are demonstrated in their organisation by colleagues, managers and senior leaders.

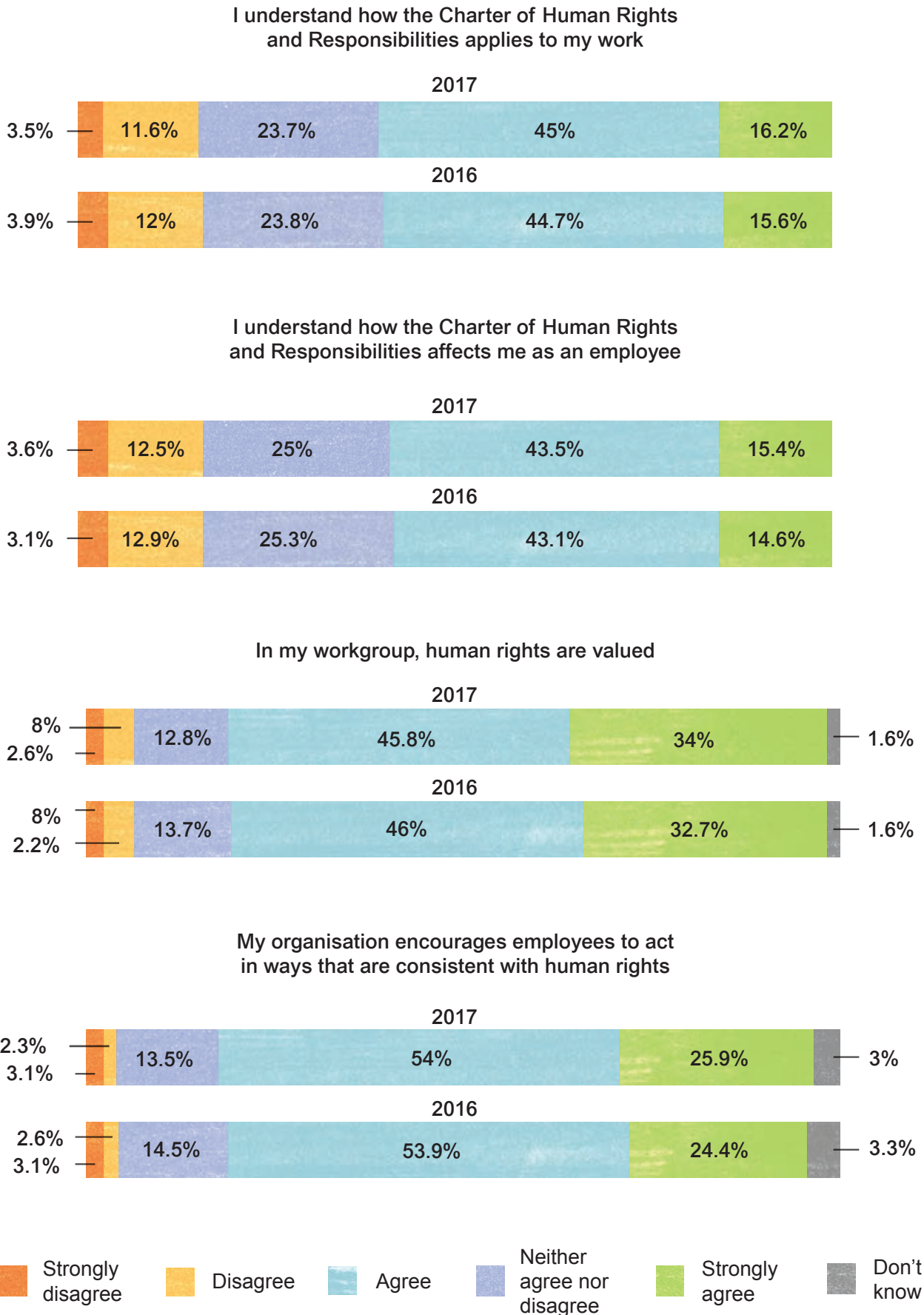
The results of the VPSC People Matter Survey

The 2017 VPSC survey captured the views of around 69,240 staff from 170 organisations within the public sector (a response rate of 38 per cent), up from around 58,670 staff from 169 organisations in 2016 (a response rate of 34 per cent).

The People Matter Survey results can provide public authorities with an insight into their progress in growing a human rights culture. As part of our work with public authorities under the Charter Education Project (detailed below), several public authorities used their organisation's results as a catalyst for taking action to improve their human rights culture.



FIGURE 6: VPSC PEOPLE MATTER SURVEY RESULTS RELATING TO HUMAN RIGHTS AND THE CHARTER



There were some noteworthy trends in 2017, shown in Figure 6:

- The results from the VPSC People Matter Survey in 2017 are generally steady or a slight improvement on the 2016 results. This slim progression is positive, however it indicates that in order to achieve more substantial improvement, more needs to be done to make human rights principles a core part of public sector culture.
- Across all four statements, there was an improvement in the percentage of employees who responded 'strongly agree', when compared to the 2016 results. The improvement was particularly pronounced in relation to statements three ('in my workgroup, human rights are valued') and four ('my organisation encourages employees to act in ways that are consistent with human rights') – 34.0 per cent and 25.9 per cent respectively, up from 32.7 per cent and 24.4 per cent in 2016.
- The number of 'neither agree nor disagree' responses to statement one ('I understand how the Charter of Human Rights and Responsibilities applies to my work') and two ('I understand how the Charter of Human Rights and Responsibilities affects me as an employee') were relatively steady in 2017, at 23.7 per cent and 25.0 per cent respectively (compared to 23.8 per cent and 25.3 per cent in 2016). However, in relation to the statements about how their employer encourages them to act in ways consistent with human rights, and that human rights are valued in their workgroups, fewer employees responded by stating that they 'neither agree nor disagree' – 13.5 per cent and 12.8 per cent respectively in 2017, down from 14.5 per cent and 13.7 per cent respectively in 2016. If the government's focus on human rights culture continues, the Commission expects to see a steady decline in the number of employees in the 'neither agree nor disagree' categories of the VPSC survey, and an increase in the number of affirmative responses. This is pleasing and arguably reflects the steady reinvestment in human rights culture by government.
- Across all four statements there was a very low number of employees who responded 'strongly disagree' to the statements; generally below four per cent of employees and as low as one point three per cent in relation to the statement 'my organisation encourages employees to act in ways that are consistent with human rights'. This also represents a reduction in the percentage of employees who responded 'strongly disagree' in relation to three out of four of the statements (the fourth statement having a steady result compared to 2016).

FIGURE 7: VPSC PEOPLE MATTER SURVEY AFFIRMATIVE RESPONSES TO THE QUESTIONS RELATING TO HUMAN RIGHTS AND THE CHARTER

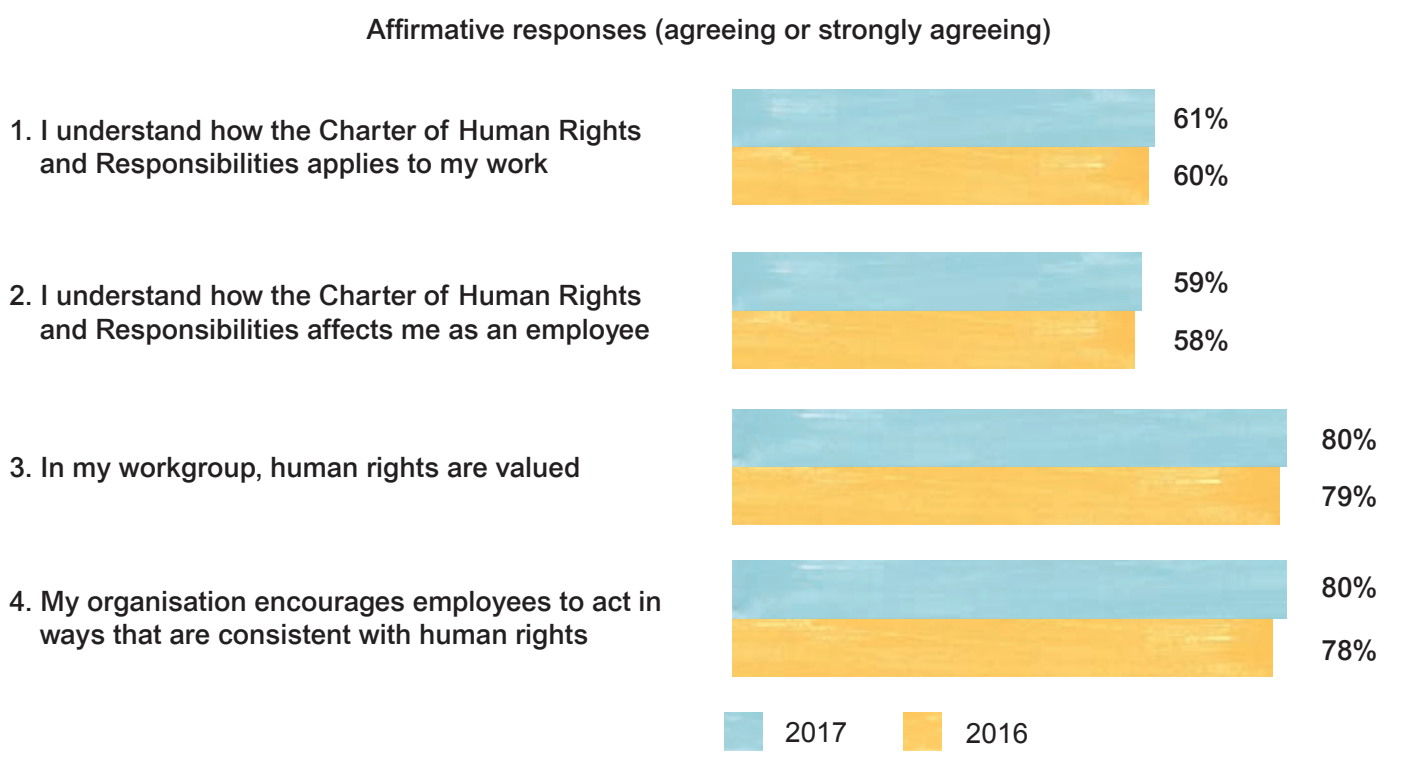


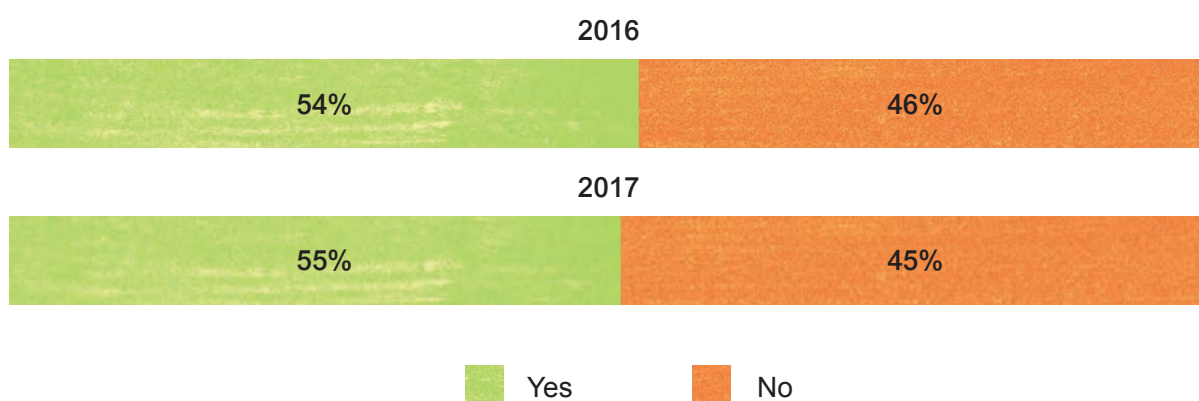
Figure 7 shows that data from statements three and four were particularly strong in 2017, with 80 per cent responding in the affirmative to each statement (up from 79 per cent and 78 per cent respectively in 2016). However, the data suggests that there is room for improvement, particularly in relation to statements one and two, which were directed at employees' understanding of how the Charter applies to their work and how the Charter affects them as employees.

Figure 8 shows that, in response to the question about whether in the past 12 months employees have seen or heard any communication/information from

their organisation about the Charter, 55 per cent of employees surveyed responded Yes (up from 54 per cent in 2016), and 45 per cent responded No (down from 46 per cent in 2016). This result means that more than 31,000 public sector employees did not see or hear any communications from their organisation about the Charter in the past 12 months. This amounts to almost half the public sector staff surveyed. This suggests that public authorities need to do more to support their staff to realise the vision for a public sector human rights culture, as articulated by the Victorian Secretaries Board.

FIGURE 8: VPSC PEOPLE MATTER SURVEY AFFIRMATIVE RESPONSES TO THE QUESTIONS RELATING TO HUMAN RIGHTS AND THE CHARTER

In the last 12 months have you seen or heard any communications/information from your organisation about the Charter of human right and responsibilities



In conclusion, while the Commission saw a slight improvement in the results of the 2017 People Matter Survey for embedding a human rights culture, overall, the results indicate that more needs to be done to make human rights principles part of the core of public sector culture.



The Charter Education Project

The Charter Education Project commenced in 2017 to support the Victorian Public Sector make human rights part of the everyday business of government. In collaboration with HRU within the Department of Justice and Regulation, the Commission worked with a range of government bodies to build a culture of human rights. The project recognises that meaningful cultural change is the result of sustained commitment and efforts over time.

Within the project, the Commission and HRU have begun work on a number of priorities including direct engagement with public authorities, resource development and e-learning, and the establishment a community of practice – a human rights hub – for a culture of human rights.

The Commission and HRU have adopted a partnership approach with a range of public authorities in order to focus on building capacity, knowledge and skills. For each audience, human rights education is informed by consultation and assessment. The Commission and HRU have complemented their customised education with other elements, including reviewing and developing organisational policies and resources, encouraging leadership to commit and drive expectations within their organisation regarding consideration of human rights, assisting the government body to link human rights directly to governance and strategy, and nurturing an engaged and informed community of ‘Human Rights Champions’ across the public sector. The combination of these actions is designed to support public authorities better embed a human rights culture within their organisations.

Growing a human rights culture in practice – case studies

Public authorities may undertake a range of activities under the three areas of cultural influence that are the most effective in creating a human rights culture.

TABLE 1: ACTIVITIES TO GROW A HUMAN RIGHTS CULTURE

Senior leadership and organisational vision	Building staff capability and practice	External participation and accountability
Incorporating human rights in vision and values statements	Incorporating human rights obligations in policies and procedures	Community participation to identify human rights issues and problem solving in public sector decision-making
Internal and external commitment to building human rights culture	Designing tailored decision making tools and resources ⁸	
Setting minimum expectations on staff to uphold human rights	Build the human rights knowledge and skills of management and staff	Information exchange with community organisations and other stakeholders
Role modelling public sector values and human rights practices	Ensuring complaints handling includes consideration of human rights obligations	
Developing human rights action plans	Evaluation and continuous learning on embedding human rights culture	Seeking external research and guidance to develop evidence base on how best to uphold human rights in the specific organisational context
Incorporating human rights in business planning	Identifying opportunities for professional development for human rights expertise	
Human and financial resources allocated to human rights initiatives	Team meetings to raise human rights issues and challenges	Implementing service improvements that stem from complaints or investigations undertaken by external review agencies.
	Human rights values incorporated in performance reviews	
	Recruitment and promotion practises are aligned with human rights principles	

During 2017, in collaboration with HRU, the Commission worked with a range of public authorities to build a culture of human rights. Over the year both the Commission and HRU trained 3000 staff from public authorities on how the Charter operates and how they can protect and promote human rights in their everyday work. Education was delivered across all Victorian Government departments and entities including Victoria Police, the Victorian Civil and Administrative Tribunal and local councils.

In this chapter, the Commission has highlighted five of these public authorities:

- Inspector General for Emergency Management
- Department of Health and Human Services' Health and Wellbeing division
- Corrections Victoria
- Registry of Births, Deaths and Marriages Victoria
- East Gippsland Shire Council

The case studies are presented in an interview-style below. For each, the Commission has highlighted activities from our broader list of possible activities to grow a human rights culture that were undertaken by each particular public authority. Every public authority should consider the activities that would maximise improvement in the human rights culture of their specific organisation and take action accordingly.



CASE STUDY 1: INSPECTOR-GENERAL FOR EMERGENCY MANAGEMENT – HUMAN RIGHTS ACTION PLAN

The Inspector-General for Emergency Management (IGEM) provides assurance to government and the community regarding the emergency management arrangements in Victoria, and fosters the continuous improvement of emergency management in Victoria. By undertaking activities such as evaluations, reviews, investigations, implementation and performance monitoring, IGEM strives to give Victorians confidence that the emergency management arrangements are appropriate and effective. In addition, IGEM looks for continuous improvement opportunities that lead to meeting the sector's objective of safer, more resilient communities.

Why did you decide to engage with the Charter Education Project?

As a public entity, IGEM's values naturally complement Victoria's human rights and underpin the behaviours that the government and community rightly expect of IGEM. However, we sought to further develop our conceptual and practical understanding of important and relevant rights in the context of our work and emergency management such as the right to life, freedom of movement, equality and non-discrimination, and cultural rights.

Emergencies such as fires, floods and storms touch people's lives in many and different ways. In parallel, Victorians expect, and are entitled, to have the same access to services before, during and after events, and be treated fairly and with respect. Embracing a human rights culture that recognises the inherent value of each person supports us to identify where the desired community outcomes delivered in response to a particular emergency event or activity were not achieved, and identify where possible improvements can be made.

What actions did you take to grow a culture of human rights?

- ✔ Setting minimum expectations on staff to uphold human rights
- ✔ Developing human rights action plans
- ✔ Incorporating human rights in business planning
- ✔ Build the human rights knowledge and skills of management and staff
- ✔ Information exchange with community organisations and other stakeholders
- ✔ Seeking external research and guidance to develop evidence base on how best to uphold human rights in the specific organisational context

In 2017 we partnered with the Charter Education Project to set the foundations for the development of a Human Rights Action Plan under our Strategic Plan, which will feed into the IGEM business plan in 2018 and beyond. The Commission ran a series of sessions with staff to identify the human rights impact of IGEM's current approaches – taking account of the full spectrum of human rights, the range of affected groups, and adjusting that approach through effective organisational learning.

A number of other key steps were undertaken. All staff participated in Charter education sessions to build knowledge of the Charter and the obligations on public authorities. We also held a seminar for IGEM staff and external stakeholders to explore a rights-based approach to emergency management in the global context and the role of the Charter

What are your 'next steps'?

- ✓ Internal and external commitment to building human rights culture
- ✓ Role modelling public sector values and human rights practices
- ✓ Developing human rights action plans
- ✓ Incorporating human rights obligations in policies and procedures
- ✓ Designing tailored decision making tools and resources
- ✓ Build the human rights knowledge and skills of management and staff
- ✓ Evaluation and continuous learning on embedding human rights culture

Priority focus areas identified in 2017 include embedding the Charter in policies for decision-making, internal and external facing leadership actions, and developing internal human rights expertise. Building IGEM's human rights culture is an ongoing process, and one based on respect, inclusion and commitment by all our employees. Refining and embedding IGEM strategy and process is one of our 2017–21 strategic priorities. This strategic priority includes the continuing development – and implementation – of our Human Rights Action Plan under themes including knowledge of rights; leading by example; systems and processes.

What were you hoping to achieve for your organisation?

Whether it be through our external facing work with Victorian communities or our internal relationship with our employees, community and continuous improvement are at the centre of IGEM's activities and practices. To grow a strong culture of human rights, we needed to develop in such a way that our internal culture was not one of focusing on compliance, but one where rights are thoughtfully considered and prioritised in everyday business. Hence our priority to develop IGEM's Human Rights Culture Action Plan. The plan's implementation will support the practical application of a human rights culture in the conduct of IGEM's activities, and in the emergency management arrangements we assure.

What have been the biggest challenges for you to grow your human rights culture?

Fortunately there was an inherent acceptance and understanding in staff of the need for our work to be considerate of the human rights of the community and our stakeholders. As such, the challenges for IGEM are more in the future than the past.

In terms of future challenges, we are looking forward to the practical implementation of a human rights culture – which may include rights-related assessment indicators for undertaking our evaluations and reviews. Future work with the Commission will be invaluable to gain a stronger conceptual and practical understanding of important and relevant rights in emergency management, and the connections with our assurance activities.

Have you seen any improvements in human rights culture? If so, in what way?

While our Human Rights Culture Action Plan is in its infancy, we use mechanisms such as the annual People Matter Survey to gauge employee feedback on aspects of our culture including respect, inclusion, diversity and of course – human rights.

IGEM's survey participation rates increased in 2017 with our employees seeing that our human rights culture building work was being taken seriously and leading to changes in the workplace. Positive responses to areas of respect, human rights, diversity and inclusion rated very strongly, however there is always room for improvement and that is why we are looking forward to further strengthening our human rights culture.

What advice would you give to other public authorities who are trying to grow their human rights culture?

Engage subject matter experts! For IGEM, working with the Commission to improve our understanding of human rights will enable us to better contribute to improving diversity and inclusion across the emergency management sector. This is critical to the ongoing effectiveness and sustainability of Victoria's emergency management arrangements. Victoria needs safe and resilient communities where everyone can participate and be included – this is human rights in action.

CASE STUDY 2: DHHS'S HEALTH AND WELLBEING DIVISION – HUMAN RIGHTS IN POLICY SETTING

The Department of Health and Human Services' (DHHS) Health and Wellbeing division is responsible for policy, strategy and commissioning of services in Victoria's primary prevention (prevention of ill health), secondary (ongoing treatment and care) and tertiary (specialised treatment and care) healthcare system. The division works with agencies and services to promote wellness and active participation and inclusion of all Victorians in their communities and to prevent and minimise the impact of poor health and wellbeing and disadvantage across Victoria.

Why did you decide to engage with the Charter Education Project?

The Prevention, Population Health and Place Branch's 2017 People Matter Survey results confirmed that our branch's understanding of the Charter and our responsibilities under it is low. We are committed to addressing this issue so we decided to start a workplace conversation on the Charter and deepen a 'human rights in health' approach to our work.

What actions did you take to grow a culture of human rights?

- ✓ Internal and external commitment to building human rights culture
- ✓ Incorporating human rights obligations in policies and procedures
- ✓ Designing tailored decision-making tools and resources
- ✓ Build the human rights knowledge and skills of management and staff
- ✓ Seeking external research and guidance to develop an evidence base on how best to uphold human rights in the specific organisational context

Our branch's culture and values working group surveyed staff to assess their interest in participating in training to build their effectiveness as public servants. One of the topics suggested was 'responding to human rights', which scored highly with staff. The branch then partnered with the Commission to explore developing a *Human Rights in Health* education project for approximately 80 staff. In preparing the program, Commission staff met with the culture and values working group and agreed on the purpose and scope of the work. Survey feedback from staff indicated it was important that the education program was both practical and scenario based in order for staff to practice applying the Charter to realistic situations.

The Commission met with the branch leadership group and provided an executive briefing that outlined a co-designed approach to educating staff and the possibilities for embedding human rights within the ongoing business of the branch. We recognised that leadership plays a critical role in setting expectations, creating an authorising environment and aligning human rights to the values of the branch. The executive briefing was integral to ensuring the leadership group understood and committed to human rights and provided guidance on next steps.

Given the diverse array of policy, system and place based programs that make up the branch's core work, it was essential that the education program was tailored to the needs of our staff. Subsequent to the executive briefing the Commission met with and interviewed six staff across various programs in the branch to gain an understanding of learning needs and focus for workshops. Using this information the Commission team designed and implemented a tailored education series that covered how to use the Charter and principles of a rights-based approach when formulating policies in the preventative health and wellbeing sector.

The Commission has developed a one-page tool to summarise the rights protected under the Charter and the steps required of public authorities to apply their Charter obligations. The Commission's education sessions applied this tool to reinforce key messages around rights protected by the Charter and the key obligation of public authorities. Expanding on these core obligations, the sessions introduced human rights principles applicable in the health sector to build human rights culture. Human rights principles included participation, equality, accountability and empowerment of rights holders.

What are your 'next steps'?

- ✔ Setting minimum expectations on staff to uphold human rights
- ✔ Role modelling public sector values and human rights practices
- ✔ Build the human rights knowledge and skills of management and staff

Now that the *Human Rights in Health* education project has been implemented, the interesting work of sustaining this learning and deepening the conversation in the workplace begins.

The *Human Rights in Health* education project highlighted that the Charter is a progressive and dynamic framework to make human rights part of the everyday business of the branch. The leadership team have discussed hosting a human rights debate at a forthcoming planning forum to ensure the Charter is positioned as a priority in the ongoing work of staff and the branch.

What were you hoping to achieve for your organisation?

The aim of the Branch's *Human Rights in Health* education project was to equip staff with the knowledge and skills to consider rights and support ethical decision-making, particularly as we work with vulnerable communities across a diverse range of settings. The Charter reflects the values that underpin the relationship between the branch, the wider Victorian Government and the Victorian communities we serve. It keeps the work that we do focused on the people we serve and, in doing so, strengthens our relationship with the community.

What have been the biggest challenges for you to grow your human rights culture?

The biggest challenge for branch staff is embedding the Charter in commissioning, system management and policy design in practical and meaningful ways. Taking the principles of the Charter and applying them in the day to day work of the branch is often not straightforward and will take some time for us to achieve. Having said this, we have found it more straightforward in areas that deal with service delivery or regulation, than in areas focusing on development of broad public health policy.

Have you seen any improvements in human rights culture? If so, in what way?

Branch staff have only recently completed the training, so it is early days yet, however there is greater awareness of the Charter and our responsibilities in relation to it. There is also a willingness to explicitly frame a human rights approach when undertaking consultations with communities on key policy priorities such as women's health, HIV, mental health and vulnerable children. The training has sparked a number of conversations between staff members about how the Charter could apply to our work in the future and how it could have applied in the past.

What advice would you give to other public authorities who are trying to grow their human rights culture?

Growing a human rights culture in public authorities requires an adaptive leadership approach. This is leadership as a verb not as a noun, leadership that is exercised by all staff regardless of formal or informal authority. This requires examining purpose, asking difficult questions that will produce uncertainty and looking at who we partner with and why. Ultimately it requires all staff being willing to examine the values that underpin their work and understanding how the Charter and its responsibilities are everyone's business. When we understand this relationship and our role in exercising leadership to promote human rights then our purpose in improving the population health of vulnerable Victorians becomes effortlessly clear.

In relation to training, we would recommend that other public authorities also spend time working with the Victorian Equal Opportunity and Human Rights Commission to tailor the training to the work of the authority to make the principles 'real' for participants.

CASE STUDY 3: CORRECTIONS VICTORIA – STRENGTHENING HUMAN RIGHTS CAPACITY OF LEADERSHIP

Corrections Victoria (CV) – a business unit of the Department of Justice and Regulation (DJR) – implements court judgments and orders of the Adult Parole Board. It sets strategy, policy and standards for the management of the state’s system of correctional facilities. It also develops programs for the management and rehabilitation of prisoners and the community-based supervision of offenders.

Why did you decide to engage with the Charter Education Project?

CV engaged the Charter Education Project to provide training to our prison staff about human rights in a prison environment. While CV is proud of the way in which it has embraced the Charter and assesses its policies against the Charter, it recognises that there are day-to-day decisions to be made where prisoners’ human rights need overt consideration, and providing staff with the skills to adequately consider human rights was identified as an opportunity.

What actions did you take to grow a culture of human rights?

- ✔ Setting minimum expectations on staff to uphold human rights
- ✔ Build the human rights knowledge and skills of management and staff
- ✔ Evaluation and continuous learning on embedding human rights culture
- ✔ Identifying opportunities for professional development for human rights expertise

Following a high level meeting between Corrections Victoria, DJR’s Human Rights Unit and the Commission, the Charter Education Project conducted a briefing for all General Managers of Victorian prisons on the obligations under the Charter. The session emphasised the Charter as a decision-making framework, with a focus on ensuring that any limitation of human rights is conducted in accordance with the Charter. The General Managers also considered actions to strengthen human rights practices in the day-to-day work of prisons. The group requested human rights education for the leadership teams of all Victorian prisons to build leadership knowledge and skills regarding the Charter.

In response to the request, the Charter Education Project conducted on-site sessions for the leadership teams of all 14 adult prisons and one transition centre in Victoria, as well as an additional session for operations managers. The sessions covered the key rights and obligations under the Charter and how to use the Charter in everyday decision-making.

To further these efforts, selected staff at every prison completed training so they can provide authoritative advice and assistance to prison staff on human rights questions. To develop leadership capacity, sessions for prison supervisors have also commenced.

What are your 'next steps'?

- ✔ Setting minimum expectations on staff to uphold human rights
- ✔ Incorporating human rights obligations in policies and procedures
- ✔ Ensuring complaints handling includes consideration of human rights obligations
- ✔ Evaluation and continuous learning on embedding human rights culture
- ✔ Team meetings to raise human rights issues and challenges

CV has maintained a strong focus on human rights, reflected through its policies, its responses to complaints and decisions made about prisoners, and through dialogue with staff. Following the first round of training provided to every prison's leadership team, and the second round of training to prison supervisors, CV will continue to provide forums whereby human rights discussions are featured, such as prison managers' meetings and the prison supervisors' conference.

What were you hoping to achieve for your organisation?

CV was hoping to increase awareness of the Charter among prison supervisors and management, and to teach them how to adequately consider human rights in a prison environment – balancing the security and 'good order' needs (and community expectations about how prisons are run) with the rights of prisoners, staff and visitors and indeed our staff. CV is also hoping to receive feedback about its policies and training material from the Charter Education Project.

What have been the biggest challenges for you to grow your human rights culture?

CV strongly supports the Charter, and while there has not been staff resistance to this, there are some challenges in ensuring that decision-making, policies and (to a lesser degree) infrastructure maximise alignment to the Charter. This includes ensuring that processes are in place so that staff are aware of the Charter and how they consider human rights in a prison in addition to the set operational policies, and accounting for the different types of prison security. Balancing prison security needs with prisoners' human rights can also be challenging, given the serious consequences related to people's safety. This extends to the design phase of prison infrastructure such as management and observation cells. Policy development in areas such as how we manage prisoners who are at risk of suicide or self-harm require careful consideration.

Have you seen any improvements in human rights culture? If so, in what way?

Yes, I think there has been an improvement in the human rights culture, brought about by a greater understanding of human rights, and demonstration as to how to manage this in prisons.

What advice would you give to other public authorities who are trying to grow their human rights culture?

I wouldn't say that we are doing so well that we are in a position to be giving advice! However, to grow a human rights culture, I think it's critical that leaders, managers and supervisors learn about human rights so they can speak to staff about this regularly and embed them into daily conversation and thinking. They need to explain to staff how to balance human rights with any competing demands that may limit those rights. Those responsible for policy development in public authorities need to understand the Charter and be able to explain how human rights have been considered, as do those responsible for the design of facilities. Staff need to be able to seek advice regarding human rights questions, whether that be from a staff member, specialist unit or information portal. Convening regular forums that provide for human rights discussions will ensure that staff are reminded of the importance of considering human rights in all aspects of our work.

CASE STUDY 4: THE REGISTRY OF BIRTHS, DEATHS AND MARRIAGES VICTORIA – BUILDING A CULTURE OF HUMAN RIGHTS ACROSS THE ORGANISATION

The Registry of Births, Deaths and Marriages Victoria (the Registry) provides services that recognise significant events in people's lives. It is responsible for:

- registering all births, adoptions, marriages and deaths in Victoria
- registering all domestic and caring relationships in Victoria
- registering name changes for those born or living in Victoria
- issuing certificates for all the above
- offering a civil marriage service through the Victorian Marriage Registry.

The Registry also offers some of its records to people looking to trace their family history, as well as providing data services to government agencies, universities and medical institutions for research and planning purposes.

Why did you decide to engage with the Charter Education Project?

It is essential that the Registry's services, often provided during emotional periods in people's lives, are underpinned by a workplace culture that acknowledges and respects human rights.

The Charter Education Project provided the Registry with an opportunity to:

- strengthen the Registry's understanding of human rights
- take steps to further embed human rights principles in workplace culture and practice
- respond to feedback from Registry staff in the 2017 People Matters Survey that sought better opportunities to develop an understanding of how the Charter applies to their work and affects them as employees.

What actions did you take to grow a culture of human rights?

- | | |
|---|--|
| <input checked="" type="checkbox"/> Internal and external commitment to building human rights culture | <input checked="" type="checkbox"/> Build the human rights knowledge and skills of management and staff |
| <input checked="" type="checkbox"/> Setting minimum expectations on staff to uphold human rights | <input checked="" type="checkbox"/> Team meetings to raise human rights issues and challenges |
| <input checked="" type="checkbox"/> Role modelling public sector values and human rights practices | <input checked="" type="checkbox"/> Information exchange with community organisations and other stakeholders |

The Registry's senior leadership team is committed to embedding a human rights culture in all aspects of the Registry's work. The first key step was to engage all of the extended leadership team (those in senior staff management roles) in face-to-face training on human rights. A briefing was held which explored the rights and obligations of the Registry as a public authority, as well as the principles of a rights-based approach that facilitate good human rights practice.

Human rights training was then rolled out to all 119 Registry staff (a participation rate of 100 per cent, excluding those on leave). The Commission, as part of the Charter Education Project, provided this training and used practical, tailored examples from the Registry's business to ensure that the training was relevant to Registry staff. Further, a new role was created in 2017 (Senior Legal Policy Officer). The accountabilities for this new role included providing advice and support to the Registry about human rights as required, such as developing and delivering in-house human rights training.

The second step was to 'walk the talk'. The extended leadership team was encouraged to raise awareness about the relevance of human rights to the Registry's business by modelling respect and explicitly discussing human rights in their daily interactions and decision-making with citizens, stakeholders and Registry staff.

What are your 'next steps'?

- ✓ Incorporating human rights in business planning
- ✓ Incorporating human rights obligations in policies and procedures
- ✓ Designing tailored decision making tools and resources
- ✓ Build the human rights knowledge and skills of management and staff
- ✓ Evaluation and continuous learning on embedding human rights culture
- ✓ Identifying opportunities for professional development for human rights expertise
- ✓ Team meetings to raise human rights issues and challenges
- ✓ Human rights values incorporated in performance reviews
- ✓ Community participation to identify human rights issues and problem solving in public sector decision-making
- ✓ Seeking external research and guidance to develop evidence base on how best to uphold human rights in the specific organisational context

The third step, currently underway, is to implement an end-to-end organisational strategy of embedding human rights in business processes, and staff learning and development. The Registry has developed a tailored presentation with practical examples and interactive exercises, to assist Registry staff to identify where and how to act compatibility with human rights in their daily work. The presentation will be delivered through face-to-face training to stimulate meaningful and applied learning, as part of a scheduled roll out of the Registry's induction and on-boarding program and annual refresher training for all Registry staff. Staff learning and development on human rights values will also assist staff in their performance reviews which already incorporate human rights values.

Updates and progress on embedding a culture of human rights has now been included as a quarterly agenda item for discussion at the Registry's extended leadership team meetings.

Reference to human rights will be integrated into the Registry's policy and process business tool, ProMapp, to ensure that human rights are integrated into operational procedures. This action builds on the work the Registry is already undertaking to implement service improvements.

The Registry is improving its services by involving communities and external organisations in the identification of human rights issues and public sector decision-making. A key focus for the Registry in 2017 was its work with the Victorian Koori community to increase birth registrations of Koori kids and adults. Previously, the Registry has undertaken projects with other communities such as the Victorian communities of Myanmar.

In 2017 the Registry finalised its *Coolamon Strategy* to increase access to Registry services for Victoria's Koori communities. As part of the *Coolamon Strategy*, the Registry initiated its *Strong Identity, Strong Spirit* project to increase the birth registrations of Koori kids and adults. Over the last 12 months, the Registry has made a concerted effort to consult with Victorian Koori communities to promote the importance of birth registration. As part of its consultation process, the Registry engaged the Castan Centre for Human Rights and community organisations to provide guidance and evidence for the project. In partnership with the Castan Centre and Dhauwurd-Wurrung Elderly and Community Health Service, the Registry organised a forum on birth registrations to discuss the barriers faced by Koori people when registering a birth and obtaining a birth certificate

In order to develop an appropriate engagement strategy, the Registry first met with Dhauwurd-Wurrung Elderly and Community Health Service. From these discussions, it was agreed that a pilot in the Barwon South West region that linked in with local community organisations and community events would be the most appropriate way to promote the Registry's services. Before meeting with local community organisations, the Registry engaged a range of Aboriginal organisations to assist with developing appropriate communications and messaging for the Koori community. Building on the successes of the pilot the Registry is now in the process of engaging with various Koori organisations around Victoria to provide the Registry's services directly to the community.

The Registry regularly engages with a number of stakeholder groups on issues relevant to their communities, for example the LGBTI communities in relation to providing inclusive services and recognising diversity. The Registry played a key role in efficiently and effectively implementing same-sex marriage in Victoria at the end of 2017.

What were you hoping to achieve for your organisation?

The Registry recognises that a human rights based approach to service delivery helps to ensure that individuals receive the service best suited to them. We sought to strengthen our human rights practice across the whole of the organisation. Participation in the Charter Education Project continues to be a catalyst to develop a strong human rights culture at the Registry – part of how the Registry does ‘things around here’.

What have been the biggest challenges for you to grow your human rights culture?

Our biggest challenges were in identifying data supporting the need for growing the Registry’s human rights culture and articulating the relevance of human rights to improving our services. The results from the annual survey of staff, People Matters Survey 2017, demonstrated that staff at the Registry were seeking more information on how to apply human rights in their daily work practice and how it affects them as employees. As such, we knew that we had a receptive learning environment from which the Registry could start working with senior leadership and staff towards growing a human rights culture.

Have you seen any improvements in human rights culture? If so, in what way?

Noting that it is too early to fully evaluate the impact of the Registry’s work to grow a culture of human rights, anecdotal evidence suggests a greater awareness at all levels about the relevance of human rights. We are now starting to clearly and overtly embed human rights in the Registry’s processes, and further staff learning and development will build on this awareness to foster and grow the Registry’s human rights culture.

What advice would you give to other public authorities who are trying to grow their human rights culture?

Start at the beginning. Get the data and do the groundwork to articulate the relevance of human rights to your agency’s work. Involve people and communities affected by your agency’s work, engage senior leadership, encourage discussion and provide opportunities for learning and development in human rights. But don’t stop there – look for opportunities to embed human rights’ considerations in your agency’s processes and to keep the discussion alive both informally and formally at all levels of your agency.

CASE STUDY 5: EAST GIPPSLAND SHIRE COUNCIL – BUILDING A CULTURE OF HUMAN RIGHTS ACROSS THE ORGANISATION

East Gippsland Shire Council provides governance and leadership for the local community through advocacy, decision-making and action. It is responsible for the delivery of more than 100 local government services to the residents of East Gippsland.

Why did you decide to engage with the Charter Education Project?

In 2017 East Gippsland Shire Council (Council) contacted the Commission to seek support in developing a best practice approach to dealing with challenging customers and a best practice human rights approach to providing customer service across the Council. This includes adopting a case management approach towards customers that required additional support to engage productively with the Council. While the Council was experiencing challenges in dealing with complex and sensitive issues, there were no specific human rights problems specifically identified at that stage.

What actions did you take to grow a culture of human rights?

- | | |
|---|---|
| <input checked="" type="checkbox"/> Internal and external commitment to building human rights culture | <input checked="" type="checkbox"/> Build the human rights knowledge and skills of management and staff |
| <input checked="" type="checkbox"/> Setting minimum expectations on staff to uphold human rights | <input checked="" type="checkbox"/> Ensuring complaints handling includes consideration of human rights obligations |
| <input checked="" type="checkbox"/> Role modelling public sector values and human rights practices | <input checked="" type="checkbox"/> Evaluation and continuous learning on embedding human rights culture |
| <input checked="" type="checkbox"/> Incorporating human rights in business planning | <input checked="" type="checkbox"/> Identifying opportunities for professional development for human rights expertise |
| <input checked="" type="checkbox"/> Human and financial resources allocated to human rights initiatives | <input checked="" type="checkbox"/> Team meetings to raise human rights issues and challenges |
| <input checked="" type="checkbox"/> Incorporating human rights obligations in policies and procedures | <input checked="" type="checkbox"/> Human rights values incorporated in performance reviews |
| <input checked="" type="checkbox"/> Designing tailored decision making tools and resources | |

We conducted an audit of infrastructure, knowledge and practice to develop an understanding of the human rights dimensions across all functional units and to identify challenges and opportunities for the Council. Based on the audit, a program was designed to address the Council's specific operational environment.

We introduced five training sessions in total for councillors, executive leaders, managers and coordinators and team leaders from all business units. The workshops were designed to identify:

- opportunities to learn or enhance our understanding of the Charter
- barriers to Charter compliance including operational and structural barriers such as policies, practices and key practice enablers
- any gaps in understanding responsibilities and legal obligations in relation to professional conduct and ethics
- current culture and lessons learnt from previous activities, strategies and action plans
- short-term and long-term organisational initiatives.

Councillors were tasked with key actions to support a human rights approach to Council practice, which included:

- building the context for a human rights approach to practice via role modelling and setting expectations for community interaction and customer service
- ensuring accountability and quality control in meetings, supervision and performance reviews, and incident management
- developing a feedback culture where it is safe to discuss issues, develop skills to self-reflect and identify areas of improvement, and staff are treated respectfully.

Senior leaders were tasked with key actions including integrating human rights into organisational vision, values, and strategic planning; developing the capacity of new and existing staff in knowledge and skills; ongoing education and professional development including designing useful tools and resources to reinforce good practice; identifying human rights champions to guide and sustain capacity and ensuring resources to support good human rights practice.

Further sessions were held for team leaders to identify and apply human rights in their specific areas of responsibility, focusing on a human rights approach to customer service provision and complaint handling. Following on from these sessions the Charter Education Project is providing further support to team leaders in facilitating Charter skill development workshops with frontline customer service staff. We are also supporting the incorporation of human rights practice into governance and strategy processes, in particular, customer service protocols and guidance materials.

What are your 'next steps'?

- | | |
|---|---|
| <input checked="" type="checkbox"/> Developing human rights action plans | <input checked="" type="checkbox"/> Ensuring complaints handling include consideration of human rights obligations |
| <input checked="" type="checkbox"/> Incorporating human rights obligations in policies and procedures | <input checked="" type="checkbox"/> Identifying opportunities for professional development for human rights expertise |
| <input checked="" type="checkbox"/> Designing tailored decision making tools and resources | <input checked="" type="checkbox"/> Seeking external research and guidance to develop evidence base on how best to uphold human rights in the specific organisational context |
| <input checked="" type="checkbox"/> Build the human rights knowledge and skills of management and staff | |

We will continue to keep in touch the Commission's project team to step into phase 3 to attain the evaluation report and act on the recommendations to refine the program model for potential implementation across the whole organisation staged over the next couple of years.

We have developed a complaints management policy and procedure with a framework that will ensure Council officers manage complaints fairly, promptly and objectively and in a manner that upholds human rights. The complaints policy also acts as a guide while dealing with complaints in relation to human rights to foster a culture of leading human right practices.

Staff are attending complaints handling workshops conducted by the Victorian Ombudsman to empower good decision-making and foster good complaints handling across the Council.

What were you hoping to achieve for your organisation?

Council appreciated the offer and assistance from the Victorian Equal Opportunity and Human Rights Commission to work with us under the Charter Education Project as we believed that the following outcomes and benefits could be achieved as a result of the collaborative initiative:

- opportunity to foster a culture of leading human right practices
- opportunity to be leading local government in this space as this is a pilot and we are the first council in Victoria to be provided with this opportunity
- empower our staff by strengthening their understanding of human rights and therefore achieving better customer experience and conflict resolutions
- opportunity to have our policies and procedures endorsed by the Commission.

What have been the biggest challenges for you to grow your human rights culture?

The biggest challenges we faced were:

- the lack of appropriate policies and procedures that guided Council staff in relation to their Charter responsibilities
- the lack of sound understanding of what it means to have provided considerations to someone's human rights
- the lack of overall quantitative and qualitative data and analysis of complaints being handled by Council.

Have you seen any improvements in human rights culture? If so, in what way?

The leadership group and all managers and coordinators have immensely benefited from a better understanding of the Charter and all the different rights.

The complaints management policy has the endorsement of the Victorian Equal Opportunity and Human Rights Commission which creates more accountability to comply with the policy and manage complaints to the best of our ability and to take all reasonable steps to avoid discrimination, including by considering any attribute that may be the cause of the conduct, and victimisation, and uphold the human rights of people with unreasonable complainant conduct.

There has been an increase in managers and supervisors seeking assistance from directors and manager place services (case manager) as required if in doubt or dealing with complex or sensitive matters that provide additional opportunities to consider human rights at an earlier stage.

What advice would you give to other public authorities who are trying to grow their human rights culture?

This exercise not only enhanced our knowledge about the Charter but put a new lens on how we interact with our citizens and customers and how we view complaints and what outcomes we now want to achieve.

Endnotes

1. Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (Report, 1 September 2015), 22.
2. Ibid 8.
3. Ibid 24.
4. Ibid 10.
5. State Government of Victoria, *Government Response to the 2015 review of the Charter of Human Rights and Responsibilities Act* (20 July 2017) <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/human+rights+legislation/government+response+to+the+2015+review+of+the+charter+of+human+rights+and+responsibilities+act>>.
6. Message from Greg Wilson, Secretary of Department of Justice and Regulation, Victorian Secretaries Board supports Charter of Human Rights and Responsibilities, 26 September 2017.
7. Victorian Public Sector Commission, *Code of Conduct for Victorian Public Sector Employees: Public Sector Values* (31 May 2015) <<http://vpsc.vic.gov.au/html-resources/code-of-conduct-for-victorian-public-sector-employees/public-sector-values/>>.
8. The Commission has developed a number of decision-making tools and resources for Victorian Public Sector workers (<<http://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/know-your-responsibilities-brochures/item/1698-the-charter-of-human-rights-and-responsibilities-a-guide-for-victorian-public-sector-workers-feb-2014>>) and Local Government (<<http://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/toolkits/item/861-everyday-people-everyday-rights>>).



CHAPTER 6:

2015 CHARTER REVIEW RECOMMENDATIONS – IMPLEMENTATION PROGRESS

2015 review of the Charter

The Charter contains mechanisms for review of the legislation after a period of four years and again after eight years of operation. These reviews were designed to facilitate community reflection on how the Charter was operating and whether it was meeting the needs of the community.

The four-year review was conducted in 2011 by the Scrutiny of Acts and Regulations Committee. We reported on this review in our 2012 Charter Report. In March 2015 the Attorney-General appointed Michael Brett Young to conduct the eight-year review and, in September 2015, Mr Brett Young tabled the 2015 independent review of the Charter's operation (the 2015 Review).

The findings of the 2015 Review indicated that the Charter has helped to build greater consideration and adherence to human rights principles within the Victorian public sector, Parliament and the courts in key areas. However, findings also indicated that initial efforts to embed the Charter in government processes and practices had waned in recent years, which had set back the development of a human rights culture in Victoria.

The 2015 Review contained 52 legislative and policy recommendations to make the Charter more accessible, effective and practical. These recommendations related to eight key policy areas, outlined below.

1. Building our human rights culture

The 2015 Review found that, for the Charter to be effective, the Victorian Government must prioritise work to build a stronger human rights culture, particularly in the Victorian public sector. It found that Victoria needs a culture that makes human rights real in people's everyday interaction with government, and that a strong human rights culture facilitates better government decision-making.

2. Clarifying responsibilities for human rights

The 2015 Review made a number of recommendations clarifying the role of public sector organisations, and their responsibilities in relation to protecting and promoting human rights. These included recommendations to ensure greater certainty about who is a public authority, in order to help individuals be aware of their rights and entities be aware of their obligations.

3. The role of statutory authorities

The 2015 Review considered the roles of relevant statutory authorities under the Charter, including what is needed to build an effective regulatory framework. It set out recommendations to better facilitate compliance with the Charter, to support the resolution of issues when a member of the community is concerned government has not complied with the law, and to clarify oversight roles.

The 2015 Review found the Charter is missing key elements of an effective regulatory system. It recommended the Charter be enhanced to enable the Commission to offer dispute resolution under the Charter (as it does under the *Equal Opportunity Act 2010* and the *Racial and Religious Tolerance Act 2001*).

4. Remedies and oversight – the role of the courts

The 2015 Review examined the role of the courts in determining whether a person's human rights have been breached and in deciding what should happen if a breach has occurred.

The 2015 Review proposed a remedies provision modelled on section 40C of the *Human Rights Act 2004* (ACT) to provide a clear framework to achieve these outcomes.

The proposed model would give community members access to dispute resolution at the Commission, and an avenue to have the Victorian Civil and Administrative Tribunal decide whether their rights have been breached. People could continue to raise the Charter in other legal proceedings where relevant. Government oversight bodies could continue to look at Charter issues that are relevant to their jurisdiction.

5. Interpreting and applying the law

The 2015 Review considered other issues that relate to the Charter's operation, including some of the more technical legal debates about its operation.

It recommended the Charter require statutory provisions to be interpreted, as far as possible, in the way that is most compatible with human rights. When a choice must be made between possible meanings that are incompatible with human rights, the provision should be interpreted in the way that is least incompatible with human rights. The Review noted the Attorney-General and the Commission play useful roles intervening in proceedings that raise the Charter.

6. More effective parliamentary scrutiny

The 2015 Review considered the role of human rights scrutiny in law making. It noted that parliamentary human rights scrutiny has had a positive impact on the human rights compatibility of new laws, but some small changes are needed to increase the robustness and transparency of this process. The main criticism of the scrutiny process was the short timeframe within which the Committee must consider and report on Bills. This timeframe means that the public has little opportunity to make submissions on the human rights impacts of proposed legislation, and the Committee lacks the time and capacity to consider any submissions in detail.

7. Emerging issues

The 2015 Review examined other issues, including the application of the Charter to national schemes, the introduction of additional rights into the Charter and the definition of discrimination.

8. The need for a further review

The 2015 Review also recommended that the Charter be amended to require a further review.

Implementation progress

In July 2016 the Victorian Government provided a response to the recommendations made in the 2015 Review. The government accepted in full or in principle 45 of the 52 recommendations.

The table below provides a summary of the actions undertaken on all recommendations during 2017. The table demonstrates that while considerable work has begun on some recommendations, the majority of recommendations accepted by government are yet to progress. The Commission will continue to track the implementation progress of all recommendations.

Over half of the recommendations that were supported by the Victorian Government require legislative amendment. The reforms recommended would greatly improve the operation of the Charter and the protections it offers all Victorians, and the Commission urges the progress of the necessary legislative changes.

Building a human rights culture

There has been significant progress in implementing recommendations designed to build and strengthen a human rights culture in Victoria. As outlined in Chapter 5 of this report, all members of the Victorian Secretaries Board issued statements to their organisations reiterating the importance of the Charter and encouraging them to seek Charter training to make human rights ‘part of the everyday business of government’. In addition, the Department of Justice’s Human Rights Unit (HRU) has worked with the Commission to establish the Charter Leaders Group, an inter-departmental executive sponsors group with a mandate to foster a human rights culture within the Victorian public sector.

A total of \$1.8 million funding was made available to HRU and the Commission to deliver human rights education for 18 months until 30 June 2018. The education program has been highly successful to date. Approximately 3000 officers across the public sector have received tailored human rights education and feedback has been overwhelmingly positive.

In addition, government departments and the Commission continue to highlight the importance of human rights through events and awareness-raising activities.

Other key policy areas

As the table below illustrates, progress on implementing other key policy areas has been limited. The majority of recommendations that were supported by the government have yet to be completed. Numerous remain under consideration or pending.

Detailed information regarding the implementation of all recommendations from the 2015 Review can be found in the table below. This information has been provided by the agency responsible for implementation.

The following organisations are referred to throughout the table:

- Department of Justice (DJR)
- DJR’s Human Rights Unit (HRU)
- Independent Broad-based Anti-corruption Commission (IBAC)
- Judicial College of Victoria (JCV)
- Victorian Civil and Administrative Tribunal (VCAT).

**TABLE 2: 2015 CHARTER REVIEW RECOMMENDATIONS
– IMPLEMENTATION PROGRESS**

Chapter 1 – Building our human rights culture

#	Recommendation	Government response	Progress	Status
1	The Victorian Government make a public statement of commitment to human rights and Ministers reinforce in their dealings with departments and agencies their expectation that they should act compatibly with human rights	Supported	<p>The Victorian Government has made several public statements of its commitment to human rights, including when the Attorney-General released the government's response to the 2015 Charter Review on 22 July 2016 and also when opening the whole-of-government International Human Rights Day event on 5 December 2017.</p> <p>Ministers will continue to reinforce to departments and agencies the need to consider the Charter in actions and decision-making processes.</p>	Complete / Ongoing
2	The Victorian Secretaries Board include the development of a human rights culture as part of its work in setting values and standards across the Victorian public sector. An inter-departmental committee should support this work by providing leadership and coordination for departments and agencies at the State government level	Supported	<p>On 26 September 2017, the Victorian Secretaries Board reaffirmed its commitment to human rights, issuing statements by departmental secretaries to all departmental staff.</p> <p>An inter-departmental executive sponsors group (Charter Leaders Group) has also been established to support this work and provide leadership and coordination for departments and agencies. The mandate of this group is to embed a stronger culture of human rights across the Victorian public sector.</p>	Complete / Ongoing
3	<p>The Victorian Government encourage public sector entities to promote a human rights culture in their organisations, including by:</p> <p>(a) ensuring their organisational vision, plans, policies and procedures support good human rights practice</p> <p>(b) building relevant human rights capabilities into staff position descriptions and ongoing professional development</p>	Supported	<p>The Charter Leaders Group will consider these (and other) initiatives as part of its mandate to promote and embed a stronger human rights culture across the Victorian public sector.</p> <p>It is anticipated that greater awareness and understanding of human rights through the Charter Education Project will lead to public sector entities promoting a human rights culture within their organisations and referencing human rights in business plans, policies and position descriptions.</p> <p>One initiative already implemented has been the publication of the 'Good Practice Guide: Managing Complaints Involving Human Rights'. The Guide was jointly produced by the Department of Justice and Regulation's (DJR's) Human Rights Unit (HRU), the Commission, the Ombudsman and the Independent Broad-based Anti-corruption Commission (IBAC) and was launched in May 2017. The Guide is intended to inform, complement, be incorporated into, and read in conjunction with existing complaint handling procedures.</p>	In progress

#	Recommendation	Government response	Progress	Status
4	The Victorian Government review the structure and placement of the Human Rights Unit so that it can provide centralised expertise on human rights within government. The Unit's role should include providing advice, developing and maintaining human rights resources for use within the Victorian Government, and providing specialist training (such as training on how to develop human rights compatible policy and legislation, and how to draft statements of compatibility).	Supported in principle	The government considers that as the Charter falls within the Attorney-General's portfolio, the HRU is best positioned to fulfil its functions of providing expert human rights advice and delivering human rights training across government from within DJR.	Complete
5	The Human Rights Unit update the Charter Guidelines for Legislation and Policy Officers. The Unit should also work with departments and agencies to continue to develop specialist guidance and promotional materials in key areas of policy and service delivery, such as policing, corrections, health services, disability services, child protection and education	Supported in principle	<p>The HRU is considering whether the Charter Guidelines for Legislation and Policy Officers should be updated, or alternatively whether it is preferable to design, develop and maintain a suite of alternative resources that complement existing resources, including the Judicial College of Victoria's Charter Bench Book.</p> <p>The HRU will continue to work with the Commission and other agencies to provide human rights guidance and educative resources, including human rights e-learning modules and a human rights online 'hub'.</p>	In progress
6	<p>The Victorian Equal Opportunity and Human Rights Commission be given responsibility to provide human rights education within the public sector to:</p> <p>(a) leaders across the Victorian public sector to ensure that they can influence a positive culture of human rights</p> <p>(b) local government councillors. As a priority, materials should be available to support the induction of new councillors after the October 2016 local government elections</p> <p>(c) staff of Victorian public sector departments, agencies and local government. Where possible, the training should be tailored to the needs of particular work areas and be delivered in consultation with front line staff who understand the operational aspects of the work area</p> <p>(d) private entities that perform functions of a public nature and have obligations under the Charter</p>	Supported in principle	<p>During 2017, the Commission and the HRU collaborated in the delivery of education sessions on the Charter to more than 3000 staff from public authorities, funded by the Victorian Government under the Charter Education Project. The public authorities included departments, local government and statutory authorities. Each session covered an overview of the Charter, the rights specifically protected and the obligations on public authorities. Participants applied the Charter to realistic workplace scenarios tailored in partnership with the public authorities. The Charter Education Project delivered the sessions to executive teams, managers and staff.</p> <p>In 2017 the Commission began developing suite of e-learning modules for public authorities as part of a move toward blending e-learning with face-to-face education.</p>	Complete / Ongoing

#	Recommendation	Government response	Progress	Status
7	The Victorian Equal Opportunity and Human Rights Commission facilitate opportunities for public and community sector workers to share experience and expertise on the Charter. Such opportunities could include Human Rights Network events, the production of resources, the establishment of communities of practice sponsored by a senior executive, and the use of existing networks	Supported in principle	During 2017 the Commission began developing an online Human Rights Hub. The purpose of the Human Rights Hub is to build a human rights community and culture by sharing information, resources, best practice and expertise. The Hub will be freely available and will provide an opportunity for workers across all sectors to share experiences.	In progress
8	The Victorian Equal Opportunity and Human Rights Commission provide further human rights education to the community and community advocates	Supported in principle	<p>During 2017 the Commission developed Charter education with a particular emphasis on cultural rights, including creating partnerships with key community groups and councils. In addition, the Commission provided training sessions to primary, secondary and tertiary students.</p> <p>The Commission has also developed materials specific to Aboriginal cultural rights in consultation with Aboriginal community groups, which were launched in June 2018. We have created a partnership with the Commission for Children and Young People to help identify ways to improve cultural rights for Aboriginal youth in detention, launched in July 2018.</p>	In progress
9	Public authorities make relevant human rights information available when providing services to the community and provide a way for people to have a say about issues that affect them	Supported	<p>While some public authorities already make human rights information available when providing services to the community, other strategies are being used across government to ensure that such information is more broadly provided, including through:</p> <ul style="list-style-type: none"> • the promotion of the 'Good Practice Guide: Managing Complaints Involving Human Rights' (referred to in Recommendation 3); • communications from the Charter Leaders Group • encouraging this approach in training provided to service delivery areas. 	Complete / Ongoing

#	Recommendation	Government response	Progress	Status
10	The Victorian Equal Opportunity and Human Rights Commission look for ways to engage with the private sector to build a broader human rights culture in Victoria. Such engagement could include establishing a Corporate Charter Champions group, partnering with businesses on activities, or working with business networks to build understanding of the Charter	Not supported		Not supported
11	The Judicial College of Victoria be responsible for educating judicial officers and tribunal members regularly on how the Charter operates. Where appropriate, this education could be done in conjunction with professional development for the legal profession	Supported in principle	<p>This recommendation continues to be implemented through the Judicial College of Victoria's (JCV) ongoing work maintaining the Charter Bench Book, which is a resource for judicial officers on the operation of the Charter.</p> <p>Additionally, the HRU assisted the JCV by presenting a Charter training session to the Victorian Drug Court on 1 August 2017 (as a component of the JCV's professional program). There were approximately 60 participants, including magistrates of the court, case workers, social workers, and lawyers from Victoria Police and Victorian Legal Aid. HRU and the Commission have also delivered a presentation for tribunal members and registry staff at VCAT as part of VCAT's professional development program.</p>	In progress

Chapter 2 – Clarifying responsibilities for human rights – acts and decisions of public authorities

#	Recommendation	Government response	Progress	Status
12	<p>Section 4 of the Charter be amended to set out a non-exhaustive list of functions of a public nature under section 4(1)(c), including:</p> <ul style="list-style-type: none"> (a) the operation of prisons and other correctional facilities (b) the provision of public health services (c) the provision of public education, including public tertiary education (d) the provision of public housing, including by registered housing providers (e) the provision of public disability services (f) the provision of public transport (g) the provision of emergency services (h) the provision of water supply 	Supported in principle	In relation to this (and other) recommendations from the Review that require legislative amendment and that were accepted by the government, the introduction and passage of the necessary legislation is dependent on the government's legislative program as a whole.	Pending
13	The Victorian Government use the <i>Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013</i> (Vic) to prescribe entities to be or not be public authorities—including entities that provide services under national schemes—where necessary to resolve doubt	Supported	This recommendation relates closely to Recommendation 12 and is therefore similarly 'Pending'.	Pending
14	A whole-of-government policy be developed for relevant State contracts to include terms that contracted service providers will have public authority obligations when performing particular functions under the contract and a provision be included in the Charter to authorise this	Supported	HRU will continue to consult with relevant parts of government to develop guidance on options for requiring contracted service providers to fulfil Charter obligations when performing particular functions under the Charter.	In progress
			See Recommendation 12.	Pending
15	The Charter provide for any entity to 'opt in' to public authority obligations by requesting the Attorney-General declare them to be a public authority, as in section 40D of the <i>Human Rights Act 2004</i> (ACT)	Supported	See Recommendation 12.	Pending

#	Recommendation	Government response	Progress	Status
16	The Victorian Government review and clarify how the Charter applies to public sector employees who are not employed under the <i>Public Administration Act 2004</i> (Vic) (such as teachers)	Supported in principle	HRU proposes to review the legislative arrangements for the employment of public sector employees not employed under the <i>Public Administration Act 2004</i> (Vic). The HRU will then assess whether any legislative amendment or other action is desirable to clarify that such employees are clearly included in the Charter's definition of 'public authority'.	Yet to start
17	The Charter be amended to clarify that decisions of public authorities must be substantively compatible with human rights, whether by defining 'to act' as including 'to make a decision' or by specifying in section 38(1) that it is unlawful for a public authority to make a decision that is incompatible with a human right	Supported	See Recommendation 12.	Pending
18	The Victorian Government consider the exception from public authority obligations in section 38(4) of the Charter (an exception relating to the religious doctrines, beliefs and principles of a religious body), as part of its current examination of religious exceptions and equality measures in other Victorian laws, so it can apply a consistent approach	Supported	This recommendation acknowledged legislative work being undertaken in relation to laws about religious exceptions and equality measures in other laws. Subsequently, the proposed amendments were defeated in the Legislative Council in 2016. In any event, any legislative amendments to the Charter are now dependent on the government's legislative program as a whole (see Recommendation 12).	Pending
19	The second sentence in the note to section 4(1)(j) of the Charter be removed or amended, because listing cases and adopting practices and procedures may sometimes involve acting in a judicial capacity rather than in an administrative capacity	Supported	See Recommendation 12.	Pending

Chapter 3 – Facilitating good practice and dispute resolution – the role of statutory authorities

#	Recommendation	Government response	Progress	Status
20	The Victorian Equal Opportunity and Human Rights Commission be given the power to request information to assist with its statutory functions under the Charter and public authorities be given a duty to assist, as exists under the <i>Privacy and Data Protection Act 2014</i> (Vic)	Supported in principle.	See Recommendation 12.	Pending
21	The Victorian Equal Opportunity and Human Rights Commission be given the discretion to charge for the reasonable costs of voluntary compliance reviews, and education and training services	Supported	See Recommendation 12.	Pending
22	The Victorian Ombudsman, the Independent Broad-based Anti-corruption Commission, and other relevant oversight bodies be given the power to request the Victorian Equal Opportunity and Human Rights Commission to help them when they exercise their statutory powers in relation to human rights issues	Supported	See Recommendation 12.	Pending
23	The Victorian Equal Opportunity and Human Rights Commission be given the statutory function and resources to offer dispute resolution for disputes under the Charter	Under further consideration	This recommendation remains under consideration by the Victorian Government.	Under Consideration
24	The <i>Ombudsman Act 1973</i> (Vic) make clear that the Ombudsman can consider human rights issues relating to the administrative actions of all public authorities under the Charter, except police and protective services officers. The Charter should note this jurisdiction	Under further consideration	This recommendation remains under consideration by the Victorian Government.	Under Consideration
25	All relevant public sector oversight bodies should have the ability to consider human rights issues that arise within their jurisdiction, for example, the Mental Health Complaints Commissioner should continue to be able to consider human rights issues that relate to public mental health service providers. Mechanisms should be established to enable referral and appropriate information sharing between complaint-handling and oversight bodies. The Charter should note these roles	Under further consideration	This recommendation remains under consideration by the Victorian Government.	Under Consideration
26	The Victorian Government ensure the Independent Broad-based Anti-corruption Commission has capacity to investigate allegations of serious human rights abuses by police and protective services officers	Supported	The government will continue to ensure that the IBAC is sufficiently resourced to investigate allegations of human rights breaches by police and protective services officers.	Complete / Ongoing

Chapter 4 – Remedies and oversight – the role of the courts

#	Recommendation	Government response	Progress	Status
27	<p>The provisions and process for obtaining a remedy under the Charter be clarified and improved by:</p> <p>(a) amending the Charter to enable a person who claims a public authority has acted incompatibly with their human rights, in breach of section 38 of the Charter, to either apply to the Victorian Civil and Administrative Tribunal for a remedy, or rely on the Charter in any legal proceedings. The amendment should be modelled on section 40C of the <i>Human Rights Act 2004</i> (ACT).</p> <p>The Tribunal's jurisdiction to determine whether a public authority has breached section 38 of the Charter should be similar to its jurisdiction in relation to unlawful discrimination under the <i>Equal Opportunity Act 2010</i> (Vic). If the Tribunal finds that a public authority has acted incompatibly with a Charter right, it should have power to grant any relief or remedy that it considers just and appropriate, excluding the power to award damages.</p> <p>(b) if the Charter is raised in another legal proceeding, the court or tribunal should retain the ability to make any order, or grant any relief or remedy, within its powers in relation to that proceeding. It should remain the case that a person is not entitled to be awarded any damages because of a breach of the Charter, in accordance with existing section 39(3) of the Charter.</p> <p>(c) amending the Charter to make it clear that a person who claims that a decision of a public authority is incompatible with human rights, or was made without proper consideration of relevant human rights, can seek judicial review of that decision on the ground that the decision is unlawful under the Charter, without having to seek review on any other ground</p>	Recommendation 27(a) and (c) is under further consideration.	27(a) This recommendation remains under consideration.	Under Consideration
			27(b) No action required	Completed
			27(c) This recommendation remains under consideration.	Under Consideration

Chapter 5 – Interpreting and applying the law

#	Recommendation	Government response	Progress	Status
28	<p>Section 32 of the Charter be amended to:</p> <p>(a) require statutory provisions to be interpreted, so far as it is possible to do so consistently with their purpose, in the way that is most compatible with human rights</p> <p>(b) require, where a choice must be made between possible meanings that are incompatible with human rights, that the provision be interpreted in the way that is least incompatible with human rights</p> <p>(c) make it clear that section 7(2) applies to the assessment of the interpretation of what is most compatible, or least incompatible, with human rights</p> <p>(d) set out the steps for interpreting statutory provisions compatibly with human rights, to ensure clarity and accessibility</p>	Supported in principle.	See Recommendation 12.	Pending
29	The Charter define the concepts of ‘compatibility’ and ‘incompatibility’ to make it clear that an act, decision or statutory provision 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 in terms of section 7(2). The Charter should use the two terms consistently, in relation to scrutiny of legislation (sections 28 and 30), the interpretation of legislation (sections 32, 36 and 37) and the obligations of public authorities (section 38)	Supported	See Recommendation 12.	Pending
30	Section 7, containing the general limitations clause, be excluded from the Charter’s definition of ‘human rights’ and the definition of ‘human rights’ refer to all the rights in Part 2, not only the civil and political rights	Supported	See Recommendation 12.	Pending
31	The internal limitation on freedom of expression in section 15(3) be repealed, so the general limitation provision in section 7(2) can be applied as the Charter’s common test to balance competing rights and interests	Not supported		Not supported

#	Recommendation	Government response	Progress	Status
32	Sections 36 and 37 of the Charter be amended to use the words 'declaration of incompatible interpretation' and 'cannot be interpreted compatibly with a human right', for consistency with terminology used in related sections, including section 32	Supported	See Recommendation 12.	Pending
33	Section 35 of the Charter be amended to remove the notice requirement for proceedings in the County Court and to give a judicial officer or tribunal member power to require a notice to be issued for a Charter issue of general importance or when otherwise in the interests of justice (at their discretion). Further, an explanatory note should be added to section 35 to make clear that proceedings do not have to be adjourned while notice is issued and responded to. The Attorney-General and the Commission should retain their right to intervene in all proceedings	Supported in part	See Recommendation 12.	Pending
34	Sections 34 and 40 of the Charter be amended to explicitly give a judicial officer or tribunal member power to place conditions on interventions to support case management. Conditions may include, for example, timetabling, setting how the interveners may participate in proceedings, and confining the matters that submissions may address	Supported	See Recommendation 12.	Pending
35	The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission publish guidance on how they will consider and process Charter notifications and their cost policies as an intervener (when they do not already do so). The Attorney-General and the Commission should make this guidance available to the public and promote it in the legal sector	Supported	<p>During 2017 the Attorney-General developed Charter Intervention Guidelines, including costs policies as an intervener. The Commission's Charter Intervention Guidelines are available on its website.</p> <p>At the time of writing this report, the Attorney-General's Charter Intervention Guidelines have been made available on the DJR website and Commission website. The guidelines have also been distributed to the legal sector and other stakeholders, including Victoria Legal Aid, the Federation of Community Legal Centres Victoria, the JCV, the Victorian Bar, the Law Institute of Victoria and the Victorian Ombudsman.</p>	In progress

Chapter 6 – Firming the foundations – more effective parliamentary scrutiny

#	Recommendation	Government response	Progress	Status
36	The secretariat of the Scrutiny of Acts and Regulations Committee arrange for human rights induction training for members of the Committee and the Victorian Equal Opportunity and Human Rights Commission offer a human rights briefing to all new parliamentarians.	Supported	<p>Committee members are provided with human rights briefing materials at the start of each Parliament.</p> <p>The Commission is yet to formalise a process for providing human rights briefings to all new parliamentarians.</p>	In progress
37	<p>The process for human rights scrutiny of Bills by the Scrutiny of Acts and Regulations Committee (SARC) be improved and public engagement in the process be enhanced by:</p> <p>(a) the Victorian Government considering how best to ensure that the Committee has sufficient time to scrutinise Bills that raise significant human rights issues</p> <p>(b) the Committee establishing an electronic mailing list to notify individuals and organisations of Bills that it is considering and to invite submissions</p> <p>(c) the Committee referring to the content of submissions made to it in its Alert Digests on Bills</p>	Supported in principle	<p>The Government will identify options for providing SARC with sufficient time to consider Bills that raise significant human rights issues.</p> <p>The committee scrutinises all Bills that are introduced into Parliament each sitting week and reports back to Parliament on those Bills in the following sitting week. The list of bills introduced each sitting week is available on the Parliament's website. The committee refers to submissions that it receives on bills and may publish them on its website.</p> <p>The government notes that while SARC's internal processes and procedures are a matter for it to consider, the government intends to write to SARC and draw to its attention parts (b) and (c) of the Recommendation.</p>	<p>Yet to start</p> <p>Yet to start / In progress</p>
38	The Victorian Government refer amendments to non-Victorian laws that apply in Victoria under a national scheme, and to Regulations under those laws, to the Scrutiny of Acts and Regulations Committee for consideration	Supported	The recommendation for referral to SARC will be encouraged as part of the whole-of-government policy on national schemes to be developed under Recommendation 47.	Yet to start

#	Recommendation	Government response	Progress	Status
39	Section 29 of the Charter be amended to specify the Scrutiny of Acts and Regulations Committee's failure to report on the human rights compatibility of any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or any other statutory provision	Supported	See Recommendation 12.	Pending
40	To ensure that House Amendments can be subject to human rights scrutiny and to make the Charter and the <i>Parliamentary Committees Act 2003</i> (Vic) consistent, the Scrutiny of Acts and Regulations Committee should be given clear power to consider and report on provisions of Acts that it did not consider when a Bill was before Parliament (within a limited time)	Supported	See Recommendation 12.	Pending
41	The human rights analysis in statements of compatibility be improved by: (a) amending section 30 of the Charter to clarify that the Scrutiny of Acts and Regulations Committee may report to Parliament on statements of compatibility (b) the Victorian Government publishing draft statements of compatibility when exposure drafts of Bills are released for public comment	Supported	See Recommendation 12.	Pending
			In many situations draft Statements of Compatibility are already released with exposure drafts of Bills. If asked, the HRU advises that releasing draft Statements of Compatibility with exposure drafts of Bills is best practice. HRU will consider whether it is appropriate to send out further guidance on this matter, for example, by a practice note.	In progress
42	The Victorian Government facilitate the identification of human rights impacts of legislative proposals and options for addressing them by consulting the Human Rights Unit in the Department of Justice & Regulation at an early stage of developing legislation and drafting statements of compatibility	Supported	Early engagement and consultation with the HRU when developing legislation is strongly encouraged. The importance of timely consultation with HRU is emphasised whenever human rights advice is provided across government, in training sessions, and by members on the Charter Leaders Group.	In progress
43	Members of Parliament are encouraged to provide a short statement on the human rights compatibility of their proposed House amendments to parliament, when time permits	Supported	In many situations, this is also current practice. If asked, the HRU advises departments and Ministers to update the human rights analyses when House Amendments are proposed.	In progress

#	Recommendation	Government response	Progress	Status
44	<p>Human rights scrutiny of statutory rules and legislative instruments be made more transparent and effective by:</p> <p>(a) publishing all human rights certificates in an online repository maintained by the Scrutiny of Acts and Regulations Committee</p> <p>(b) amending section 30 of the Charter to require the Scrutiny of Acts and Regulations Committee to consider all statutory rules and legislative instruments and report to Parliament if it corresponds with a Minister about the human rights impact of any statutory rule or legislative instrument or considers the statutory rule or legislative instrument limits human rights</p>	Supported	While SARC's internal processes and procedures are a matter for it to consider, the government intends draw to SARC's attention part (a) of the Recommendation.	In progress
			See Recommendation 12	Pending
45	Local laws be made subject to the Charter by amending item 2(f) of Schedule 8 to the <i>Local Government Act 1989</i> (Vic) to refer to the human rights in the Charter, making incompatibility with the human rights in the Charter a factor for the Minister's consideration when deciding whether to recommend revocation of a local law	Supported in principle	<p>An exposure draft Bill to amend the Local Government Act 1989, incorporating provisions to give effect to Recommendation 45, was made publicly available on 12 December 2017. For the Recommendation to be fully implemented, the Bill will need to be passed by Parliament.</p> <p>At the time of writing this report, the Local Government Bill 2018 had been introduced by the Government.</p>	In progress
46	The provision for override declarations in section 31 of the Charter be repealed. The explanatory materials for the amending statute should note that Parliament has continuing authority to enact any statute (including statutes that are incompatible with human rights), and the statement of compatibility is the mechanism for noting this incompatibility. If legislation is passed that is incompatible with human rights, the responsible Minister should report to Parliament on its operation every five years	Not supported		Not supported

Chapter 7 – Emerging issues

#	Recommendation	Government response	Progress	Status
47	The Victorian Government adopt a whole-of-government policy that, in developing a national scheme, the Charter should apply to the scheme in Victoria to the fullest extent possible. Alternatively, the national scheme should incorporate human rights protections equivalent to, or stronger than, the Charter. In developing a national scheme, the Government should consider separately the question of protection and promotion of human rights through scrutiny of legislation, the interpretation of legislation, whether regulators and others involved in administering a national scheme in Victoria are public authorities, and oversight and compliance mechanisms	Supported	DJR proposes to develop this whole-of-government policy on national schemes, in consultation with relevant government departments, to acquit this Recommendation.	Yet to start
48	The principles in the Preamble to the Charter be amended to: (a) recognise the need for public authorities to take steps to respect, protect and promote human rights (b) recognise the importance of individuals and communities being able to have a say about policies, practices and decisions that affect their lives (c) refer to self-determination having special importance for the Aboriginal people of Victoria, as descendants of Australia's first peoples	Supported	See Recommendation 12.	Pending

#	Recommendation	Government response	Progress	Status
49	The Victorian Government work with Victorian Aboriginal communities to promote, protect and respect self-determination and the empowerment of Aboriginal people. This work could be pursued through existing forums, such as the Premier's meetings with members of the Aboriginal communities	Supported	<p>The government continues to work with Aboriginal communities to promote, protect and respect self-determination and the empowerment of Aboriginal people. During 2017 the government undertook significant consultation in relation to the Advancing the Treaty Process with Aboriginal Victorians Bill 2018, which reflects the shared aspiration of the Government and Aboriginal Victorians to negotiate a treaty or treaties that will tangibly help to improve the lives of Aboriginal Victorians. The Bill will be the roadmap to treaty negotiations (e.g. through facilitating the establishment of a Treaty Authority and treaty negotiation framework).</p> <p>At the time of writing this report, the Advancing the Treaty Process with Aboriginal Victorians Bill 2018 had been introduced by the government and passed as law.</p>	In progress
50	Section 17 of the Charter include a new provision that every person born in Victoria has the right to a name and to be registered as soon as practicable after birth	Supported	See Recommendation 12.	Pending
51	'Discrimination' in the Charter be defined as 'direct and indirect discrimination' on the basis of a protected attribute in the Equal Opportunity Act 2010 (Vic).	Supported	See Recommendation 12.	Pending

Chapter 8 – The need for a further review

#	Recommendation	Government response	Progress	Status
52	The Charter be amended to require the Attorney-General to cause there to be a further review of the Charter four years after the commencement of the proposed complaints and remedies provision. The review should consider the operation of the Charter and how it could be improved, including the application of economic, social and cultural rights and the range of remedies available when human rights are breached.	Supported in principle.	See Recommendation 12.	Pending



Victorian Equal Opportunity
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