

# **Charter of Human Rights and Responsibilities Bill**

## **As Sent Print**

### **EXPLANATORY MEMORANDUM**

#### **General**

The purpose of this Charter is to establish a framework for the protection and promotion of human rights in Victoria.

The human rights protected by the Charter are civil and political rights. They primarily derive from the *International Covenant on Civil and Political Rights 1966* and are set out in Part 2, which follows a number of general provisions set out in Part 1.

Part 3 of the Charter outlines the scheme by which human rights are protected by Parliament, courts and tribunals and public authorities. There are three noteworthy elements of this framework.

First, the Charter facilitates the protection and promotion of human rights by Parliament in the development of new legislation and increases transparency in the consideration of human rights in parliamentary procedures. This is achieved by requiring all Bills introduced into Parliament to be accompanied by a statement of compatibility prepared by the relevant member of Parliament. The Charter requires a statement to provide whether the Bill is compatible with the rights protected by Part 2 of the Charter. The Scrutiny of Acts and Regulations Committee will also have a role in the process by examining whether a Bill is incompatible with the Charter.

Second, the Charter imposes obligations on public authorities to act in a way that is compatible with the human rights protected by the Charter.

Third, the Charter requires courts and tribunals to interpret Victorian statutes and statutory instruments in a manner that is compatible with human rights so far as it is possible to do so in accordance with the purpose of the statute or statutory instrument.

The Charter changes the name of the Equal Opportunity Commission to the Victorian Equal Opportunity and Human Rights Commission and confers new functions on the Commission in Part 4. The Victorian Equal Opportunity and Human Rights Commission is intended to act as an independent monitor of the operation of the Charter.

Part 5 of the Charter contains a number of general provisions including requirements for the Charter to be reviewed. It also grants the Governor in Council a power to make regulations and provides for consequential amendments and savings and transitional provisions.

### **Clause Notes**

#### **PREAMBLE**

The Preamble explains the objects that the Charter seeks to achieve and the context in which the Charter is to be interpreted.

It specifies that human rights are important for everyone and have particular significance for the Aboriginal people of Victoria.

#### **PART 1—PRELIMINARY**

Part 1 sets out the purpose and application of the Charter. It also defines a number of key words and phrases and provides for the commencement of the Charter to occur in two stages.

Clause 1 sets out the purpose and citation of the Charter.

Sub-clause (1) provides that the Charter is to be referred to as the Charter of Human Rights and Responsibilities.

Sub-clauses (2) and (3) outline the purpose of the Charter.

Clause 2 provides for a staggered commencement of the Charter.

Sub-clause (1) provides that with the exception of Divisions 3 and 4 of Part 3, the Charter will commence on 1 January 2007.

Sub-clause (2) provides that Divisions 3 and 4 of Part 3 will commence on 1 January 2008. Divisions 3 and 4 of Part 3 encompass provisions governing the interpretation of laws and obligations on public authorities following the enactment of the Charter.

The staggered commencement will allow for a period of approximately 18 months for government departments to review existing laws, policies and procedures to ensure compliance with the Charter.

Clause 3 defines certain words and references in the Charter.

Sub-clause (1) contains a number of definitions.

Sub-clause (2) provides guidance in relation to references made in the Charter to a function and an exercise of a function, providing that a reference to a function includes a reference to a power, authority and duty, and a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

Clause 4 defines the meaning of public authority for the purposes of the Charter.

Sub-clause (1) contains the definition of public authority.

This definition encompasses two types of public authorities: core public authorities, who are bound by the Charter generally, and functional public authorities, who are only bound when they are exercising functions of a public nature on behalf of the State or a public authority.

In the category of core public authorities are the following authorities:

- A public official within the meaning of the **Public Administration Act 2004** (paragraph (a)).  
The incorporation of this definition is intended to promote consistency with existing conceptions of "government" within Victorian law. It will be necessary to refer to the **Public Administration Act 2004** for a list of who is covered by the meaning of public official. The definition includes public sector employees, certain judicial employees and parliamentary officers, persons holding certain statutory offices or a prerogative office and directors of public entities. It excludes the Governor, the Lieutenant-Governor, judges, magistrates, coroners, members of VCAT, government Ministers, a Parliamentary Secretary, the President of the Legislative Council, the Speaker of the Legislative Assembly and certain Ministerial officers.
- An entity established by a statutory provision that has functions of a public nature (paragraph (b)). An entity includes persons, both legal persons and human beings, and unincorporated bodies. Guidance on the meaning of "functions of a public nature" is contained in sub-clause (2).

- The Victoria Police (paragraph (d)).
- A Council within the meaning of the **Local Government Act 1989**, and Councillors and Council staff within the meaning of that Act (paragraph (e)). It will be necessary to refer to the **Local Government Act 1989** to determine the meaning of these terms.
- A Minister (paragraph (f)).
- Courts and tribunals and members of Parliamentary Committees are also bound by the Charter, when acting in an administrative capacity (paragraphs (g) and (j)). For example, they are considered to be public authorities when hiring staff. The obligation to comply with the Charter does not, however, extend generally to Parliament or Parliamentary proceedings or to the courts when acting in a judicial or quasi-judicial capacity (paragraphs (i) and (j)).

The obligation to comply with the Charter extends beyond these "core" government authorities, to cover other entities when they are performing functions of a public nature on behalf of the State (paragraph (c)). This reflects the reality that modern governments utilise diverse organisational arrangements to manage and deliver government services. The Charter applies to "downstream" entities, when they are performing functions of a public nature on behalf of another public authority. Guidance on the meaning of "functions of a public nature" and on the meaning of "on behalf of the State or a public authority" is provided in sub-clauses (2) to (5).

The Charter also provides that regulations made under it may declare that a particular entity is, or is not, a public authority for the purposes of the Charter (paragraphs (h) and (k)). This provision will assist in adding clarity to the scope of the definition.

Sub-clause (2) contains a list of factors that may be taken into account in determining if a function is of a public nature. These factors were distilled from jurisprudence and commentary relating to like provisions in the United Kingdom *Human Rights Act 1998* and the New Zealand *Bill of Rights Act 1990*. They are intended to guide courts and tribunals on the meaning of functions of a public nature.

The factors that may be taken into account in determining if a function is of a public nature are:

- That the function is conferred on the entity by or under a statutory provision (paragraph (a)). In some cases, a function may be conferred directly by statute, such as the powers of arrest which are conferred on an authorised officer under the **Transport Act 1983**. In other cases, an entity may be performing functions that have been delegated to it (via contract or otherwise) under statutory authority. These situations need to be distinguished, however, from situations in which the private sector is subject to statutory licensing arrangements which regulate their private businesses, such as a private fishing business operating under licence.
- That the function is connected to or generally identified with functions of government (paragraph (b)). The Charter gives the example of a private company managing a prison. In this case, the function has its origin in governmental responsibilities and is being performed in the broader public interest.
- That the function is of a regulatory nature (paragraph (c)). For example, a professional association which has statutory disciplinary, ethical or qualification powers is likely to be exercising public functions.
- That the entity is publicly funded to perform the function (paragraph (d)).
- That the entity is a company whose shares are wholly held by or on behalf of the State (paragraph (e)). The companies responsible for the retail supply of water in Victoria are one example of entities wholly owned by or on behalf of the State.

Sub-clause (3) provides that the factors listed in sub-clause (2) are not exhaustive of the factors that may be relevant to the question of whether a body is performing a public function. In a particular case, other factors may be equally or more important in determining the nature of the function. Similarly, the sub-clause provides that the fact that one or more of the factors exist in relation to a function, does not necessarily mean that the function is one of a public nature.

Sub-clause (4) provides guidance on the meaning of the expression "on behalf of the State or a public authority". It clarifies that this phrase is not intended to be confined to an agency relationship. A more loosely connected arrangement in which an entity is acting as a representative of or for the purpose of the State or a public authority may be covered under sub-clause (1).

The degree of government regulation and control of the functions being performed are relevant factors to consider when interpreting the meaning of the expression "on behalf of the State or a public authority". For example, a non-government school may be regarded as performing functions of a public nature in providing education. However, such schools are independent of government and, although subject to regulation, they are not controlled by government. For these reasons, non-government schools are not acting "on behalf of the State" and consequently their conduct is not regulated by the Charter.

Sub-clause (5) provides further guidance on the meaning of the expression "on behalf of the State or public authority". It clarifies that just because an entity is publicly funded to perform a function doesn't necessarily mean that it is performing that function on behalf of the State. While public funding may be relevant to deciding if the entity is acting on behalf of the State, all of the circumstances, such as the degree of government regulation and control and the nature of the functions being performed, are relevant factors to consider.

Clause 5 provides that the Charter does not limit any right or freedom that is not included in the Charter. The purpose of this provision is to ensure that the Charter is not misused by limiting a right a person may have under any other law (including under international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) on the basis that the right is either not recognised in the Charter or recognised to a lesser extent in the Charter.

For example, if a right under an international treaty is a relevant consideration for the purpose of administrative decision-making, the Charter does not operate to make that right irrelevant because it is not expressed in the Charter.

Clause 6 outlines the application of the Charter.

Sub-clause (1) provides that only persons have human rights. This clause is to be read together with clause 3 which defines "person" to mean a natural person. This clause clarifies that the Charter does not confer any rights on other legal entities apart from individuals. The accompanying note to this clause makes clear that corporations do not have human rights under the Charter. The provision applies regardless of whether a person is an Australian citizen and applies to all people physically present within the State.

This provision does not preclude a group of individuals from making application to a court or tribunal in respect of a question relating to the human rights outlined in Part 2 of the Charter. Whether an individual or group of individuals have a cause of action or otherwise have standing before a court or tribunal is not affected by this Charter.

Sub-clause (2) sets out the scope of application of the Charter to the various entities that the Charter applies to: the Parliament; courts and tribunals; and public authorities. The Charter confers functions on these bodies in Parts 2 and 3.

Sub-clause (3) clarifies that the Charter does not take away from or limit the functions conferred on the entities specified in sub-clause (2) or on entities which otherwise have functions conferred by the Charter. These include Parliament, courts and tribunals, public authorities, the Victorian Equal Opportunity and Human Rights Commission, the Scrutiny of Acts and Regulations Committee and Victoria Police.

Sub-clause (4) provides that the Charter binds the Crown in right of Victoria and in its other capacities so far as the legislative power of the Parliament permits.

## **PART 2—HUMAN RIGHTS**

Part 2 of the Charter sets out the human rights protected by the Charter. It also outlines the extent to which these rights may be limited.

The Charter provides a general limitation clause in clause 7. It is described in further detail below. It is one of the key provisions in the Charter. This clause recognises that no right is absolute and that there may be various limitations imposed on any right. In addition, specific limitations sometimes apply in relation to a particular right, as provided in the specific clause outlining the right to be protected.

The rights protected by the Charter are contained in clauses 8 to 27. These rights are based on fundamental human rights protected in international human rights law. The majority of these rights were codified in the *International Covenant on Civil and Political Rights 1966* (the Covenant) which the Commonwealth ratified in 1980. Although the rights appear in a different order to that of the Covenant, they are generally expressed in the same terms as the Covenant. Some adjustments to language have been made, to both improve the drafting and to clarify the application of the particular human right in the context of the State of Victoria.

In some instances a right, or part of a right, contained in the Covenant has been omitted from the Charter. Omissions have occurred for various reasons. The right to self-determination contained in article 1 of the Covenant is not incorporated in the Charter because the right to self-determination is a collective right of peoples. Moreover, there is a lack of consensus both within Australia and internationally on what the right to self-determination comprises. Other rights are omitted because they are matters within the Commonwealth's jurisdiction and are consequently inappropriate in State legislation. For example, the prohibition on expulsion of non-nationals contained in article 13 of the Covenant is omitted for this reason. Article 23(2) to (4) of the Covenant concerning marriage is also omitted, as is article 24(3) which concerns a child's right to a nationality. Other omissions are mentioned in the clause notes below.

Regarding the nature and meaning of the human rights listed in Part 2, it is intended that clause 32(2) will operate as a guide. Under this clause, a court or tribunal may examine a number of sources in interpreting the meaning and nature of the human rights. These sources are international law and the judgments of domestic, foreign and international courts and tribunals relevant to the human rights. The operation of clause 32(2) is discussed further below.

Clause 7 introduces Part 2 and outlines a general limitation applicable to the rights protected in the Charter.

Sub-clause (1) provides that Part 2 sets out the human rights that Parliament seeks to protect and promote.

Sub-clause (2) outlines a general limitation applicable to the human rights in Part 2 of the Charter. Parliament considers a general limitation to be preferable to limitations that operate on a clause-by-clause basis. Pursuant to clause 7 of the Charter, a human right may only be subject under law (whether statutory or common law) to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.



This sub-clause reflects Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests. The operation of this clause envisages a balancing exercise between Parliament's desire to protect and promote human rights and the need to limit human rights in some circumstances.

The sub-clause lists a range of relevant factors to be taken into account when assessing whether a human right may be limited. These factors include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and whether there are less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The general limitation clause, including the list of relevant factors, is modelled on section 5 of the New Zealand *Bill of Rights Act 1990* and, more particularly, on section 36 of the Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*.

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

Sub-clause (3) provides that the Charter should not be interpreted as giving a person, entity or public authority a right to limit or to destroy the human rights of any person. The purpose of this sub-clause is to safeguard against the possibility that the Charter might be misused to destroy or limit rights. Parliament recognises in the Preamble that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. For example, it is not Parliament's intention that the right to freedom of expression should be used to destroy the right to privacy.

Clause 8 provides for the right to recognition and equality before the law.

Sub-clause (1) establishes the right to recognition as a person before the law. This provision is modelled on article 16 of the Covenant. As noted above, it is intended that clause 32(2) will operate to guide courts and tribunals as to the meaning and nature of the right to recognition.

Sub-clause (2) establishes the right of every person to enjoy his or her human rights without discrimination. This is modelled on article 26 of the Covenant. The definition of discrimination in the Charter has the same meaning as provided in section 6 of the **Equal Opportunity Act 1995**. The accompanying note to the

definition of discrimination in clause 3(1) notes that section 6 of the **Equal Opportunity Act 1995** lists a number of attributes in respect of which discrimination is prohibited. Some of these attributes are listed in the note, however, this list is not exhaustive. It will be necessary to refer to the **Equal Opportunity Act 1995** when interpreting the meaning of discrimination under the Charter.

Sub-clause (3) establishes the right to equality. This sub-clause provides that people have the right to equal protection of the law without discrimination. It also provides that people have the right to equal and effective protection against discrimination. This provision is modelled on article 26 of the Covenant.

Sub-clause (4) provides that certain measures outlined in the sub-clause do not constitute discrimination. The purpose of this provision is to recognise that substantive equality is not necessarily achieved by treating everyone equally. Special measures may be required to achieve equality for some groups in the community. This sub-clause ensures that such measures do not breach the Charter. This provision is modelled on section 19(2) of the New Zealand *Bill of Rights Act 1990*. The purpose of the measures taken must be to assist or advance a person or group of persons who are disadvantaged because of discrimination.

Clause 9 establishes the right to life. This provision is modelled on article 6(1) of the Covenant. This provision is to be read together with the savings provision in clause 48. That provision states that nothing in the Charter affects any law applicable to abortion or child destruction.

The right to life has been interpreted in some international judgments as encompassing a procedural obligation to undertake effective coronial investigations where required.

Clause 10 provides for freedom from various forms of ill-treatment.

Paragraph (a) establishes a right not to be subject to torture. This provision is modelled on article 7 of the Covenant. In accordance with clause 32(2), courts and tribunals may consider article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 10 December 1984 when examining whether conduct amounts to torture.

Paragraph (b) establishes a right not to be subject to cruel, inhuman or degrading treatment. This provision is modelled on article 7 of the Covenant.

Paragraph (c) establishes a right not to be subject to medical or scientific experimentation or treatment without full, free and informed consent. This sub-clause is also modelled on article 7 of the Covenant. This clause expands on article 7 of the Covenant as it also includes a prohibition on medical or scientific *treatment* without consent. In addition it has been modified to provide that consent must be full, free and informed. This modification is intended to reflect the requirements for consent outlined in section 5(1) of the **Medical Treatment Act 1988**.

It is intended that the rights in this clause may be subject under law to such reasonable limitations as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom (see clause 7). For example, under Victorian law there are some well recognised situations where full, free and informed consent to medical treatment is not required. These include where there is an emergency or where a person is incapable of giving consent and consent is provided by a substitute decision-maker. Some procedures are also permitted without consent in accordance with Divisions 3 to 6 of Part 4A of the **Guardianship and Administration Act 1986**. These procedures will not breach the Charter since they are reasonable limitations under law and can be demonstrably justified in a free and democratic society.

Clause 11 provides for freedom from forced work.

Sub-clause (1) establishes a right to be free from slavery or servitude. This provision is modelled on article 8(1) and (2) of the Covenant.

Sub-clause (2) establishes a right to be free from forced or compulsory labour. This provision is modelled on article 8(3)(a) of the Covenant.

Sub-clause (3) of the Charter qualifies the right to freedom from forced or compulsory labour by providing three exceptions to the prohibition in sub-clause (2).

The first exception in paragraph (a) is for work or service normally required of a person who is under detention because of a lawful court order, or who, under a lawful court order, has been conditionally released from detention or has been ordered to perform work in the community. This paragraph is not intended to apply to prisoners on remand since these prisoners may not be directed to work (see section 84H of the **Corrections Act 1986**).

The second exception in paragraph (b) is for work or service required because of an emergency threatening the Victorian community or part of the Victorian community.

The third exception in paragraph (c) is for work or service that forms part of normal civil obligations. An example of normal civil obligations is jury service pursuant to the **Juries Act 2000**.

Sub-clause (3) is modelled on article 8(3)(c) of the Covenant. However, the Charter does not include article 8(3)(c)(ii), which provides an exception to the right to be free from forced or compulsory labour for military service or national service required to be performed by conscientious objectors, as these are considered matters within the Commonwealth's jurisdiction.

It is intended that courts and tribunals will examine sub-clause (3) first when interpreting the prohibition in sub-clause (2) to determine if the conduct complained of comes within its scope. Clause 32(2) will then operate to guide courts and tribunals as to the meaning and nature of sub-clause (2).

Sub-clause (4) clarifies that the reference to "court order" (as used in sub-clause (3)(a)) includes an order made by a court of another jurisdiction. This ensures that the exception would cover the interstate transfer of prisoners to Victoria.

Clause 12 establishes the right to freedom of movement within the State of Victoria. Freedom of movement requires all Victorians to be able to move freely within Victoria, to enter and leave Victoria and to choose where to live within Victoria. This provision is modelled on article 12 of the Covenant.

The right to freedom of movement may be subject under law to such reasonable limitations as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom (see clause 7). For example, restrictions on the freedom of movement of persons lawfully detained, such as prisoners, are not intended to infringe the Charter. Nor is the right to freedom of movement intended to bring into challenge restrictions on the movement of persons who are subject to a lawful order restricting their movement or where they may live. For example, persons for whom a guardian has been appointed under the **Guardianship and Administration Act 1986** are within this category. Guardians under that Act have a discretion to restrain the freedom of movement and to decide where a person for whom they are responsible should live. This power is a reasonable limitation under the Charter. Orders of the Adult Parole Board which restrict a person's movement or place of residence would also come within the reasonable limitation as

would other lawful orders restricting movement, such as family violence intervention orders.

It is Parliament's intention that the right to freedom of movement should be observed through government restraint. For example, the right does not require the provision of positive steps by a public transport operator to promote free movement.

- Clause 13 establishes a right to privacy. The right to privacy means that a person must not be subject to either unlawful or arbitrary interference with his or her privacy, family, home or correspondence and has the right not to have his or her reputation unlawfully attacked. This provision is modelled on article 17 of the Covenant. It is intended that the right to privacy is to be interpreted consistently with the existing information privacy and health records framework in Victoria to the extent that it protects against arbitrary interferences.
- Clause 14 provides for freedom of thought, conscience, religion and belief.
- Sub-clause (1) establishes the right to freedom of thought, conscience, religion and belief. The right includes the freedom to have or to adopt a religion or belief of a person's choice and the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
- Sub-clause (2) establishes that a person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.
- This clause is modelled on article 18 of the Covenant.
- Clause 15 provides for freedom of expression. This clause is modelled on article 19 of the Covenant.
- Sub-clause (1) establishes the right to hold an opinion without interference.
- Sub-clause (2) establishes the right to freedom of expression. The scope of this right includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside of Victoria and whether orally, in writing, in print, by way of art or in another medium chosen by a person.
- Sub-clause (3) establishes a limitation on the right of freedom of expression. It provides that the right to freedom of expression may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons, or to protect national security, public order, public health or public morality. This is a specific limitation to the right to freedom of expression

outlined in sub-clause (2). It is modelled on article 19(3) of the Covenant. In addition to this specific limitation, the general limitation provided in clause 7 applies to sub-clauses (1) and (2). For example, restrictions on tobacco advertising would not be in breach of the right to freedom of expression as sub-clause (3) specifically contemplates that restrictions may be imposed where the restriction is reasonably necessary to protect public health.

Clause 16 provides for the right of peaceful assembly and freedom of association.

Sub-clause (1) establishes the right of peaceful assembly. This sub-clause is modelled on article 21 of the Covenant.

Sub-clause (2) establishes the right to freedom of association with others. This right includes the right to form and join trade unions. This sub-clause is modelled on article 22 of the Covenant.

As for all of the Part 2 rights, the general limitation in clause 7 applies in relation to this clause. It is intended that these rights may be subject under law to such reasonable limitations as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. For example, reasonable limits may be justified in order to ensure the safety and security of prison facilities in Victoria.

Clause 17 provides for the protection of families and children.

Sub-clause (1) provides that families are the fundamental group unit of society and are entitled to be protected by society and the State. This provision is modelled on article 23(1) of the Covenant. This sub-clause recognises a right to protection. It is not Parliament's intention to create a right to found a family in the Charter. Parliament intends that the term "families" be given a meaning that recognises the diversity of families that live in Victoria, all of whom are worthy of protection.

Sub-clause (2) provides that every child, without discrimination, has the right to such protection as is in the best interests of the child and which is needed by reason of being a child. This provision is modelled on article 24(1) of the Covenant. Discrimination is defined in clause 3(1) of the Charter.

Clause 18 provides for the right to take part in public life.

Sub-clause (1) establishes a right to participate in the conduct of public affairs, directly or through freely chosen representatives. This clause does not provide a right to a specific outcome from such participation. It requires each person to be given the opportunity, without discrimination, to exercise this right.

Sub-clause (2) establishes, for eligible persons without discrimination, the right to vote and to be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors, and the right to have access, on general terms of equality, to the Victorian public service and public office. This clause is modelled on article 25 of the Covenant.

Clause 19 provides for the recognition of cultural rights.

Sub-clause (1) establishes a right of all persons with a cultural, religious, racial or linguistic background to not be denied the right, in community with other members of that background, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language. This provision is modelled on article 27 of the Covenant. The provision is also based on section 4 of the **Multicultural Victoria Act 2004** which enshrines in law a number of important principles of multiculturalism.

Sub-clause (2) provides specific rights for Aboriginal persons in Victoria. It establishes that Aboriginal persons must not be denied the right, with other members of their community, to enjoy their identity and culture, to maintain and use their language, to maintain their kinship ties and to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

This sub-clause specifically recognises that Aboriginal persons in Victoria have a right to enjoy their own culture. It is based on article 27 of the Covenant and decisions of the United Nations Human Rights Committee extending article 27 to protect the cultural rights of indigenous peoples. Paragraph (d) is also modelled on article 25 of the *United Nations Draft Declaration on Indigenous Rights*.

Clause 20 establishes a right not to be deprived of property other than in accordance with the law. This right does not provide a right to compensation.

Clause 21 provides for the right to liberty and security of person.

Sub-clause (1) establishes a person's right to liberty and security.

Sub-clause (2) establishes a prohibition on arbitrary arrest or detention.

Sub-clause (3) establishes a prohibition on the deprivation of liberty, except on grounds and in accordance with procedures established by law.

Sub-clause (4) establishes a right to be informed if arrested or detained. This right applies to a person who is detained as well as a person who is arrested. It requires such a person to be informed at the time of arrest or detention of the reason for the arrest or detention and about any proceedings to be brought against the person.

Sub-clause (5) establishes a number of procedural rights for persons arrested or detained on a criminal charge.

Sub-clause (6) establishes a number of procedural rights for persons awaiting trial.

Sub-clause (7) provides further procedural rights to a person deprived of liberty by arrest or detention. This sub-clause establishes a right to apply to a court for a declaration or order regarding the lawfulness of a person's detention and requires a court to make a decision without delay and order the release of the person if the court finds that the detention is unlawful.

Sub-clause (8) provides that a person must not be imprisoned only because of his or her inability to perform a contractual obligation.

This clause is modelled on articles 9 and 11 of the Covenant and embodies safeguards that are well recognised in international law. It is a right concerned primarily with physical liberty. It is intended to operate in a different manner to article 7 of the *Canadian Charter of Rights and Freedoms* which guarantees the right to "life, liberty and security of the person" in that the Victorian provision is not intended to extend to such matters as a right to bodily integrity, personal autonomy or a right to access medical procedures.

Parliament does not intend to create any right to compensation for a person who claims that he or she has been unlawfully arrested or detained.



Clause 22 provides for humane treatment when a person is deprived of liberty.

Sub-clause (1) establishes the right of all persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person.

Sub-clause (2) establishes a right of an accused person who has been detained or a person detained without charge, to be segregated from convicted persons, except where reasonably necessary.

Sub-clause (3) establishes a right of an accused person who has been detained or a person detained without charge, to be treated in a way that is appropriate for a person who has not been convicted.

This clause is modelled on article 10 of the Covenant. Reference to article 10(3) of the Covenant has been specifically excluded in the Charter. Clause 22 broadens article 10 of the Covenant by requiring humane treatment for accused persons and persons who have been detained without charge. These rights may already be recognised under specific Victorian laws. For example, section 13ZB of the **Terrorism (Community Protection) Act 2003** provides that persons subject to preventative detention orders must be treated with humanity, respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment.

Clause 23 provides for certain rights for children in the criminal process.

Sub-clause (1) establishes the right of an accused child who has been detained or a child detained without charge to be segregated from accused and convicted adults.

Sub-clause (2) establishes the right of an accused child to be brought to trial as quickly as possible. This is a more onerous obligation than the requirement of trial "without unreasonable delay" provided in clauses 21(5)(b) and 25(2)(c).

Sub-clause (3) establishes the right of a child who has been convicted of an offence to be treated in a way that is appropriate for his or her age.

This clause is modelled on article 10(2)(b) of the Covenant.

Clause 24 provides for the right to a fair hearing.

Sub-clause (1) establishes that a person charged with a criminal offence or a party to a civil proceeding has a right to have the charge or proceeding decided by a competent, independent or impartial court or tribunal after a fair and public hearing.

Sub-clause (2) provides an exception to the right outlined in sub-clause (1). Under this sub-clause, a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than the Charter. The accompanying note to this sub-clause lists a number of Acts in which exclusion of persons from a hearing is permitted on various grounds. The Acts listed in this note are not intended to be exhaustive.

Sub-clause (3) establishes a requirement on courts and tribunals to make public all judgments and decisions. The requirement does not apply if the best interests of a child or a law other than the Charter requires or permits otherwise.

This clause is modelled on article 14(1) of the Covenant.

Clause 25 provides for various rights in criminal proceedings.

Sub-clause (1) establishes the right of a person charged with a criminal offence to be presumed innocent until proved guilty according to law. This sub-clause should be read together with clause 49(2) which provides that the Charter does not affect any proceedings commenced or concluded before the commencement of Part 2.

Sub-clause (2) outlines the minimum guarantees a person charged with a criminal offence is entitled to receive, without discrimination.

Sub-clause (3) establishes the right of a child who is charged with a criminal offence to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

Sub-clause (4) establishes the right of any person convicted of a criminal offence to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

This clause is modelled on article 14(2) to (5) of the Covenant. The minimum guarantees outlined in sub-clause (2) are based on those enumerated in article 14(3) of the Covenant. A number of intentional modifications have been made to the minimum guarantees. In relation to legal assistance, references have been made in sub-clause (2)(d), (e) and (f) to the Victorian **Legal Aid Act 1978**. It is Parliament's intention that any rights to legal assistance contained in the Charter are consistent with existing rights under that Act.

It is also Parliament's intention to recognise that some people charged with a criminal offence will need, and are entitled to, specialised communication tools and technology in order to understand the nature and the reason for the criminal charge and to participate in the judicial process. Sub-clause (2)(j) has been drafted accordingly.

Sub-clause (2)(g) qualifies the rights of an accused person in relation to the attendance and examination of witnesses by including the words "unless otherwise provided for by law". This qualification is intended to make it clear that current rules in relation to the cross-examination of certain witnesses, such as children and victims of sexual assault, continue to apply. In addition, the rights in this clause may be subject under law to such reasonable limitations as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom (see clause 7).

Clause 26 establishes a right not to be tried or punished more than once for an offence for which that person has already been finally convicted or acquitted in accordance with law. This clause is modelled on article 14(7) of the Covenant. The protection from double jeopardy is a well-supported safeguard in Victoria.

Clause 27 provides for certain rights in respect of retrospective criminal laws.

Sub-clause (1) prohibits a person from being found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

Sub-clause (2) prohibits a penalty being imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

Sub-clause (3) provides that if a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

Sub-clause (4) provides that this clause does not affect the trial and punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done. The purpose of this provision is to ensure that a person may still be tried and punished for crimes under international law, as long as the offences existed under international law at the time they were committed or omitted.

This clause is modelled on article 15 of the Covenant.

## **PART 3—APPLICATION OF HUMAN RIGHTS IN VICTORIA**

Part 3 of the Charter outlines the functions of Parliament, courts and tribunals and public authorities under the Charter.

Division 1 concerns the role of Parliament in the scrutiny of new legislation. It requires a statement of compatibility to be prepared in respect of all Bills introduced into Parliament.

Division 2 provides that Parliament may override human rights in exceptional circumstances by express declaration in an Act.

Division 3 concerns the role of courts and tribunals in interpreting laws. It requires statutory provisions to be interpreted in a manner that is compatible with human rights so far as it is possible to do so in accordance with the purpose of the provision. This Division also provides an avenue for the referral to the Supreme Court of certain questions arising in a proceeding before a court or tribunal. Two types of questions may be referred under the Charter to the Supreme Court. First, the Charter provides for the referral of questions of law relating to the application of the Charter. Second, the Charter provides for the referral of questions arising with respect to the interpretation of a statutory provision in accordance with the Charter.

In some cases a statutory provision may not be able to be interpreted consistently with human rights. This Division provides that the Supreme Court may make a declaration of inconsistent interpretation in such circumstances. The process by which this may occur is outlined in this Division, as is the action to be taken where a declaration of inconsistent interpretation is made.

Division 4 concerns the conduct of public authorities and makes it unlawful for public authorities to act in a manner that is incompatible with a human right or to fail to give proper consideration to a human right protected in the Charter.

### **Division 1—Scrutiny of New Legislation**

Clause 28 provides for statements of compatibility to be prepared in respect of new Bills introduced into Parliament.

Sub-clause (1) establishes a requirement on a member of Parliament who proposes to introduce a Bill into a House of Parliament to cause a statement of compatibility to be prepared in respect of that Bill.

Sub-clause (2) provides that a member of Parliament introducing a Bill, or another member acting on his or her behalf, must cause the statement of compatibility to be laid before Parliament. The Charter requires this to occur before the member gives his or her second reading speech on the Bill. The accompanying note clarifies the application of the requirements in sub-clauses (1)

and (2) to both Ministers introducing government Bills and members of Parliament introducing non-government Bills.

Sub-clause (3) establishes the scope of the requirement outlined in sub-clause (1). It provides that a statement of compatibility must state whether, in the member's opinion, the Bill is compatible with human rights, and if so, how it is compatible, and, if the member is of the opinion that any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

Sub-clause (4) provides that a statement of compatibility made under this section is not binding on any court or tribunal. This provision makes clear that the Supreme Court has an independent role in determining questions of law involving the application of the Charter and questions with respect to the interpretation of statutory provisions, including provisions for which a statement of compatibility has been made, in accordance with this Charter.

Clause 29 provides that a failure to comply with the requirements in the Charter on statements of compatibility in respect of Bills does not affect the validity, operation or enforcement of any ensuing Act or any other statutory provision.

This clause confirms Parliament's intention that clause 28 is not to be regarded as a constitutional "manner and form" provision for the passing of legislation. A failure to comply with the Charter will not affect the validity of any Bill that becomes an Act.

Clause 30 establishes a requirement for the Scrutiny of Acts and Regulations Committee to consider any Bill introduced into Parliament and to report to Parliament as to whether the Bill is inconsistent with human rights. The accompanying note explains that this requirement also extends to statutory rules.

### **Division 2—Override Declaration**

Clause 31 provides that Parliament may, in an Act, override the Charter in exceptional circumstances. The operation of this clause is intended to occur when Parliament is introducing new legislation and exceptional circumstances exist which require Parliament to depart from the Charter in a specific manner and for a fixed period of time. Examples of exceptional circumstances would be threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria.

Sub-clause (1) establishes Parliament's right to override the Charter through express declaration. Overriding the Charter may occur either in an Act with Parliament stating that that Act or a provision of that Act has effect despite the Charter, or by Parliament declaring in an Act that another Act or a provision of another Act will operate notwithstanding the Charter.

Sub-clause (2) provides that if an override declaration is made in respect of an Act or a provision of an Act, the declaration extends to any subordinate instrument made under or for the purpose of that Act or provision.

Sub-clause (3) establishes a requirement on a member of Parliament introducing a Bill containing an override declaration to make a statement to the Legislative Council or the Legislative Assembly explaining the exceptional circumstances that justify the inclusion of the override declaration.

Sub-clause (4) makes explicit Parliament's intention that an override declaration will only be made in exceptional circumstances.

Sub-clause (5) outlines when a statement under sub-clause (2) must be made.

Sub-clause (6) sets out the effect of an override declaration. To the extent of the declaration, the Charter will not apply to the Act or provision for which the override declaration has been made. This includes the interpretation clause outlined in clause 32 of the Charter. The accompanying note to this sub-clause clarifies that as the Charter has no application to an Act or provision for which an override declaration has been made, the Supreme Court cannot give a declaration of inconsistent interpretation under clause 36 in respect of that Act or provision. It also explains that the requirement under section 32 to interpret statutory provisions compatibly with human rights does not apply to a statutory provision for which an override declaration has been made.

Sub-clause (7) provides that a provision of an Act containing an override declaration expires after five years. The effect of the override declaration is that for five years from the date of the override declaration, the Charter will not apply to the Act or provision for which the override declaration has been made.

Sub-clause (8) permits Parliament to re-enact an override declaration at any time. It also establishes that all of the provisions of this clause will apply to any re-enacted declaration. This means that for a re-enacted declaration Parliament must follow the same procedures as for the initial override declaration.

Sub-clause (9) provides that a failure to comply with the procedure in the Charter for an override declaration will not affect the validity, operation or enforcement of any ensuing Act or any other statutory provision.

### **Division 3—Interpretation of Laws**

Clause 32 provides for certain rules of statutory interpretation under the Charter.

Sub-clause (1) establishes the requirement that courts and tribunals must interpret all statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the statutory provision. The object of this sub-clause is to ensure that courts and tribunals interpret legislation to give effect to human rights. The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.

Sub-clause (2) permits courts and tribunals to consider international law and judgments of domestic, foreign and international courts and tribunals relevant to a human right in reading and giving effect to a statutory provision.

It is intended that sub-clause (2) will operate as a guide, so that a court or tribunal may examine international law and the judgments of foreign and international courts and tribunals relevant to the human rights in interpreting the meaning and scope of the human rights in Part 2 as formulated in that Part.

Under sub-clause (2), a court or tribunal may examine international conventions, international customs as evidence of a general practice accepted as law, the general principles of law recognised by civilized nations, and (as subsidiary means) judicial decisions and teachings of the most highly qualified publicists of various nations (see article 38 of the *Statute of the International Court of Justice*). Decisions of the International Court of Justice, European Court of Justice, Inter-American Court of Human Rights and United Nations treaty monitoring bodies including the Human Rights Committee, will be particularly relevant. The clause also permits consideration of judgments of domestic and foreign courts and tribunals relevant to a human right when interpreting a statutory provision. A number of jurisdictions have incorporated international human rights into domestic law. Decisions from courts in these jurisdictions including the Australian Capital Territory, Canada,

New Zealand, South Africa and the United Kingdom may be relevant.

Sub-clause (3) confirms that an Act or provision of an Act, or a subordinate instrument or provision of a subordinate instrument, will remain valid even if they are incompatible with a human right. The same result will apply to a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right if the Act under which it was made permitted it to be so made. The corollary of this is that if a subordinate instrument is incompatible with human rights and the Act under which it was made did not enable the incompatibility with human rights, the relevant provision of the subordinate instrument will not be valid as it would not have been empowered to be incompatible with the human right.

Clause 33 allows for certain questions to be referred to the Supreme Court of Victoria.

Sub-clause (1) outlines the process by which a referral to the Supreme Court may occur. A referral may be made where, in a proceeding before a court or tribunal, a question of law arises relating to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter. This sub-clause requires that in order for a question to be referred a party must make an application for referral and the (original) court or tribunal hearing the matter must consider that the question is appropriate for determination by the Supreme Court. A referral cannot be made without satisfying both of these requirements.

Sub-clause (2) outlines the process that is to occur if a referral is made. It provides that if a question has been referred to the Supreme Court, the court or tribunal which made the referral must not make a determination to which the question is relevant while the referral is pending or proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.

Sub-clause (3) provides that if a question is referred by the Trial Division of the Supreme Court the referral is to be made to the Court of Appeal.

Sub-clause (4) provides that a question may only be referred to the Supreme Court in accordance with the procedure outlined in this clause. This is despite anything contained in any other Act regarding referrals of questions to the Supreme Court.



Clause 34 establishes the Attorney-General's unqualified right to intervene in proceedings involving the Charter.

Sub-clause (1) establishes the Attorney-General's right to intervene in proceedings in which a question of law arises relating to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter. It also provides that the Attorney-General may be joined as a party to that proceeding. Whether the Attorney-General exercises the right to intervene is a matter for his or her discretion.

Sub-clause (2) clarifies that if the Attorney-General intervenes in a proceeding under this clause, then, for the purposes of the institution and prosecution of an appeal from an order made in that proceeding, the Attorney-General may be taken to be a party to that proceeding.

Clause 35 contains requirements for the giving of notice to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission.

Sub-clause (1) requires a party to a proceeding to give notice to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission if, in a Supreme Court or County Court proceeding, a question of law arises that relates to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter, or if a question is referred to the Supreme Court under clause 33.

Sub-clause (2) dispenses with this requirement in two instances. Where the State is a party to the proceeding, no notice is required to be given to the Attorney-General. Similarly, where the Commission is a party to the proceeding, a party need not give notice to the Commission.

Clause 36 provides for the Supreme Court to issue a declaration of inconsistent interpretation in certain circumstances.

Sub-clause (1) outlines the application of the clause. This clause applies in three instances. Paragraph (a) provides that the section applies if in a Supreme Court proceeding a question of law arises that relates to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter. Paragraph (b) provides that the section applies if the Supreme Court has had a question referred to it under clause 33. Paragraph (c) provides that the section applies if an appeal before the Court of Appeal relates to a question of kind referred to in paragraph (a).

Sub-clause (2) establishes that the Supreme Court has the right to issue a declaration of inconsistent interpretation. The requirements for issuing a declaration of inconsistent interpretation are outlined in this sub-clause. Subject to any relevant override declaration, the Supreme Court must be of the opinion that a statutory provision cannot be interpreted consistently with a human right.

Sub-clause (3) imposes further requirements on the Supreme Court in issuing a declaration of inconsistent interpretation. It provides that if the Supreme Court is considering making a declaration, it must ensure that notice is given to the Attorney-General and the Commission that the Supreme Court is considering making such a declaration. The Supreme Court may give the notice itself or may require a party to the relevant proceeding to give the notice.

Sub-clause (4) provides that the Supreme Court must not make a declaration of inconsistent interpretation unless it is satisfied first, that prior notice in the prescribed form has been given to the Attorney-General and the Commission and that a reasonable opportunity has been given to the Attorney-General and Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.

Sub-clause (5) provides that a declaration of inconsistent interpretation does not affect the validity, operation or enforcement of the statutory provision in respect of which the declaration is made, or create in any person a legal right or give rise to any civil cause of action. This sub-clause confirms Parliament's clear and unequivocal intention that the Charter is not intended to create any independent cause of action or provide remedies for breach of the Charter's provisions.

Sub-clause (6) requires the Supreme Court to cause a copy of any declaration of inconsistent interpretation to be given to the Attorney-General within 7 days after any appeal is finalised or if no appeal is made, within 7 days after the period provided for the lodging of an appeal has ended.

Sub-clause (7) requires the Attorney-General to give a copy of the declaration of inconsistent interpretation to the Minister administering the statutory provision in respect of which the declaration was made, as soon as reasonably practicable after receiving it, unless the Attorney-General is the relevant Minister.

Clause 37 provides for the action to be taken on a declaration of inconsistent interpretation. It establishes a requirement for the Minister administering the statutory provision in respect of which a declaration of inconsistent interpretation has been made to take certain steps within 6 months of receiving the declaration. Two acts are required. Paragraph (a) requires the Minister to prepare a written response to the declaration. Paragraph (b) requires that the Minister cause a copy of the declaration, together with his or her written response to it, to be laid before each House of Parliament and published in the Government Gazette. These requirements are intended to ensure that appropriate action is taken with respect to any declaration of inconsistent interpretation that may be issued by the Supreme Court.

#### **Division 4—Obligations on Public Authorities**

Clause 38 places obligations on public authorities.

Sub-clause (1) prohibits public authorities from acting in a way that is incompatible with human rights. It also prohibits public authorities from failing to give proper consideration to relevant human rights when making a decision. This provision is modelled on section 6 of the United Kingdom *Human Rights Act 1998* and is intended to ensure that public authorities make decisions and act compatibly with human rights. Note that in clause 3(1) "act" is defined to include a failure to act and a proposal to act.

Sub-clause (2) qualifies the prohibition in sub-clause (1). It provides that the prohibition does not apply if the public authority could not reasonably have acted differently or made a different decision as a result of a statutory provision or a provision made by or under an Act of the Commonwealth, or otherwise under law. An example is provided in this sub-clause to guide courts and tribunals in the interpretation of the prohibition on public authorities. This sub-clause is intended to exonerate public authorities who act to give effect to a statutory provision that is incompatible with a human right in circumstances where they could not reasonably have acted differently or made a different decision.

Sub-clause (3) clarifies that this clause does not apply to an act or decision of a private nature.

Sub-clause (4) further qualifies the prohibition in sub-clause (1). It provides that the prohibition does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body from acting in conformity with its religious doctrines, beliefs or principles. It will apply where a religious body may be a public authority when undertaking a public function (e.g. denominational hospitals), and also where a religious body may be interacting with a public authority, for example where the religious body is funded or licensed by the public authority to undertake certain functions. The exemption is only in respect of sub-clause (1) and does not affect the application of other laws that may be relevant to the religious body in carrying out those functions.

Sub-clause (5) contains the definition of "religious body" in this clause. "Religious body" is defined to mean a body established for a religious purpose or an entity that establishes, or directs, controls or administers an educational or other charitable entity that is conducted in accordance with religious doctrines, beliefs or principles.

Clause 39 sets out guidance regarding legal proceedings that may be available in relation to an unlawful act or decision of a public authority.

Sub-clause (1) provides that if a person has a right to seek relief or a remedy *otherwise than because of this Charter*, founded on the unlawfulness of some conduct by a public authority, then any unlawfulness generated by this Charter (as set out in clause 38) may be a further ground in the cause of action. This clause does not create any new or independent right to relief or a remedy if there is nothing more than a breach of a right protected under Part 2. In particular, the clause does not confer any entitlement to an award of damages arising from nothing more than a breach of a right protected under Part 2, nor are any damages to be awarded referable to the breach of a right protected under Part 2. The unavailability of damages is further reinforced by sub-clause (3).

Sub-clause (2) confirms that the Charter does not displace a person's right to seek any remedy in respect of an act or decision of a public authority, including a right to seek judicial review, a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

Sub-clause (3) clarifies that a person is not entitled to be awarded any damages because of a breach of this Charter. This confirms Parliament's intention that the Charter does not create any independent cause of action or any independent forms of relief.

Sub-clause (4) provides that nothing in this clause affects any right a person may have to damages apart from the operation of this clause.

#### **PART 4—VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION**

Part 4 outlines the functions conferred on the Victorian Equal Opportunity and Human Rights Commission in relation to the Charter. It is intended that the Commission will act as an independent monitor of the operation of the Charter.

Clause 40 establishes the Commission's unqualified right to intervene in proceedings involving the Charter.

Sub-clause (1) establishes the Commission's right to intervene in proceedings in which a question of law arises that relates to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter. It also provides that the Commission may be joined as a party to that proceeding. Whether the Commission exercises the right to intervene is a matter for its discretion.

Sub-clause (2) clarifies that if the Commission intervenes in a proceeding under this clause, then, for the purposes of the institution and prosecution of an appeal from an order made in that proceeding, the Commission may be taken to be a party to that proceeding.

Clause 41 outlines the functions of the Victorian Equal Opportunity and Human Rights Commission under the Charter. These functions are broadly based on the functions of the Australian Capital Territory's Human Rights Commissioner with a number of adaptations to the Victorian context.

The functions are—

- to present to the Attorney-General an annual report that examines the operation of the Charter, including its interaction with other laws, all declarations of inconsistent interpretation made during the year and all override declarations made during the year;

- when requested by the Attorney-General, to review the effect of Victorian law and the common law on human rights, and report in writing to the Attorney-General on the results of the review;
- when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights;
- to provide education about human rights and the Charter;
- to assist the Attorney-General in the review of the Charter under clauses 44 and 45. These reviews are to be undertaken after the first 4 and 8 years of the Charter's operation;
- to advise the Attorney-General on anything relevant to the operation of the Charter; and
- any other functions given to it under the Charter or any other Victorian law.

The Commission's annual report is expected to focus on key aspects of the Charter's operation as a conduit for institutional dialogue.

In relation to paragraph (c), it is intended that the Commission will work co-operatively with the public authority in making a comprehensive assessment of the authority's programs and practices.

The Commission also has a right to intervene in certain proceedings (see clause 40).

Clause 42 grants the Commission a general power to perform its functions. The Commission is empowered to do all things that are necessary or convenient to be done for or in connection with the performance of its functions under the Charter. This provision ensures that the Commission has the requisite independence and flexibility required to perform the functions conferred upon it by Parliament.

Clause 43 provides for reports of the Commission to be laid before Parliament.

Sub-clause (1) establishes a requirement for the Attorney-General to cause a copy of any Commission report prepared under clause 41(a) or (b) to be laid before both Houses of Parliament. This clause requires this to occur on or before the 6th sitting day of the House of Parliament after receipt of a Commission report.

Sub-clause (2) allows the Attorney-General to amend a report in certain circumstances. Amendment is permitted where the Attorney-General considers it necessary to protect a person's identity or to protect the public interest.

Sub-clause (3) establishes a requirement on the Attorney-General if a Commission report is amended to present a statement to Parliament stating that the report has been amended.

#### **PART 5—GENERAL**

Part 5 contains a number of general provisions including requirements for the Attorney-General to cause reviews to be made of the Charter. It also grants the Governor in Council a power to make regulations and provides for consequential amendments, savings provisions and transitional provisions.

Clause 44 provides for the Charter to be reviewed after 4 years of operation.

Sub-clause (1) establishes an obligation on the Attorney-General to cause a review to be undertaken of the first 4 years of operation of the Charter. It obliges the Attorney-General to cause a report of the review to be presented to Parliament on or before 1 October 2011. This clause is not intended to preclude any review or proposals for amendment that might be made before that date.

Sub-clause (2) provides a list of matters to be considered in the Attorney-General's review. These include whether the Charter should include additional human rights including rights under the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination against Women*, whether the right to self-determination should be included, whether auditing of government departments should be made mandatory and whether further provision should be made in the Charter with respect to proceedings that may be brought and the remedies available under the Charter in relation to unlawful acts or decisions of public authorities.

The intention of this clause is to ensure that the Charter remains flexible and effective in supporting community values and aspirations in Victoria.

Clause 45 provides for the Charter to be reviewed after 8 years of operation.

Sub-clause (1) establishes an obligation on the Attorney-General to cause a review to be undertaken of the 5th to 8th years of operation of the Charter. It obliges the Attorney-General to cause a report of the review to be presented to Parliament by 1 October 2015. This clause is not intended to preclude any review or proposals for amendment that might be made before that date.

Sub-clause (2) imposes an obligation on the Attorney-General to include in the review a recommendation as to whether further reviews of the Charter are necessary.

Clause 46 empowers the Governor in Council to make regulations under the Charter.

Clause 47 establishes that the Charter makes consequential amendments to a number of Acts listed in the Schedule to the Charter.

Clause 48 provides that the Charter does not affect any law applicable to abortion or child destruction, whether before or after the commencement of Part 2. This encompasses both statute law and any common law interpretation of statute law.

Clause 49 makes transitional provisions.

Sub-clause (1) establishes that the Charter applies to all Victorian Acts and subordinate instruments regardless of when they commenced.

Sub-clause (2) restricts the application of the Charter to legal proceedings commenced after 1 January 2008. This means that the Charter may not be relied on in any legal proceedings commenced before that date.

Sub-clause (3) provides that the obligations on public authorities in the Charter do not apply to any act or decision made by a public authority before 1 January 2008.



### Schedule—Consequential Amendments

The Schedule outlines certain consequential amendments made in the Charter, as follows—

- The **Equal Opportunity Act 1996** is amended to change the name of the Equal Opportunity Commission to the Victorian Equal Opportunity and Human Rights Commission and to refer to the new functions conferred on the Victorian Equal Opportunity and Human Rights Commission by the Charter.
- The **Ombudsman Act 1973** is amended to confer upon the Ombudsman a power to enquire into or investigate whether any administrative action is incompatible with the human rights set out in this Charter.
- The **Parliamentary Committees Act 2003** is amended to provide for the new functions conferred on the Scrutiny of Acts and Regulations Committee by the Charter.
- The **Police Regulation Act 1958** is amended to provide that one of the objects of the Director of the Office of Police Integrity is to ensure that members of the force have regard to the human rights contained in the Charter.
- The **Public Administration Act 2004** is amended to include human rights in the list of public sector values and public sector employment principles.
- The **Racial and Religious Tolerance Act 2001** is amended to take account of the change of name of the Equal Opportunity Commission to the Victorian Equal Opportunity and Human Rights Commission.
- The **Subordinate Legislation Act 1994** is amended to require a human rights certificate to be prepared in respect of all proposed statutory rules. The required content of a human rights certificate is outlined in the amendment provisions and an exemption is provided for certain statutory rules, such as court rules.
- The **Victorian Civil and Administrative Tribunal Act 1998** is amended to take account of the change of name of the Equal Opportunity Commission to the Victorian Equal Opportunity and Human Rights Commission.