

**Victorian Government submission to the Scrutiny of
Acts and Regulations Committee's review of the
Charter of Human Rights and Responsibilities Act
2006**

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Abbreviations

2005 Consultation Committee Report	<i>Responsibilities and Respect: The Report of the Human Rights Consultation Committee (2005)</i>
ACT HRA	<i>Human Rights Act 2006 (ACT)</i>
Charter Act	<i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i>
Charter Act Guidelines	<i>Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria</i>
DEECD	Department of Education and Early Childhood Development
DH	Department of Health
DHS	Department of Human Services
DOJ	Department of Justice
DOT	Department of Transport
DPC	Department of Premier and Cabinet
HRC	Human Rights Committee
HRU	Human Rights Unit, Department of Justice
ICCPR	<i>International Covenant on Civil and Political Rights</i>
LLPOT	Legal and Legislative Policy Officer Training
MHRB	Mental Health Review Board
OCPC	Office of Chief Parliamentary Counsel
SARC	Scrutiny of Acts and Regulations Committee
SLACHRR Act	<i>Statute Law Amendment (Charter of Human Rights and Responsibilities) Act 2009</i>
SoC	Statement of Compatibility
UK HRA	<i>Human Rights Act 1998 (UK)</i>
UN	United Nations
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity & Human Rights Commission
VGSO	Victorian Government Solicitor's Office

1. Introduction

1. On 19 April 2011, the Governor in Council referred the following terms of reference to the Scrutiny of Acts and Regulations Committee (SARC):

To inquire into and report by 1 October 2011 on the first four years of operation of the Charter of Human Rights and Responsibilities Act 2006 (**the Charter Act**), including:

1. the matters referred to in section 44(2) of the Charter Act
2. the effects of the Charter Act on
 - (a) the development and drafting of statutory provisions
 - (b) the consideration of statutory provisions by Parliament
 - (c) the provision of services, and the performance of other functions, by public authorities
 - (d) litigation and the roles and functioning of courts and tribunals
 - (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights
3. the overall benefits and costs of the Charter Act; and
4. options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria.

In carrying out its inquiry, the Committee is asked to take note of, and make use of as it sees fit, the evidence and findings of, and government responses to, previous inquiries and reports concerning rights and responsibilities.

Source: Victoria Government Gazette, No. S 128, 19 April 2011

2. The Victorian Government submission focuses primarily on the second and third parts of the Terms of Reference – the effects of the Charter Act within government and the benefits and costs of the Charter Act to government.
3. This submission seeks to provide factual information to SARC about the operation and effects of the Charter Act within government. The submission does not seek to canvass matters of policy. Accordingly, the submission does not address the matters referred to in the first Term of Reference. Nor does it address the matters referred to in the fourth Term of Reference, except in relation to issues of a technical nature. The submission also does not address Term of Reference 2(e).
4. The information contained in the submission concerns government departments as they are structured at the time of writing. It does not concern statutory authorities or other public authorities. The submission does not examine the effect of the Charter Act on Victoria Police, except to the extent that certain legal and implementation costs are included, as Victoria Police is operationally independent of government.

5. The remainder of this submission is divided into three sections, each responding to one of the Terms of Reference of the review. Section 2 addresses Terms of Reference 2(a) – 2(d). Section 3 addresses Term of Reference 3 on the overall benefits and costs of the Charter Act within government. Section 4 responds to Term of Reference 4, focusing on options for reform or improvement related to technical issues that have arisen in the implementation of the Charter Act.

2. Effects of the Charter Act on Government

2.1 Development and drafting of statutory provisions

6. The Charter Act has influenced three aspects of legislative development and drafting:
 - audit and amendment of existing legislation to ensure compatibility with rights in the Charter Act;
 - development and drafting of statutory provisions that are compatible with rights in the Charter Act (policy development); and
 - preparation and tabling of Statements of Compatibility (**SoCs**) and human rights certificates.

(a) Audit and amendment of existing legislation

7. In 2007, as part of the preparation for the commencement of the Charter Act, the Department of Justice (**DOJ**) initiated an audit of legislation and policies, in consultation with government departments, to assess their compatibility with rights in the Charter Act.
8. The details of this audit, conducted under the previous government and subject to cabinet confidentiality, are not available for the purposes of this submission. Rather, this section is based only on information that was publicly available prior to the change in government and was not cabinet-in-confidence.
9. Allocation of responsibility for the conduct of the audit was determined by individual departments but, on the whole, rested primarily with legal and legislative policy officers.
10. Some departments sought external advice from the VGSO as part of the audit. External advice was typically sought in relation to audits of complex legislation and by departments who needed to review a high volume of laws identified as having a higher risk of incompatibility with the Charter Act.
11. Some laws were not reviewed as part of the initial audit because they were subject to broader, ongoing reviews and community consultation. DOJ, for instance, deferred the review of six laws originally identified as high priority because of existing reviews. The reviews of the *Mental Health Act 1986* and the *Drugs, Poisons and Controlled Substances Act 1981* are examples of reviews deferred by government departments. Some of the laws that were deferred were, however, assessed for compatibility with the Charter Act as part of those broader reviews.

12. Most of the audited legislation was considered to be compatible with rights in the Charter Act.¹ However, provisions in a number of laws were identified as potentially incompatible. A number of different approaches were adopted to respond to potential incompatibilities with the Charter Act that were identified during the audit process.
13. One approach was the enactment of the *Statute Law Amendment (Charter of Human Rights and Responsibilities) Act 2009 (SLACHRR Act)*.
14. The SLACHRR Act amended seven laws that contained provisions identified during the audit as potentially incompatible with rights in the Charter Act. A summary of amendments made by the SLACHRR Act is set out below:

Legislation amended	Section(s) amended	Purpose of amendment
<i>Australian Grands Prix Act 1994</i>	51(5)(a), 51(5)(b)	To change the onus on the defendant from being legal to evidential in relation to an offence against a regulation made under the Act
<i>Education and Training Reform Act 2006</i>	2.4.31(2)	To remove age discrimination
<i>Fair Trading Act 1999</i>	4, 14	To change the onus from being legal to evidential in relation to an offence of making a representation about a future matter and false testimonials
<i>Forests Act 1958</i>	59, 61	To remove reverse onus provisions contained in offences relating to protected forests
<i>Project Development and Construction Management Act 1994</i>	43	To change the wording of an offence relating to the disclosure of confidential information to make it consistent with the freedom of expression
<i>Transport Act 1983</i>	2288ZL, 228ZN	To change the onus from being legal to evidential in relation to an offence of failing to comply with a direction of, or to give an address to, a transport safety officer
<i>Victorian Urban Development Authority Act 2003</i>	72	To change the wording of an offence relating to the disclosure of confidential information to make it consistent with the freedom of expression

¹ Victorian Government, *Submission to the National Human Rights Consultation* (2009), para. 4.11, available at: [http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/E9E060945335451DCA25760700160C27/\\$file/victorian_government_AGWW-7SX4WY.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/E9E060945335451DCA25760700160C27/$file/victorian_government_AGWW-7SX4WY.pdf) (reviewed on 5 July 2011).

15. As a result of the compatibility review, changes were made to specific legislation identified as potentially incompatible. For example:

- The *Superannuation Legislation Amendment Act 2010* amended seven superannuation Acts and five Acts related to the judiciary to ensure, among other things, that they did not discriminate on the grounds of sexual orientation or age and were compatible with the rights to non-discrimination and equality in section 8 of the Charter Act;
- The Major Sporting Events Bill 2009 substantially revised a statutory provision that effectively prohibits conduct at a major sporting event that is disruptive or interrupts the event, to be more compatible with the freedom of expression in section 15 of the Charter Act. The SoC stated that:

This provision establishes a more objective test than the existing equivalent provision in section 15 of the *Major Events (Crowd Management) Act 2003*. It focuses more clearly on disruption of the event and introduces a trigger related to safety. Whereas a person may be asked to leave for “causing annoyance to spectators” under section 15, clause 84 requires an authorised officer to believe a person is causing “unreasonable disruption or unreasonable interference to spectators of the event or persons engaged in the conduct or management of the event”. This is important not only to minimise the limitation of the right ... but because more significant consequences may result if a person who is directed to leave under this clause fails to do so immediately or re-enters or attempts to re-enter.²

- The Transport Legislation Miscellaneous Amendments Bill 2009 amended a number of Acts (e.g. *Marine Act 1988*) to enhance their compatibility with Charter Act rights (e.g. right to privacy). One of the amendments to the *Marine Act 1988* introduced by the Bill concerned the introduction of the Australian Builders Plate standard and the monitoring of vessels for compliance.³ Citing the right to privacy in section 13(a) of the Charter Act, the SoC stated that:

[t]he bill allows for the disclosure or use of the information collected in the monitoring process by Consumer Affairs Victoria to assist with monitoring compliance with the APB Standard and to bring proceedings for an offence under the *Fair Trading Act 1999*. The amendments to the scheme do not provide for disclosure or use of information in any other circumstance.

16. Further approaches included:

- consideration of Charter Act compatibility in drafting legislation replacing laws originally deferred for review; and

² SoC, Major Sporting Events Bill 2009.

³ The SoC explains: “[w]ith the purpose of enhancing boat safety, it requires a fixed plate to be attached to recreational vessels specifying uniform safety, design and construction information. Marine Safety Victoria will be responsible for monitoring vessels for compliance and be authorised to audit and collect information for the purpose of checking compliance with Victoria’s Fair Trading (Safety Standard) Regulations”.

- addressing potential incompatibilities with the Charter Act at an operational level.
17. As not all laws and regulations were audited in preparation for the entry into force of the Charter Act, it is possible that certain statutory provisions that were potentially incompatible with the Charter Act remain on the statute books. Many of the laws and regulations not included in the initial audit have, however, since been assessed for compatibility as part of legislative and regulatory reviews that occur from time to time.
- (b) Addressing Charter Act issues in the development and drafting of statutory provisions**
18. Following the introduction of the Charter Act, three initiatives were undertaken to develop the capacity of relevant officers to address rights issues as part of the process of developing and drafting statutory provisions. These were:
- publication and dissemination of the Charter Act Guidelines;⁴
 - development of the Human Rights Portal; and
 - establishment of a Charter Act training programme for legal and legislative policy officers.
19. In addition, individual departments introduced their own initiatives aimed at providing targeted information about their obligations under the Charter Act. Many of these initiatives are documented and described in the annual Charter Act reports of the Victorian Equal Opportunity & Human Rights Commission (**VEOHRC**) and are, therefore, not discussed here in detail.⁵ Examples include training administered by the Human Rights Coordinator in the Department of Education and Early Childhood Development (**DEECD**) and training provided by the Department of Transport (**DOT**) to authorised officers employed by bus, train and tram operators.

⁴ Department of Justice, *Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria* (2008), available at: <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+internet/home/your+rights/human+rights/human+rights+charter/justice+++charter+guidelines> (reviewed on 5 July 2011).

⁵ See VEOHRC, 2007 Report on Charter Act, pp 12-19; VEOHRC, 2008 Report on Charter Act, pp 19-28; VEOHRC, 2009 Report on Charter Act, pp 19-32; VEOHRC, 2010 Report on Charter Act, pp 26-29; VEOHRC, 2010 Compilation Report on Charter Act, pp 34-38, 50-54, 185-186, 199-202.

Charter Act Guidelines

20. In 2008, the Charter Act Guidelines were published to encourage early and systematic consideration of Charter Act issues in the policy development cycle. The intention behind the Guidelines was that they would help to:
- ensure that statutory provisions are developed efficiently and effectively to enhance Charter Act rights;
 - ensure that limitations of rights are reasoned and evidence-based and that less restrictive means of achieving the purpose of the statutory provision are given proper consideration;
 - ensure consistency in the application and interpretation of the Charter Act across government; and
 - promote efficiencies by establishing a common approach to Charter Act rights issues.
21. The Guidelines include a series of templates to assist officers to meet their obligations under the Charter Act, including SoC templates.
22. The Guidelines are available on the DOJ website⁶ and the Human Rights Portal (see below). The Guidelines are also used as a key resource in the Legal and Legislative Policy Officer Training (**LLPOT**), described below.

Human Rights Portal

23. In 2008, an online resource – the Human Rights Portal – was established to assist legal and legislative policy officers to develop statutory provisions that are compatible with the Charter Act. The Portal is intended as a supplement to the Charter Act Guidelines.⁷ Access was originally restricted to the Victorian Public Service but the Portal is now available for public access.
24. Between May and December 2010 there were 1,375 visits to the Portal.

Training for legal and legislative policy officers

25. In preparation for the commencement of the Charter Act on 1 January 2007 (for new legislation) and 1 January 2008 (for public authorities generally), an across-government education and training campaign was introduced to raise awareness and understanding of the Charter Act. The DOJ Human Rights Unit (**HRU**) also assisted individual departments with their own training on the Charter Act.

⁶ See Department of Justice:
<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+internet/home/your+rights/human+rights/human+rights+charter/justice+-+charter+guidelines> (reviewed on 5 July 2011).

⁷ See Human Rights Portal: <http://humanrights.vgso.vic.gov.au/>.

26. Training of legal and legislative policy officers was prioritised through initiatives such as LLPOT, in order to ensure that they had the necessary skills and knowledge to develop statutory provisions that are compatible with the Charter Act.
27. LLPOT was established in early 2007 and consists of an optional full-day course. The course is aimed at legal and legislative policy officers from across government.
28. In March 2010 LLPOT was expanded to include optional targeted training for new VPS graduates with a law degree, which has generally received positive feedback from participants.
29. Approximately 1,250 VPS staff have attended LLPOT since it commenced in early 2007. Over 45 graduates attended LLPOT between March 2010 and March 2011. A total of 193 VPS staff attended during the 2009 and 2010 calendar years.

Development and drafting of statutory provisions

30. Consideration of individual rights was already taken into account during the development of statutory provisions prior to the commencement of the Charter Act. This is illustrated by the *Consulting with Justice* policy that outlined a number of rights-related issues (e.g. rights of appeal and administrative review, same-sex relationships, privacy and inspection and enforcement powers) that legal and legislative policy officers across government should consult DOJ about when developing statutory provisions.
31. The intention of the Charter Act was to introduce a new and common framework into the existing policy development process, rather than to establish a new process for developing statutory provisions.⁸
32. The stages of the policy development process and their relationship to the Charter Act are summarised in the following table, which has been extracted from the Charter Act Guidelines.⁹

Legislative bid	Legislative bid forms must identify whether the proposal is likely to have human rights implications.	The Charter Guidelines provide policy triggers to assist in identifying rights issues.
Policy development	Prepare a human rights impact assessment of the proposal.	Officers should use the human rights impact assessment table ...
Drafting instructions	When lodging drafting instructions, officers must provide their human rights impact assessment to Parliamentary Counsel and the Human Rights Unit if the proposal limits any right in the Charter.	The Human Rights Unit will advise on the impact of the Charter on the proposal and whether it is appropriate to seek external advice on compatibility. ...

⁸ Charter Act Guidelines, p 25.

⁹ Charter Act Guidelines, p 50.

Approval in principle	AIP cabinet submissions must identify which human rights issues the proposed legislation raises; whether the Department has sought advice in relation to the proposal; and whether the proposal can be developed compatibly with the Charter	The analysis to Cabinet is a summary of your human rights impact assessment
Statement of compatibility	Officers must provide Parliamentary Counsel and the Human Rights Unit with a copy of the statement of compatibility for the Bill at least one week prior to lodging the BAC submission. Officers must also provide the Human Rights Unit with a copy of the Bill and the human rights impact assessment table.	... The Human Rights Unit will advise on the compatibility of the proposal with the Charter. Parliamentary Counsel will review the form of the statement and identify any omissions.
Bill at Cabinet	BAC submission must attach the statement of compatibility and include a recommendation that Cabinet approve the statement.	The 'Charter of Human Rights and Responsibilities impacts' section of the submission should state whether or not the Bill is compatible with the Charter and refer to the attached statement of compatibility.
Parliament & SARC	If the Bill is amended in the 1 st House of Parliament, the statement of compatibility may need to be updated before the Bill is introduced into the next House. SARC reports to Parliament on the compatibility of Bills. SARC will write to Ministers where a statement of compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe Charter rights.	Responses to adverse comments from SARC should be well prepared and based on an informed understanding of the Charter. Advice / assistance should be sought from the Human Rights Unit to ensure consistency across government.

33. The HRU was established as a specialist unit to support and assist government departments in developing and drafting statutory provisions that are compatible with the Charter Act. Advice related to the Charter Act and the development of statutory provisions constitutes a significant proportion of work undertaken by the HRU, though demand for advice fluctuates depending on such factors as the legislative agenda of the government. Government officers also often seek advice on the Charter Act from the VGSO throughout the process of developing statutory provisions in the same way as they seek external advice on other legal questions.
34. Many of the processes outlined above are necessarily unseen by those outside the executive branch of government, because they occur largely in the confidential policy development process before Bills are approved in Cabinet. For the same reasons, these impacts are also difficult to measure.

35. There are a number of examples which indicate the Charter Act has been considered as part of the legislative development process:
- The preamble to the *Family Violence Prevention Act 2008* states that Parliament recognises the principles that “family violence is a fundamental violation of human rights and is unacceptable in any community or culture”. The accompanying SoC stated that the Act promotes the right to protection of families and children in section 17 of the Charter Act and “indirectly” promotes the right to life in section 9 of the Charter Act;
 - The review of the Regulation of Supported Residential Services in Australia, conducted in 2008, considered the need to “make sure laws about supported residential services fit” with the Charter Act, among other relevant policy and legislation. The legislation introduced following the review, the *Supported Residential Services (Private Providers) Act 2010*, included provisions protecting the rights to be accorded to residents living in supported residential services (e.g. through the establishment of statutory occupancy rights to prevent unfair evictions);
 - The *Professional Boxing and Combat Sports Amendment Act 2008* removed a penalty of 12 months imprisonment for an offence of failing to complete a medical examination before and after a contest. The SoC stated that the legislation “promotes human rights by removing an inappropriately severe penalty for failure to undertake a compulsory pre or post-contest medical examination and replacing it with a practical and enforceable consequence – cancellation or suspension of registration”;
 - The *Traditional Owner Settlement Act 2010*, enabling legislation that creates a framework for agreement-making between the State of Victoria and a given Traditional Owner group entity for an area of Crown land, was, amongst other things, intended to reflect section 19(2) of the Charter Act.¹⁰ Section 19(2) sets out cultural rights of Aboriginal persons in Victoria, including rights to enjoy their identity and culture and to maintain and use their language; and
 - The review of the *Alcoholics and Drug Dependent Persons Act 1968* had regard to the rights in the Charter Act, particularly as to whether the Act embodied the principle in section 7(2) of the Charter Act of least restrictive means to achieve its purpose. Following the review, the *Severe Substance Dependence Treatment Act 2010* was enacted, which included a number of intended safeguards for people detained under the Act, including providing criteria for detention and treatment that

¹⁰ SoC, Traditional Owner Settlement Bill 2010.

require that there be no less restrictive means reasonably available to ensure the person receives treatment.

36. The commencement of the Charter Act did not necessitate any major changes to the established process for drafting statutory provisions, other than the requirement to prepare accompanying Statements of Compatibility. Instead, Charter Act considerations were incorporated into existing policies and procedures (e.g. through amendment to the Legislative Process Handbook published by the Office of Chief Parliamentary Council (**OCPC**)).¹¹ The OCPC characterises the Charter Act as one of a number of pieces of background legislation that legislative drafters need to be aware of when drafting statutory provisions.¹²
37. The OCPC reported that it was its practice to raise rights concerns with relevant departments prior to the Charter Act based on general principles of justice and fairness and established legal principles. The OCPC reported that the Charter Act has, through the Statement of Compatibility process and obligations on public servants, provided a legislative basis to raise rights issues. Further, the express obligations imposed on government under the Charter Act has required an increased focus on rights concerns by departments.
38. The requirement to prepare SoCs did, however, necessitate a change in existing procedures. Following the introduction of the Charter Act, the OCPC is required to review SoCs to confirm that all Charter Act issues raised in a Bill have been addressed. The drafter does not settle the SoC but, rather, raises outstanding issues with the instructor with a view to ensuring that those issues are addressed in the SoC.¹³

(c) Statements of Compatibility

39. Section 28 of the Charter Act introduced a requirement that all Bills introduced into Parliament be accompanied by a SoC. SoCs are public statements that explain the Charter Act dimensions of proposed Bills.
40. Since the commencement of the Charter Act, over 350 SoCs have been tabled in Parliament. Only two SoCs have identified incompatibilities with rights in the Charter Act.¹⁴

¹¹ OCPC, *The Legislative Process Handbook*, available at: [http://www.ocpc.vic.gov.au/CA2572B3001B894B/WebObj/LPHandBook20110308/\\$File/LPHandBook20110308.pdf](http://www.ocpc.vic.gov.au/CA2572B3001B894B/WebObj/LPHandBook20110308/$File/LPHandBook20110308.pdf) (reviewed on 5 July 2011). See also OCPC, *Notes for Guidance on the Preparation of Statutory Rules*, available at: [http://www.ocpc.vic.gov.au/CA2572B3001B894B/WebObj/SRNGSApril2011/\\$File/SRNGSApril2011.pdf](http://www.ocpc.vic.gov.au/CA2572B3001B894B/WebObj/SRNGSApril2011/$File/SRNGSApril2011.pdf) (reviewed on 5 July 2011).

¹² Other examples include, relevantly, the *Constitution Act 1975*, the *Criminal Procedure Act 2009*, the *Interpretation of Legislation Act 1984* and the *Sentencing Act 1991*.

¹³ OCPC, *The Legislative Process Handbook*, p 38.

¹⁴ SoC, Control of Weapons Amendment Bill 2010; SoC, Summary Offences and Control of Weapons Acts Amendment Bill 2009.

41. The government has selected a six month sample period – 1 January 2010 to 30 June 2010 – to evaluate SoCs tabled in Parliament in a detailed fashion for the purposes of this submission. The nature and content of SoCs were analysed and information was sought from departments regarding the costs and resources involved in preparing those SoCs (see Section 3 below for information on costs and resources). The government also selected an additional six month sample period – 1 July 2009 to 31 December 2009 – to further evaluate the nature and content of SoCs. However, information about costs and resources involved in preparing SoCs was not sought from departments for this additional period due to timing constraints. The results of the analysis of SoCs are set out in full in **Appendix A**.
42. SoCs from the sample period were categorised according to their level of complexity: high (H), medium (M), low (L) or very low (VL). The SoCs were assigned a level of complexity based on three criteria: the number of rights that SoCs identified as being engaged by relevant Bills;¹⁵ the number of limitations of rights justified in SoCs pursuant to section 7(2) of the Charter Act;¹⁶ and the length in pages of SoCs, rounded to the nearest half page or full number of pages.¹⁷
43. A total of 45 SoCs were tabled in Parliament between January 2010 and June 2010 and 43 SoCs were tabled in the preceding six month period. Of the 88 SoCs tabled during the 2009 – 2010 financial year:
- 18 (20%) were categorised as having a high level of complexity;
 - 19 (22%) were categorised as having a medium level of complexity;
 - 37 (42%) were categorised as having a low level of complexity; and

¹⁵ The number of rights engaged refers to all Charter Act rights mentioned in SoCs, regardless of whether they are enhanced or reasonably limited or whether there is a partial incompatibility with those rights. Rights engaged were counted once, even if a Bill engaged a single right multiple times. For example, if a SoC discussed the freedom of expression in relation to five separate clauses of a Bill, section 15 of the Charter Act was counted once and not five times. Sections of the Charter Act that have multiple sub-sections (e.g. section 19 on cultural rights) were counted only once, except for section 25 on rights in criminal proceedings. This is because the rights set out in the sub-sections of section 25 are quite distinct and are frequently referred to separately in SoCs.

¹⁶ Charter Act right limitations that were justified as reasonable under section 7(2) were counted once, even if a SoC said that a Bill limited a single right multiple times.

¹⁷ For convenience, SoCs were sorted from highest to lowest, first according to the number of rights engaged, secondly according to the number of justified limitations and lastly according to the length in pages. This reflects the relative weight given to each of the criteria. SoCs were categorised as H if they scored high on two criteria or very high on one criterion. SoCs were categorised as M if they scored high on one criterion. SoCs were categorised as L if they scored the median or below. SoCs were categorised as VL if they scored nil in all criteria except for length in pages. SoCs that were categorised as H typically addressed complex issues such as national schemes or included complex rights analysis. SoCs that were categorised as M typically engaged several rights, including rights that were limited by relevant Bills. SoCs that were categorised as L or VL typically engaged few or no rights.

- 14 (16%) were categorised as having a very low level of complexity.
44. Rights in the Charter Act were engaged a total of 255 times during the 2009-2010 financial year. The median number of rights identified in SoCs tabled during the sample period was two. The SoCs that identified the most Charter Act rights engaged by Bills were:
- Statute Law Amendment (Evidence Consequential Provisions) Bill 2009 (13 rights);
 - Justice Legislation Amendment Bill 2010 (12 rights);
 - Personal Safety Intervention Orders Bill 2010 (9 rights); and
 - Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009 (9 rights).

Fourteen SoCs tabled during the sample period stated that the relevant Bill engaged no rights in the Charter Act.

45. The three Charter Act rights most frequently addressed in SoCs tabled during the sample period were, in order of frequency:
- the right to privacy (43 engagements);
 - property rights (41 engagements); and
 - the right to a fair trial (32 engagements).

Only one right in the Charter Act was not referred to in any SoC tabled during the sample period, the freedom from forced work. Two rights, the right to life and the right to humane treatment when deprived of liberty, were engaged only once in SoCs tabled during the sample period.

46. The median number of limitations of rights justified under section 7(2) of the Charter Act as reasonable was zero.¹⁸ The SoCs that identified the highest number of limitations (5) justified under section 7(2) of the Charter Act were the Equal Opportunity Bill 2010, the Personal Safety Intervention Orders Bill 2010 and the Summary Offences and Control of Weapons Acts Amendment Bill 2009. The SoCs for the Control of Weapons Amendment Bill 2010 and the Summary Offences and Control of Weapons Acts Amendment Bill 2009 identified partial incompatibilities with the Charter Act.
47. The median length of SoCs was 1.5 pages and 86% (76) of SoCs were 4 pages or fewer in length. 16% (14) of SoCs were only half a page in

¹⁸ This means that more than 50% of SoCs stated that the relevant Bills did not limit any rights. One of the reasons that the median number was zero is that the right most commonly listed in SoCs as being engaged by Bills, the right to privacy (Charter Act, section 13), is not usually limited under section 7(2). Rather, the question of limitations is typically dealt with in SoCs in the determination of whether the right itself is engaged (i.e. whether the interference with privacy etc. is arbitrary or unlawful).

length. Examples include the SoCs for the Statute Law Amendment (National Health Practitioner Regulation) Bill 2010 and the Health and Human Services Legislation Amendment Bill 2010. Only 3% (2) of SoCs were longer than 10 pages in length, namely the SoCs for the Equal Opportunity Bill 2010 (18.5 pages) and the Credit (Commonwealth Powers) Bill 2010 (10.5 pages).

48. The median number of pages of SoCs categorised as having a high level of complexity is 5.25 pages. The median number of pages of SoCs categorised as having a medium level of complexity is 3 pages. The median number of pages of SoCs categorised as having a low level of complexity is 1.5 pages. The median number of pages of SoCs categorised as having a very low level of complexity is half a page.
49. The length of SoCs may be influenced by a range of factors, including:
 - the length of Bills;
 - whether Bills raise particularly complicated issues or cover a variety of topics (e.g. Omnibus Bills); and
 - whether SoCs include analysis of a large number of rights, including rights that are affected to a low degree by Bills.
50. The approach adopted in preparing SoCs varies significantly between departments and sometimes within departments. Some of the approaches include:
 - internal preparation of SoCs, with assistance from the DOJ HRU or equivalent in other departments (where they exist);
 - seeking external advice from the VGSO to settle the SoC and to manage risk or where the issues involved are particularly complex; and
 - outsourcing the preparation of SoCs to the VGSO.
51. There are a number of emerging issues relevant to the use of SoCs. These include:
 - the length of SoCs: in general, the average length of SoCs is quite short. However, there have been instances where SoCs have been very long and could have been shortened; and
 - the technical nature of SoCs: many SoCs are written in fairly plain language and are drafted by legal and legislative policy officers. However, some SoCs are becoming increasingly technical, with specific references to international jurisprudence. This may reflect the difficulty in finding a balance between the need for analysis in SoCs to be rigorous, including because of the role they play in interpretation by the courts, and the need for SoCs to not be unduly technical.

2.2 Consideration of statutory provisions by Parliament

52. This section of the submission examines the effect of the Charter Act on the consideration of statutory provisions by Parliament (TOR 2(b)).¹⁹
53. One of the objectives of the Charter Act is to inform Parliament of statutory provisions that raise Charter Act rights issues.²⁰ There are many aspects of this objective. Section 2.2 of the submission is concerned only with the impact of Parliament's consideration of statutory provisions on government.
54. Under section 30 of the Charter Act, SARC is required to consider statutory provisions introduced into Parliament and to report to Parliament on whether they are incompatible with Charter Act rights.²¹
55. As part of its scrutiny functions, SARC regularly writes to Ministers seeking further information about the applicability of the Charter Act to certain statutory provisions. It is also common for SARC to refer Charter Act rights issues to Parliament for its consideration. The government and Parliament then give such consideration, as they see fit, to the Charter Act rights issues that SARC has raised and decide whether it is necessary to amend statutory provisions to address those issues.
56. In the first four years of operation of the Charter Act, SARC requested further advice from the government on Charter Act issues relating to 99 Bills (26%) debated in Parliament.²² The Regulation Review Subcommittee of SARC also sought advice from the government on Charter Act human rights issues raised by statutory regulations debated in Parliament.²³ A number of additional Charter Act rights issues raised by Bills and statutory regulations were referred to Parliament.²⁴

¹⁹ The information in section 2.2 is drawn from Hansard, SARC's Annual Reviews and Alert Digests.

²⁰ Charter Act, s 1(2)(d).

²¹ See Charter Act, s 30; *Subordinate Legislation Act 1994*, s 21; *Parliamentary Committees Act 2003*, s 17.

²² This data is based on the number of Bills for which SARC requested further information from the executive. If SARC made multiple requests to the executive in relation to a single bill, the request for information was counted once. The data does not include SARC requests for further advice from the executive on human rights issues that arose from SARC's non-Charter Act human rights functions under sections 17(a)(i)-17(a)(vii) of the *Parliamentary Committees Act 2003*. It also does not include requests for further advice related to statutory regulations or matters referred to Parliament.

²³ See SARC, Annual Review 2009: Regulations 2009 (2010), pp 39-72, 87-88; SARC, Annual Review 2008: Regulations 2008 (2009), pp 18-49, 65-66; SARC, Annual Review 2007: Regulations 2007 (2008), pp 24-37, 45. The Annual Report for 2010 is not yet available on SARC's website. It is not possible to identify accurately what percentage of correspondence between SARC and the executive related to human rights issues raised by statutory provisions, due to the way information is documented in SARC's Annual Reviews of regulations. Examples of correspondence are excerpted in SARC's Annual Reviews.

²⁴ See e.g. SARC, Alert Digest No 3 of 2010, pp 1-9; SARC, Alert Digest No 7 of 2010, pp 3-4; SARC, Alert Digest No 13 of 2007, pp 13-18; SARC, Alert Digest No 9 of 2007, pp 7-10.

57. An example of the role of SARC relates to the abrogation of the privilege against self-incrimination following the Supreme Court decision in *Re application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415. In that decision, Warren CJ held that evidence discovered using compelled answers from witnesses in major crimes investigations was inadmissible in future criminal proceedings against that person unless the evidence could have been obtained through other means.
58. In order to provide guidance to legal and legislative policy officers on a range of Charter Act rights issues, including the privilege against self-incrimination, SARC issued *Practice Note No. 3* in July 2010.²⁵ The Practice Note set out SARC's views on the requirements of SoCs in light of the *Major Crimes* decision. Following publication of the Practice Note, subsequent Bills have explicitly included derivative use immunity where necessary²⁶ and SoCs have concluded that the abrogation of the privilege against self-incrimination was a reasonable limitation of rights in the circumstances.²⁷

2.3 Provision of services and performance of other functions

59. Section 38(1) of the Charter Act requires public authorities, including government departments, to act in a way that is compatible with the human rights in the Charter Act and to ensure proper consideration is given to those rights when making decisions. An exception to this obligation applies under section 38(2) where public authorities could not reasonably be expected to have acted differently. For example, where the public authority is acting to give effect to a statutory provision that is incompatible with a Charter Act right.
60. The Charter Act amended the *Public Administration Act 2004* and the *Ombudsman Act 1973* to support the obligation under section 38. One amendment to the Public Administration Act was to include respect and promotion of the human rights set out in the Charter Act as a public sector value.²⁸ The amendment to the Ombudsman Act enables the Ombudsman to investigate whether an administrative action is incompatible with a human right in the Charter Act.²⁹
61. This section comprises three parts: first, the impact of the Charter Act on services provided by government departments and by other public authorities; second, how the obligations of public authorities under the

²⁵ See SARC, Practice Note No. 3, 26 July 2010.

²⁶ See SARC, Alert Digest No 13 of 2010, pp 1-4; SARC, Alert Digest No 12 of 2010, pp 4-7 (regarding Confiscation Amendment Bill 2010).

²⁷ See SARC, Alert Digest No 12 of 2010, pp 4-7; SARC, Alert Digest No 12 of 2010, pp 10-13, 14-18, 28-30 (regarding Confiscation Amendment Bill 2010; Fair Trading Amendment (Australian Consumer Law) Bill 2010; Justice Legislation Further Amendment Bill 2010; Residential Tenancies Amendment Bill 2010).

²⁸ *Public Administration Act 2004*, s 7(1)(g).

²⁹ *Ombudsman Act 1973*, s 13(1A).

Charter Act are used in service standards and benchmarks; and third, departments' experiences of the use of the Charter Act by clients in accessing services.

(a) How the Charter Act can impact on service provision

62. The requirement in section 38 of the Charter Act and the amendments to the Public Administration Act and the Ombudsman Act impact differently on different departments depending upon their function. Charter Act rights will be engaged most by departments such as DHS, DH, DEECD and DOJ that provide direct services or who are responsible for the regulation of direct service provision by other public authorities. However, the Charter Act also has the potential to impact on the service delivery of departments that provide services primarily to business.
63. The ways in which the Charter Act has the potential to impact on service provision can be categorised in three ways:
- First, the requirement that proposed legislation be vetted for compatibility with rights in the Charter Act³⁰ may affect the standard of services;
 - Second, the requirement that public authorities act and make decisions compatibly with the rights in the Charter Act may affect the development of operational policies, procedures and practices; and
 - Third, through its inclusion as a public sector value, the Charter Act may have an impact on the manner in which policies, procedures and practice are developed and the way in which public servants make decisions and provide services.

The impact of the Charter Act on services through legislative vetting

64. The Charter Act has impacted upon legislation affecting service delivery. For example:
- the Charter Act influenced the drafting of the *Supported Residential Services (Private Providers) Act 2010*. Provisions were included for the establishment of statutory occupancy rights to prevent unfair evictions as well as additional protection for residents' money;
 - the review of the *Mental Health Act 1986* (currently underway) has been informed by careful consideration of the Charter Act, for example, in relation to policy approaches to patient participation in decisions about treatment and care and minimising the use of restrictive interventions; and
 - consideration of rights in the Charter Act, particularly the right not to be subjected to medical treatment without full, free and informed

³⁰ See section 2.1.

consent, in the review of the *Human Services (Complex Needs) Act 2003* led to the inclusion in the revised Act of a requirement to convey information regarding the accessing of services under the Act in terms in which the person is most likely to understand.

The impact of the Charter Act on the development of operational policies, procedures and practices

65. Relevant rights principles were reflected in many laws governing the treatment of vulnerable people such as young people subject to care orders, people with disabilities and prisoners prior to the Charter Act being enacted.
66. As part of the audit conducted in 2007 and 2008 in preparation for the commencement of the Charter Act,³¹ a number of government departments responsible for the direct delivery of services - DEECD, DHS and DOJ - conducted a review of their policies and procedures against the rights in the Charter Act. A number of changes were made to policies and procedures to address potential incompatibilities. For example, DEECD made changes to the Schools Reference Guide, including to the student dress code policy to improve the protection of freedom of religion and freedom of expression. In the prison system, changes were also made to aspects of the strip search policy, including the removal of random strip searches from the schedule of women's prisons.³²
67. Some departments did not make any changes to their service provision following the audit as their existing policies and procedures were assessed as compatible with the Charter Act.
68. The Charter Act continues to be considered in the development and review of existing policies. In the area of corrections, HRU are consulted in relation to the development of significant policies, such as the policy around hunger strikes, which engages freedom of expression and the right not to be subject to medical treatment without consent; and the treatment of transgender prisoners, which engages the right of non-discrimination.
69. The Charter Act has had an impact on decision making within government. For example, the Charter Act influenced the review of the Mothers and Children Policy and Program in prisons. The policy aims to reduce the impact of a mother's imprisonment on dependent children and support family ties that are important to successful reintegration. The policy declares that the assessment of applications for children in custody and program participation must consider the range of human rights outlined in the Charter Act.

³¹ See section 2.1.

³² VEOHRC, 2008 Report on Charter Act, p 37.

70. In relation to decisions of DHS regarding public housing, the Charter Act has caused decisions to be made with greater regard to the circumstances of the individual affected by the decision. In practice, the specific rights contained in the Charter Act have expanded the relevant considerations for making a decision, consistent with, but beyond the usual administrative law requirements.
71. For example, following the death of a public housing tenant, an occupant not named on the lease was required to show they had a substantial connection with the home in order to be eligible for a transfer of lease. The right to be free from unlawful or arbitrary interference with the home in section 13 (a) of the Charter Act has led to a more flexible approach being applied in relation to this requirement. This does not necessarily mean that the outcome of the decision will be different. However, it requires the decision-maker to consider the right in s 13(a) in balancing the factors involved in the decision.
72. Prior to the commencement of the Charter Act, the considerations for the transfer of a public housing tenancy were rather narrow and the Charter Act has led to a broader range of factors being taken into account, due to the nature of section 13(a), the right to be free from unlawful or arbitrary interference with the home. In other areas, the Charter Act merely reinforced existing practice and had little impact.
73. Since the Charter Act was introduced DHS clients may lodge an internal appeal with the Housing Complaints and Appeals Office regarding a public housing decision on the basis that their rights under the Charter Act have not been properly considered or that the decision unreasonably limits their rights.
74. In addition, some departments have developed guidelines and audit tools to ensure Charter Act requirements are taken into account at the operational level. For example, Responsible Alcohol Victoria is incorporating information about the Charter Act relevant to liquor licensing officers into their new Standard Operating Procedures.
75. Charter Act litigation has also had an influence on some direct service provision agencies. For example, the decision in *Kracke v Mental Health Review Board* [2009] VCAT 646 (**Kracke**) resulted in the Mental Health Review Board (**MHRB**) creating adjournment guidelines and a Charter Act practice direction. The MHRB now conducts monthly audits of listed and adjourned hearings in order to identify patients who have not had an initial, extension or periodic review within the statutory time frames and maintains a register of adjourned hearings to ensure that if any matter has been delayed it is re-listed in a timely manner.
76. The decision in *Castles v Secretary of the Department of Justice* [2010] VSC 310 (**Castles**) has clarified staff obligations under section 47 of the

*Corrections Act 1986*³³ and section 38 of the Charter Act in relation to administrative decision-making.

77. In *Castles*, the applicant, a prisoner, sought review of the decision by the Secretary of DOJ to refuse her permission to leave her detention facility to access IVF treatment. The applicant submitted that the decision breached section 47(1)(f) of the *Corrections Act 1986*, as well as the Secretary's obligations under section 38 of the Charter Act in relation to the rights to non-discrimination, privacy and family and humane treatment in detention. The Secretary of DOJ opposed these submissions. Emerton J found that the applicant was entitled to IVF treatment under section 47(1)(f) of the *Corrections Act 1986*,³⁴ but that the Secretary had not breached her obligations under section 38 of the Charter Act.³⁵
78. The contract for service providers requires contractors to ensure that the operating procedures established for the Victorian Prisoner Transport Contract meet all requirements of government agencies, including obligations under the Charter Act. Specific reference is made to the need to ensure that the provision of food, drink and prisoner toilet breaks comply with obligations under the Charter Act. Further to this, the Charter Act was used in the decision-making (as required by s 38) for the design specification of new vehicles. For example, the specification states that cell size and height were increased for prisoner comfort and respect of Charter Act rights.

Charter Act rights as a public sector value

79. Section 7(1)(g) of the *Public Administration Act 2004* incorporates the Charter Act into the public sector values. Section 7(1)(g) states that public officials should respect and promote the human rights set out in the Charter Act by making decisions and providing advice consistently with those rights and actively implementing, promoting and supporting those rights.
80. This not only requires consideration of the circumstances in which particular rights in the Charter Act may be engaged, but is relevant to the manner in which government undertakes its responsibilities.

(b) The use of rights in the Charter Act in service standards

81. Published service standards communicate the type and quality of services that consumers can expect from the service provider. Service standards also typically identify what clients and consumers can do if the service standards are not met.

³³ This provision sets out the rights of prisoners, including the right of access to reasonable medical care and treatment necessary for the preservation of health.

³⁴ At [147].

³⁵ At [187]. See further paragraph [123] below.

82. Some government departments have directly referred to the Charter Act in their service standards. For example, DSE's complaints policy, available on its website,³⁶ specifically refers to rights being conferred by the Charter Act, the requirement for DSE's services to be delivered in accordance with those rights and a process for making complaints about breaches. The State Revenue Office's (**SRO**) website similarly notes the obligation of the SRO to consider the rights set out in the Charter Act when making decisions that affect individuals.³⁷ While both of these service standard documents refer to the Charter Act, they do not identify any particular rights relevant to the provision of services by the agency.
83. Service standards relevant to other government departments are often based on Australia-wide or international standards and adapted to the Victorian context. Examples are the Australian Charter of Healthcare Rights in Victoria³⁸ and the Correctional Management Standards for Men's Prisons in Victoria and the Correctional Management Standards for Women's Prisons in Victoria.³⁹

(c) The use of the Charter Act by clients seeking access to services

84. The use of the Charter Act by clients or their representatives seeking access to services or review of services may be an indicator of the level of awareness of the Charter Act in the community and how it relates to services being provided by public authorities.
85. Some clients or their representatives raised the Charter Act or human rights in seeking access to services. However, there were distinct differences in the ways in which the Charter Act was relied upon.
86. In some areas, for example, complaints by prisoners, the reference to human rights and the Charter Act were most often non-specific (that is, no particular rights were identified as being breached) and were used to support general complaints about the quality of meals or similar issues. However, Corrections Victoria also reported that the number of complaints referring to the Charter Act is diminishing.
87. In other areas, clients and their advocates rely on specific provisions of the Charter Act. A mental health consumer body and the Mental Health Legal Centre have relied on Charter Act arguments to seek discharge from an involuntary treatment order and to gain access to mental health services.

³⁶ See <http://www.dse.vic.gov.au/about-dse/customer-service-centre/human-rights> (reviewed on 5 July 2011).

³⁷ See <http://www.sro.vic.gov.au/sro/SROnav.nsf/childdocs/-15940FAB1C6F5F5ECA2575A100442133-287802114427DFF8CA25783E00024045-799C9A82D75406EDCA25783E00137620> (reviewed on 5 July 2011).

³⁸ This is based on the Australian Charter of Healthcare Rights.

³⁹ These are based on the Guidelines for Corrections in Australia, which in turn are based on the United Nations Standard Minimum Rules for the Treatment of Prisoners.

88. The Senior Practitioner, the Office of the Public Advocate and the individuals subject to compulsory treatment, or their legal representative or advocate, have all made submissions that rely on the Charter Act in relation to compulsory treatment matters that come before VCAT. Under Part 8 of the *Disability Act 2006*, VCAT is required to review treatment plans for residents subject to compulsory treatment. Additionally, VCAT is obliged under section 7 of the Charter Act to ensure that any limitations imposed on a person are the least restrictive in the circumstances.
89. The Charter Act submissions that have been raised concern the extent of the limitations placed on people subject to compulsory treatment and whether they are the least restrictive in the circumstances. A particular example includes the matter of 'IF' in 2010. Prior to the matter, the Residential Treatment Facility had undertaken a review of their operational policies, one of which was their Supervised Leave of Absence (SLOA) Policy. The SLOA policy required all residents subject to compulsory treatment to be subject to 2:1 supervision when accessing the community. In the matter of 'IF', the resident had only been subject to 1:1 supervision when accessing the community and it was considered that there was no clinical basis for increasing the level of supervision to 2:1 in his circumstances.
90. The Senior Practitioner, Office of the Public Advocate and the legal representative for 'IF' submitted that the SLOA policy imposed a blanket rule of 2:1 supervision which was not appropriate as it was not the least restrictive option in IF's circumstances. The VCAT member agreed and determined that the treatment provided to this resident and the restrictions imposed on him must be individualised and the least restrictive in his circumstances. The member amended the resident's Treatment Plan to require only 1:1 supervision when he accessed the community.
91. Agencies and advocates have cited the Charter Act when requesting that decisions made by the Office of Housing be reviewed, prior to proceeding to litigation. It has been raised in written or verbal correspondence in response to, for example, a decision not to grant an occupant tenancy rights, and where a notice requesting a tenant to vacate their rented premises has been issued. There have been some less common instances where Charter Act rights were referred to by advocates when opposing the issuing of a breach of duty notice against a tenant. There have also been some instances when it has been raised in the context of housing allocation. Both before and after the commencement of the Charter Act there was and is frequent correspondence and communication following an unfavourable decision against a tenant. Since the introduction of the Charter Act, allegations of negative impacts on specific rights have also been raised during this process.

2.4 Litigation and roles and functioning of courts and tribunals

92. Term of reference 2(d) of the referral to SARC addresses “the effects of the Charter Act on ... litigation and functioning of courts and tribunals”. Section 2.4 of the submission addresses this term of reference.
93. This part of the submission provides data from government departments who have been involved in Charter Act litigation.⁴⁰ It also includes data from the VGSO, who advise the Attorney-General on the exercise of his statutory intervention function under section 34 of the Charter Act, and the DOJ HRU, who advise the Attorney-General on broader policy issues on the Charter Act, including in relation to litigation.
94. In total, the data collected indicates that there have been 329 matters where the Charter Act has been raised in a proceeding at some point, including 147 matters where the Charter Act is referred to in a judgment in the period from its enactment in 2006 to end May 2011. The Attorney-General has received a notice under section 35 of the Charter Act on 125 occasions, and exercised the right of intervention under section 34 on 31 occasions. VEOHRC, who also receive notices under section 35, has exercised its right of intervention under section 40 on 30 occasions. Departments were a party to Charter Act proceedings on approximately 60 occasions. Detailed tables are provided in Figures 1-6 below.
95. The number of Charter Act cases has been gradually increasing since the court functions took effect. While the data for the 2010-2011 is not complete, it appears likely that there will either be a small increase on 2009-2010, or the number of Charter Act matters will remain steady. The exception to the trend of gradual increase is the County Court, where the number of Charter Act matters appears to have fallen since 2009-2010. This may be attributable to trends in the number of serious sex offender monitoring applications where the Charter Act is raised. However, given the small number of Charter Act cases, identification of trends is difficult.
96. Where government departments are a party to Charter Act litigation, the areas of most activity have been public housing litigation in VCAT and corrections cases, particularly relating to post-release monitoring, supervision and detention of sex offenders. See paragraphs [129] to [135] and [111] to [125] below for more information.

⁴⁰ The phrase “Charter Act litigation” is used throughout this submission to refer to proceedings where the Charter Act has been raised in submissions by one of the parties to the proceeding. This includes where questions of interpretation of legislation under section 32 of the Charter Act are raised and where acts or decisions of public authorities are challenged on the basis of section 38 of the Charter Act.

97. There have been three findings by courts that public authorities have breached obligations under section 38 of the Charter Act: in the cases of *Kracke*, *Sudi*⁴¹ and *DPP v W*.⁴² The latter two cases are the subject of reserved decisions on appeal. See further below at paragraphs [133], [151] and [165].
98. The impact of the Charter Act on the length and complexity of proceedings has been varied.

(a) Approach to Charter Act litigation in Government

99. As part of the preparation for the commencement of the Charter Act in 2007, the Inter-Departmental Committee (**IDC**), convened by DOJ following the enactment of the Charter Act, prepared policies on legal advice and litigation. The aim of these policies was to achieve a “consistent, transparent and well-informed approach to the interpretation and application of rights within government”, to avoid unnecessary duplication of advice on the same issue, and to avoid unnecessary cost through such duplication.⁴³
100. The policy provides that where a department requires external advice on Charter Act issues, it should generally brief the VGSO or a barrister. Where barristers are briefed it is recommended that departments notify the DOJ HRU or the VGSO in order to avoid unnecessary duplication of advice on the same issue. To improve consistency across the whole of government, the policy recommends that departments provide a copy of the advice to the DOJ HRU or the VGSO.
101. Where a private firm is already briefed in relation to litigation in which a Charter Act issue arises, or the matter is being handled by a department in-house, the involvement of the VGSO will depend upon the nature of the matter. In many cases, the role of the VGSO has been minimal, with the relevant department simply keeping the VGSO and the DOJ HRU informed. In some cases, the VGSO has provided advice and/or assisted existing counsel with the preparation of submissions. In other cases, the VGSO's Special Counsel, Human Rights has been briefed by the private firm or department to appear in the proceedings.
102. As noted in section 2.1 of this submission, in preparation for the commencement of the Charter Act, a review of legislation and procedures was undertaken.

⁴¹ *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328.

⁴² *DPP v W* [2011] VCC (2 May 2011).

⁴³ *Charter of Human Rights and Responsibilities: Policy on Obtaining Legal Advice*, prepared by the DOJ Human Rights Unit, August 2007.

(c) Volume of Charter Act litigation

103. There are different ways of measuring the volume of Charter Act litigation in the first four years of operation of the Charter Act. This submission considers three sets of data measuring the volume of Charter Act litigation:

- A **register** of Charter Act cases, which aims to list every matter where the Charter Act has been raised during the course of a proceeding or mentioned in a judgment. This register includes, for example, cases where the Charter Act was raised and then subsequently not pursued, or where a proceeding did not proceed to judgment;⁴⁴
- A list of **section 35 notices** received by the Attorney-General. This only includes cases in the County Court and Supreme Court, as the notification obligation in section 35 does not apply to other jurisdictions. Some cases where the government is a party may not be included in this list as there is no obligation to notify the Attorney-General in this situation; and
- An **index of judgments** in which the Charter Act is mentioned in a substantive way.

104. While the above data is a comprehensive list of the matters that the government was able to identify in the preparation of this submission, it is not exhaustive. There may be matters not included in the above data, particularly from jurisdictions such as the Magistrates’ Court and VCAT, where judgments are not generally published and where notification of Charter Act matters is not given to the Attorney-General under section 35 of the Charter Act as a matter of course.

Figure 1: Charter Act cases by year⁴⁵

All Courts	06-07	07-08	08-09	09-10	10-11	Pending⁴⁶	Total
Charter Act is raised during the course of a proceeding (on Charter register)	7	35	67	99	87	34	329
Charter Act mentioned in judgment (list of judgments)	5	18	43	44	37		147
Section 35 notice received by the Attorney-General	0	4	21	39	34	27	125

⁴⁴ DOJ developed this register of cases for the purpose of this submission using the following methodology: DOJ conducted a search of the major case databases using the terms “Charter” and “human rights” for all Victorian courts and tribunals. These judgments were checked to confirm that they did in fact refer to the Charter Act. Matters included in the VGSO and OPP Charter Act registers and cases raised by government departments in consultation in the preparation of this submission were also included. DOJ did not conduct any qualitative analysis of the importance of Charter Act submissions or references.

⁴⁵ In all tables, “year” refers to the year that either judgment was handed down, the matter settled or was withdrawn or was otherwise completed. Any appeal to a higher court is counted as a new matter.

⁴⁶ Includes matters that are awaiting hearing, or where judgment is reserved.

Figure 2: Charter Act cases by jurisdiction

	High Court	Supreme Court		County Court	Magistrates Court	VCAT	Other ⁴⁷
		Trial Division	Court of Appeal				
On Charter register	3	118	35	48	3	116	6
On list of judgments	0	50	14	4	2	72	5
Section 35 notice received	0	52	19	42	1	10	1

Figure 3: Charter Act cases, Supreme Court, by year

Supreme Court – Trial Division	06-07	07-08	08-09	09-10	10-11	Pending	Total
On Charter register	4	18	22	28	32	14	118
On list of judgments	4	9	13	12	12		50
Section 35 notice received	0	3	10	13	14	12	52
Supreme Court – Court of Appeal	06-07	07-08	08-09	09-10	10-11	Pending	Total
On Charter register	1	1	13	7	8	5	35
On list of judgments	1	1	8	1	3		14
Section 35 notice received	0	0	6	4	6	3	19

Figure 4: Charter Act cases, County Court, by year

County Court	06-07	07-08	08-09	09-10	10-11	Pending	Total
On Charter register	0	0	2	21	14	11	48
On list of judgments	0	0	1	1	2		4
Section 35 notice received	0	0	2	19	11	10	42

Figure 5: Charter Act cases, VCAT, by year

VCAT	06-07	07-08	08-09	09-10	10-11	Pending	Total
On Charter register	2	14	26	42	30	2	116
On list of judgments	0	6	18	29	19		72
Section 35 notice received	0	1	2	3	3	1	10

⁴⁷ Includes the Coroners Court and the Mental Health Review Board.

Figure 6: Attorney-General notices and interventions by the Attorney-General and VEOHRC

	06-07	07-08	08-09	09-10	10-11	Pending	Total
Section 35 notice received	0	4	21	39	34	27	125
Attorney-General intervenes	0	2	10	5	9	5	31
VEOHRC intervenes	0	2	3	8	12	5	30

105. The above data shows that the Charter Act has been raised in 329 matters since its enactment and referred to in the judgment in 147 matters. Charter Act submissions have been raised in each jurisdiction as follows:

- 2 matters in the High Court, with another matter awaiting hearing;
- 153 matters in the Supreme Court, including 118 in the trial division and 35 on the Court of Appeal;
- 48 matters in the County Court;
- 3 matters in the Magistrates' Court (This figure may be an underestimate for the reasons set out above); and
- 116 matters in VCAT (This figure may also be an underestimate).

106. The following trends in the volume of Charter Act litigation can be observed from the data in Figures 1-6 above. However, given the number of cases overall, the identification of trends is difficult. In all cases the year refers to the year that a case is finalised, not instituted with a court:

- There has been a general increase in the volume of Charter Act litigation from the time the court functions commenced on 1 January 2008 to the present;
- It is too early to tell the likely 2010-2011 outcome. This will depend on when the pending matters are completed;
- The volume of Charter Act litigation in the Supreme Court has generally been increasing each year; and
- The volume of Charter Act litigation in the County Court appears to have peaked in 2009-2010 and declined in 2010-2011.

(d) The impact of Charter Act litigation

107. The impact of the Charter Act on different areas of litigation has been variable. Some areas of law have seen significant activity and/or the Charter Act has had some effect on the relevant jurisprudence. In contrast, there are areas of the law in which Charter Act submissions have not been made often or, if they are made, have not provided the basis for the decision.

Litigation where departments are a party

108. This section identifies cases in which Charter Act submissions are made and a government department is a party. It also identifies some of the consequences of those decisions for the relevant department.

109. The following government departments have been parties to Charter Act litigation:

- DOJ, specifically in the areas of Corrections Victoria and Consumer Affairs;⁴⁸
- DEECD;
- DHS, in the areas of housing and community services; and
- DOT, in the area of commercial licensing.

110. Most Charter Act litigation where a department is a party has been in the areas of corrections and housing. There has been some litigation in the areas of education, transport and community services. Seven government departments reported no Charter Act litigation where the department has been a party. Details are set out in the following table:

Department	Charter Act litigation where department is a party
DOJ – Corrections Victoria-related	21
DOJ – Consumer Affairs	1
DEECD	4
DHS – Office of Housing	29
DHS – other	2
DOT	3
Total	60

⁴⁸ The Attorney-General's intervention function is dealt with separately below.

Corrections Victoria

111. Charter Act litigation involving Corrections Victoria has most commonly related to three areas: post-sentence monitoring, supervision and detention of sex offenders; access by prisoners to healthcare; and conditions of detention. In most cases, the Secretary of DOJ is a party to the proceeding.⁴⁹
112. Victoria has various schemes that relate to post-sentence monitoring, supervision and detention of sex offenders. These include:
- The *Sex Offenders Registration Act 2004*, which establishes a Register of Sex Offenders maintained by the Chief Commissioner of Police. This includes certain information about “registrable” sex offenders and imposes certain obligations on registrable sex offenders;
 - The *Serious Sex Offenders Monitoring Act 2005 (SSOMA)*, under which the Secretary of DOJ could apply to the County or Supreme Court for an Extended Supervision Order (**ESO**) in respect of eligible offenders if the court was satisfied that the offender was likely to commit a relevant offence if released into the community at the end of their sentence. The Act was repealed on 1 January 2010 and replaced by the *Serious Sex Offenders (Detention and Supervision) Act 2009 (SSODSA)*; and
 - The SSODSA which provides for two tiers of post-sentence order: post-sentence supervision orders for high risk offenders who can be supervised in the community, and post-sentence detention orders where the court is satisfied that there is an unacceptable risk of committing a relevant offence if a detention order were not made.
113. The Charter Act was raised in litigation relating to the *Sex Offenders Registration Act 2004* in the case of *WBM v Chief Commissioner of Police* [2010] VSC 219. In this case, WBM sought a declaration that he was not a registrable offender under the Act. This submission was based in part on the Charter Act’s interpretive provision in section 32 and the submission that his registration interfered with his privacy and constituted a retrospective penalty. Kaye J held that the Charter Act did not alter the ordinary meaning of the statute⁵⁰ and that in any case the statute was not inconsistent with rights in the Charter Act.⁵¹

⁴⁹ Those cases in these areas where the relevant party on behalf of the state is the Crown, the DPP or the Chief Commissioner of Police are also dealt with in this section, for ease of reference.

⁵⁰ At [30]-[31].

⁵¹ At [58] and [63].

114. The Charter Act has been raised in a number of applications for and reviews of ESOs and supervision orders under the SSOMA and SSODSA schemes. The Charter Act has been raised in some form in 20 of the 108 sex offender ESO or supervision order matters on record, or 19% of the total.
115. Specifically, in 2009 there were 18 proceedings in the County Court under the SSOMA in which Charter Act issues were raised. The nature of the issues raised required evidence from Corrections Victoria in response.
116. In order to minimise any adverse impacts, four 'test cases' were identified and the County Court listed these matters for hearing first. The Charter Act issues added significantly to the time taken to hear these matters, with the Charter issues in two of these matters taking up as much as 50% of court time. Following delivery of judgment in those matters, the other applications were able to proceed without any increase in the cost or length of the hearings.
117. The consideration of Charter Act issues has not necessarily had an effect on the outcome of any of the decisions.
118. For example, *RJE v Secretary to the Department of Justice* (2008) 21 VR 526 was an appeal against the making of an ESO, which related to the definition of "likely to commit a relevant offence". The majority of the Court of Appeal held that "likely" meant "more likely than not".⁵² This was a departure from previous Court of Appeal authority, where a differently constituted court had found that the meaning was "a high degree of probability" but not necessarily more than 50%.⁵³ The majority in *RJE* held that its decision could be reached on the basis of common law principles of statutory interpretation and that there was no need to consider the Charter Act.⁵⁴ The judgment of Nettle JA did rely on section 32 of the Charter Act and consideration of the rights to freedom of movement and privacy as the basis of the departure from previous authority.⁵⁵
119. *Secretary to the Department of Justice v AB* [2009] VCC 1132 was an application for an ESO in the County Court, which also considered the interpretation of the SSOMA in light of the Charter Act. In this matter, Judge Ross held that on its proper construction, he was not persuaded that the relevant part of the SSOMA was "compatible with human rights within the meaning of s 32(1)", and that "the limitations on such a person's human rights are reasonable or demonstrably justified..."⁵⁶

⁵² At 541.

⁵³ *TSL v Secretary to the Department of Justice* (2006) 14 VR 109 at 112-114.

⁵⁴ At 542 (Maxwell P and Weinberg JA).

⁵⁵ At 554-558 (Nettle JA).

⁵⁶ At [267].

120. However, since the matter was in the County Court, there was no power to make a declaration of inconsistent interpretation under section 36 of the Charter Act, which gives this power only to the Supreme Court. Judge Ross interpreted section 11 in accordance with standard principles of statutory interpretation,⁵⁷ and made a supervision order.
121. As noted above, in 2010 the SSOMA was replaced with the SSODSA – a Bill which was developed in the context of the Charter Act and for which the SoC stated that the Bill was compatible with the Charter Act. The SSODSA has not been the subject of the same degree of challenge as the 2005 Act and has been considered by the Supreme Court, without the making of a declaration of inconsistent interpretation.⁵⁸
122. There have been three applications for detention orders under the SSODSA in the Supreme Court which have been resisted in part on Charter Act grounds and in part on constitutional grounds. The decisions in two of these matters have been handed down without the need to decide the Charter Act issues, while the other is pending.
123. In relation to access to healthcare for prisoners, the only case to consider the Charter Act has been *Castles*. In this case the applicant, a prisoner, sought review of the decision by the Secretary of the Department of Justice to refuse to grant her permits to leave the prison at which she was held to access IVF treatment. The applicant submitted that that the decision breached section 47(1)(f) of the *Corrections Act 1986*, which provides for a right of access to reasonable medical care and treatment necessary for the preservation of health, as well as the Secretary's obligations under section 38 of the Charter Act in relation to the rights to non-discrimination, privacy and family and humane treatment in detention.
124. Emerton J found that the applicant was entitled to resume IVF treatment under section 47(1)(f) of the *Corrections Act 1986*.⁵⁹ Emerton J found the Secretary had not breached her obligations under section 38 of the Charter Act.⁶⁰
125. In relation to the conditions of prisoners, the Charter Act was considered in *R v Benbrika (No 20)* (2008) 18 VR 410 (***Benbrika***) which was an application for a stay of a criminal trial because of the conditions the accused were facing in Barwon Prison and in being transferred to and from the court for the trial. Bongiorno J noted a number of impediments to the accused persons relying on the Charter Act in this case,⁶¹ and instead made the decision that unless certain

⁵⁷ At [285].

⁵⁸ See *DPP v CGM* [2010] VSC 509.

⁵⁹ At [147].

⁶⁰ At [187].

⁶¹ At 415-416.

conditions of detention were met, the trial would be stayed,⁶² on the basis of common law fair trial principles.⁶³

Consumer Affairs

126. The relevance of the Charter Act right to freedom of expression and the prohibition on misleading or deceptive conduct in section 9 of the *Fair Trading Act 1999* (as then in force) was considered in the matter of *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc (No 2)* [2011] VSC 153. In this matter, the Director of Consumer Affairs Victoria, sought orders that the defendants had, by publishing statements on their website and in printed materials relating to non-conventional treatments, in particular purported cures for cancer, engaged in misleading or deceptive conduct in trade or commerce. The defendants were self-represented.
127. Questions about how or whether the legislation could be interpreted compatibly with the Charter Act right to freedom of expression were raised by the judge in the course of the proceeding on 22 September 2010. A Queen's Counsel acting as an *amicus curiae*, instructed by the Public Interest Law Clearing House, was given leave to intervene on Charter Act issues and the Attorney-General also intervened. The judge also gave notice that he was considering making a declaration of inconsistent interpretation under section 36(3) of the Charter Act. Additional court time was spent hearing submissions on the Charter Act issues and the judge also called for additional written submissions from the parties on the Charter Act issues. This increased the length, complexity and cost of the proceeding.
128. The judge decided on 19 April 2011 to dismiss the proceeding on the basis that the material was not relevantly misleading or deceptive, meaning that it was not necessary in this case to determine the question of the compatibility of section 9 of the Fair Trading Act with the right to freedom of expression in the Charter Act.⁶⁴ The Director has appealed the decision to the Court of Appeal, where the matter is currently awaiting hearing.

Housing

129. The Charter Act has been raised in at least 29 housing matters since the commencement of the Charter Act.
130. Twenty-one of these matters were heard in VCAT:
- seventeen were applications for possession by the Director of Housing under sections 332, 330 or 344 of the *Residential Tenancies Act 1997 (RTA)*;

⁶² At 430-431.

⁶³ At 424-428.

⁶⁴ At [95].

- four were applications for the creation of a tenancy under section 233 of the RTA, where the Director of Housing was the respondent;
- one case was an application for a compliance order under section 209 of the RTA;⁶⁵ and
- seven of these cases have been appealed to Supreme Court of Victoria (six to the trial division, one to the Court of Appeal).

131. Charter Act issues are raised in only a small proportion of housing cases involving the Director of Housing. The Director of Housing has previously estimated that it is the applicant in, on average, approximately 800 hearings relating to the RTA in VCAT per month, including approximately 300 applications for possession orders.

132. In relation to these housing matters:

- Charter Act issues were a significant factor in 27 of the 29 cases, or 93%;
- Charter Act issues significantly affected the length or complexity of the litigation in 22 cases, or 81%;
- in only one case, *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328 (**Sudi**), was the submission relating to the Charter Act successful, or a significant factor in the outcome of the case; and
- *Sudi* was also the only case in which the Director of Housing was unsuccessful in either obtaining an order for possession or compliance, or in resisting a contested application for the creation of a tenancy.⁶⁶

133. In each case, the primary Charter Act right raised has been the protection against arbitrary or unlawful interference in privacy, family or home in section 13 of the Charter Act. However, in most Charter Act housing cases in VCAT prior to *Sudi*, the main issue considered by VCAT was whether VCAT had the jurisdiction to assess the lawfulness, under section 38 of the Charter Act, of the conduct of the Director of Housing in seeking possession.

134. In *Sudi*, Bell J found that VCAT did have the jurisdiction to assess the lawfulness under the Charter Act of the conduct of the Director of Housing in bringing an application for possession and found that the Director of Housing had breached the obligation to act compatibly with the right in section 13 of the Charter Act. *Sudi* has been appealed to the Court of Appeal where the decision is currently reserved.

⁶⁵ Note that one matter involved both an application for possession and an application to create a tenancy.

⁶⁶ In further four cases, the Director withdrew applications for possession. These cases were withdrawn on grounds independent of the Charter Act.

135. The first instance decision in *Sudi* is the first decision in which VCAT has held that it has jurisdiction to assess the lawfulness of the Director's actions and decisions under section 38 of the Charter Act, in seeking to evict a tenant. This approach has been adopted in subsequent VCAT decisions.

Community Services

136. The Charter Act has been substantively considered in two community services matters where DHS was a party. These were a guardianship matter in VCAT (which was then appealed to the Supreme Court) and an appeal against custody orders that placed indigenous children in out-of-home care. The Charter Act did not significantly affect the outcome in either case.

137. The matter of *RB (Guardianship)* [2010] VCAT 532 concerned the appointment of a plenary guardian under the *Guardianship and Administration Act 1986*. Harbison VP held that the appointment of a plenary guardian engaged a number of Charter Act rights of RB, but that any limitations on these rights were consistent with section 7(2).⁶⁷ Harbison VP found that the rights of the mother of RB were not, however, engaged by the decision.⁶⁸ On appeal to the Supreme Court, the matter was resolved by consent.

138. The matter of *Secretary to the Department of Human Services v Sanding* [2011] VSC 42 was an appeal against a Magistrate's decision to revoke custody orders made by the court to the Secretary to the Department of Human Services under the *Children, Youth and Families Act 2005*. Bell J found that the following Charter Act rights of children may be engaged in hearings in protection proceedings: protection of families and children, fair hearing, freedom of movement, protection of privacy, family and home and cultural rights of Aboriginal people. In this case, Bell J dismissed the appeal, as the decision below did not breach the rules of natural justice or the Charter Act.

Education

139. The Charter Act has been raised in four cases involving DEECD that are currently on foot. Each of these cases was instituted in the Federal Court under the *Australian Human Rights Commission Act (Cth)* alleging breaches of the *Disability Discrimination Act (Cth)*.

140. In one of these cases, the application was dismissed without consideration of the Charter Act. This matter is the subject of an appeal. The Charter Act has not formed a significant part of these cases.

⁶⁷ At [451].

⁶⁸ At [458].

Transport

141. The Charter Act has been raised in three cases related to transport licensing. Each case has involved a challenge to a decision by DOT to refuse an application for a licence.
142. In *Swain v Department of Infrastructure (General)* [2008] VCAT 848, a person sought a review by VCAT of the decision of the department to refuse the person accreditation as a commercial passenger vehicle driver or private bus service vehicle driver because of relevant prior convictions relating to insurance fraud. The applicant submitted that the refusal breached the prohibition on double punishment in section 26 of the Charter Act. The Tribunal Member held that the purpose of the refusal was not punitive, but aimed at maintenance of standards of public care, and therefore did not engage the right.
143. The matter of *Caserta v Director of Public Transport (Occupation and Business Regulation)* [2011] VCAT 98 involved another application to VCAT for review of a decision to refuse accreditation as a commercial passenger vehicle driver, this time on the basis that the applicant failed a visual acuteness test. The applicant claimed a breach of the right to non-discrimination on the basis of his “lazy eye”. The VCAT member found no breach of the right to non-discrimination.
144. In *XFJ v Director of Public Transport (Occupational and Business Regulation)* [2008] VCAT 2303, MacNamara DP overturned the decision by the department to refuse accreditation to the applicant. The applicant had been acquitted of his wife’s murder on the grounds of insanity. The Deputy President considered how to interpret the relevant parts of the *Transport Act 1983* in accordance with section 32 of the Charter Act, but found no conflict between the Charter Act and the interpretation he would otherwise have taken. This decision was upheld on appeal to the Supreme Court on non-Charter grounds.⁶⁹ The matter was appealed to the Court of Appeal. Judgment is currently reserved.

Other areas of Charter Act litigation

145. This section provides an overview of the impact of Charter Act litigation in some other areas of law where there have been Charter Act cases of significance, including criminal law, proceedings relating to investigations and asset confiscation, mental health proceedings and anti-discrimination law.

Criminal law

146. The case of *R v Momcilovic* (2010) 25 VR 436 (**Momcilovic**) considered whether section 5 of the *Drugs Poisons and Controlled Substances Act 1981* (**Drugs Act**), which had previously been considered to impose a

⁶⁹ *Director of Public Transport v XFJ* [2010] VSC 319.

reverse legal onus on an accused person, was an unjustified limitation of the presumption of innocence (section 25(1) of the Charter Act).

147. The Court of Appeal found that the reverse legal onus was an unjustified limitation on the presumption of innocence.⁷⁰ The court considered whether section 5 should be interpreted as imposing only an evidentiary onus on the accused, pursuant to section 32 of the Charter Act, but decided it could not do so consistent with the purpose of the statutory provision.
148. The Court of Appeal issued a declaration of inconsistent interpretation, which does not affect the validity of operation of the section in relation to which it is made, but rather triggers a process by which the relevant Minister must table the declaration in Parliament and make a written response.
149. As such, consideration of whether to change the effect of the provision on the basis of Charter Act considerations is left to Parliament, rather than being done by the courts. The previously accepted interpretation of section 5 of the Drugs Act, which the court found to be the clear intention of Parliament, was not altered by consideration of the Charter Act.
150. The appellant Momcilovic successfully sought special leave to appeal to the High Court. Although a number of issues relating to the Charter Act were fully argued in the High Court, the appeal also focused on an unrelated constitutional law question. The decision is currently reserved.
151. The case of *DPP v W* [2011] VCC (2 May 2011) considered whether Victoria Police had breached section 6(1) of the *Surveillance Devices Act 1999* (**SDA**), which regulates the installation, use and maintenance of listening devices, or its obligations under section 38 of the Charter Act in acting without a warrant to facilitate a covert recording. The judge held that:
 - section 6(1) of the SDA should be interpreted consistently with the right to privacy in section 13 of the Charter Act. On this basis it was held that the police had breached the section;
 - Victoria Police also breached its obligation in section 38 of the Charter Act to act compatibly with the right in section 13 of the Charter Act by breaching s 6(1) of the SDA, and failing to give proper consideration to section 13 as a relevant Charter Act right in facilitating the recording without a warrant; and
 - notwithstanding that the evidence was gathered unlawfully, including in breach of the Charter Act, the judge declined to exclude the evidence pursuant to section 138 of the *Evidence Act 2008*.

⁷⁰ At 477.

152. This decision was the subject of an appeal to the Court of Appeal. The decision in the appeal has been reserved.
153. The Charter Act has been raised in a number of bail applications. In these cases it has generally been found that consideration of the Charter Act does not alter the test that previously applied in deciding whether to grant bail. For example, although section 21(5) of the Charter Act protects the right to be tried without delay, it has generally been considered that this does not affect the question of when delay may form the basis of exceptional circumstances justifying a grant of bail.⁷¹
154. The relatively limited impact of the Charter Act in conventional criminal proceedings may be because the rights in the Charter Act that relate to criminal proceedings tend to already be quite comprehensively protected in the common law and in relevant legislation. The operative provisions of the Charter Act, including sections 32 and 39, also do not provide clear remedies for breaches of the Charter Act in criminal trials.
155. The Charter Act has, however, influenced some areas related to criminal law, particularly the rights of child complainants in criminal proceedings.
156. For example, in *DPP v Pottinger* [2010] VCC (26 October 2010), the right in section 17(2) of the Charter Act was used in considering whether the time for convening a special hearing, in which a child complainant in a trial for sex offences could give evidence in the absence of a jury, should be extended. The judge in this case held that the application of section 32 of the Charter Act led in part to the conclusion that exceptional circumstances existed and it was in the interests of justice to grant the extension. This issue has now arisen in a number of other similar cases.

Other related proceedings

157. There has also been some consideration of the Charter Act in litigation related to criminal proceedings.
158. In *Re application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 (**Major Crimes**), the Supreme Court considered what use could be made of evidence derived from compelled testimony under the *Major Crime (Investigative Powers) Act 2004*. The Court considered whether admitting evidence obtained on the basis of compelled testimony in a future criminal trial of a person was an unjustified limitation on the privilege against self-incrimination and the right to a fair hearing under the Charter Act.
159. Warren CJ held that section 39 of the *Major Crime (Investigative Powers) Act 2004* constituted an unjustified limitation on the Charter Act right.⁷² Her Honour then considered whether section 39 could nonetheless be interpreted in a way that is compatible with human rights and also

⁷¹ See, e.g., *Director of Public Prosecutions (Cth) v Barbaro* (2009) 20 VR 717.

⁷² At 450.

consistent with the purpose of the provision.⁷³ Warren CJ held that the purpose of the provision would not be undermined by reading it to exclude the admissibility in future criminal proceedings of “evidence obtained pursuant to compelled testimony ... unless the evidence is discoverable through alternative means.”⁷⁴

160. The Charter Act has been raised in four cases relating to the *Confiscation Act 1997*.⁷⁵ However, in three of these matters Charter Act submissions were raised and then subsequently not pursued or did not form the basis for the court’s decision.
161. In *DPP v Ali (No 2)* [2010] VSC 503, Charter Act submissions were a more significant factor in the litigation. Mrs Ali sought to resist civil forfeiture of a family home in which she claimed an interest on a number of grounds. This included a submission that a statutory discretion to exclude property from civil forfeiture on hardship grounds under section 38 of the *Confiscation Act* must be exercised in her favour to prevent the limitation of her rights under the Charter Act. The Charter Act rights upon which Mrs Ali relied included the rights relating to arbitrary interference in the family or home, the protection of families, and the protection of children.
162. Hargrave J found that while Charter Act rights are relevant in exercising the hardship discretion in section 38 of the *Confiscation Act*, that section did not limit Charter Act rights or require the discretion to be exercised in a particular way. The Court declined to exercise that discretion to exclude the property as a whole from civil forfeiture, but instead relied on a complementary power in the Act to order the State to pay a portion of the proceeds of sale to Mrs Ali to mitigate hardship that she and her children would otherwise suffer.
163. This outcome essentially confirmed that the relevant provisions of the *Confiscation Act* operate consistently with the rights raised under the Charter Act.

Mental Health

164. The Charter Act has had a more significant impact on proceedings relating to mental health orders.
165. In *Kracke*, VCAT considered the failure of the Mental Health Review Board (**MHRB**) to review the applicant's involuntary treatment order within the specified time under the *Mental Health Act 1986*. Bell J considered in detail the scope of the interpretive obligation in section 32

⁷³ Charter Act, s 32(1).

⁷⁴ At 455.

⁷⁵ *Moloney v Attorney-General* [2010] VCC 481, *DPP v Ali* [2008] VSC 167 and *DPP v Ali (No 2)* [2010] VSC 503. The matter of *R v Mustica & Sacco* (County Court of Victoria) is pending.

of the Charter Act,⁷⁶ and the application of section 38 to the MHRB and VCAT when acting administratively. Bell J held that the Board's delay in reviewing the applicant's treatment order constituted a breach of his right to a fair hearing under section 24 of the Charter Act,⁷⁷ and made a declaration that the Board had breached its obligations under section 38 of the Charter Act.⁷⁸

166. The decision in *Kracke* has had a significant impact on the way the MHRB undertakes its hearings and on other decision making relating to mental health, as noted in part 2.3 of this submission.

Discrimination

167. Although the definition of discrimination in section 8 of the Charter Act is aligned with the definition of discrimination in the *Equal Opportunity Act 1995 (EO Act)* (and the *Equal Opportunity Act 2010* when it commences on 1 August 2011), the Charter Act has had some impact in equal opportunity cases, particularly in relation to applications for exemptions from the Act.
168. VCAT has given consideration to the Charter Act in determining a number of applications for exemptions from the EO Act. In these cases, VCAT has considered whether any limitations placed on rights in the Charter Act, notably the right to equality and non-discrimination in section 8, have been considered justified under section 7(2) of the Charter Act. In some cases, exemptions have been granted because limitations are justified,⁷⁹ while in other cases limitations on rights have been found to be disproportionate, and applications have been refused.⁸⁰
169. The interaction of the Charter Act and the EO Act was also considered in the case of *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)* [2010] VCAT 1613 (**Cobaw**). The applicant alleged that the defendant discriminated against its members by denying access to its camp on the basis of sexual orientation. The defendants relied in part on exceptions to discrimination that apply to religious bodies or to persons complying with their religious beliefs.

⁷⁶ The approach taken to the interpretation provision in section 32 of the Charter Act in *Kracke* was not followed in *Momcilovic*.

⁷⁷ At [853]-[854].

⁷⁸ At [858].

⁷⁹ See, e.g., *Thales Australia Limited and ADI Munitions Pty Ltd (Anti-Discrimination)* [2011] VCAT 729, *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission (Anti-Discrimination)* [2011] VCAT 796, *City of Whittlesea—Thomastown Recreation and Aquatic Centre (Anti-Discrimination Exemption)* [2011] VCAT 250, *Middle Park Bowling Club Inc & Anor (Anti-Discrimination Exemption)* [2010] VCAT 1500.

⁸⁰ See, e.g., *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, *Members of Owners Corporation on Plan of Subdivision No. 441923W (Anti-Discrimination Exemption)* [2010] VCAT 1111.

170. Judge Hampel considered that a number of rights in the Charter Act were engaged, including the right to equality and non-discrimination in section 8, the right to freedom of religion in section 14, and to freedom of expression in section 15. Judge Hampel held that she should interpret the provisions of the EO Act relating to the allegation of discrimination in a way that gave effect to the section 8 right.⁸¹ Her Honour held that she was required to interpret those provisions in a way which “least infringes Charter rights”.⁸² Judge Hampel also held that with respect to the provisions of the EO Act providing for religious exemptions, the Charter Act meant they should be interpreted in a way that gave effect to the right of religious freedoms as well as a right of equality and freedom from discrimination and in a way which did not privilege one right over another, but recognised their co-existence.⁸³
171. Judge Hampel found that the defendant had unlawfully discriminated against the applicants and ordered that compensation be paid.⁸⁴ The matter has been appealed to the Court of Appeal, and is yet to be heard. An issue on appeal is whether the Charter Act provisions apply retrospectively to the decision to deny access to the camp.

The Attorney-General's and VEOHRC's intervention function

172. As noted above, the Attorney-General has received 125 notices under section 35 of the Charter Act and intervened in 31 cases under section 34. The breakdown of these cases by year is set out above in Figure 6.
173. Judges have occasionally expressed concern about the potential for delay in the provision of notice to the Attorney-General and VEOHRC, and in the preparation of their intervention.⁸⁵
174. In relation to the period following receipt of notice, the Attorney-General has only once since the commencement of the Charter Act requested an adjournment, and this was with the consent of the other party to the proceeding.
175. Where a government department is a party a proceeding, there has been consultation between that department and the VGSO, including about whether the Attorney-General will intervene, to avoid duplication of submissions made and minimise cost.
176. The VEOHRC has intervened in 30 matters pursuant to its right of intervention in section 40 of the Charter Act. Further information can be found in the 2011 VEOHRC report.⁸⁶

⁸¹ At [40].

⁸² At [22].

⁸³ At [225].

⁸⁴ At [362], [369].

⁸⁵ *Benbrika* at 416.

⁸⁶ VEOHRC, 2011 Report on Charter Act, p 51.

3. Benefits and costs of the Charter Act

3.1 Costs

Methodology for calculating costs

177. The costs to government associated with implementing the Charter Act include “direct costs” and “indirect costs”. For reasons explained below, it has been possible only to identify part of the direct costs of services (including staff) associated with the implementation and operation of the Charter Act: these identified costs are specified in paragraphs 181 (a) – (j). Indirect costs include costs incurred by staff who have some other purpose but who may, from time to time, be engaged in activities relevant to the Charter Act. Indirect costs have been calculated by reference to the relevant pay scales and the estimated time spent by officers on Charter Act tasks.
178. The indirect costs are approximate because they are based on averages and calculated from estimates of time spent and extrapolations from limited data sets. Government officers do not generally keep a record of the time spent on specific tasks and the capture of data from the earlier years of the Charter’s operation was particularly challenging. Charter Act tasks are also often part of a wider task that might be undertaken, such as preparing legislation. Some of the indirect costs identified below, such as those in section 3.1(i), have not been calculated and have not been included for these reasons.
179. The true cost of a program is its opportunity cost – the potential benefits given up by spending on the program rather than on some other program.
180. In this submission the cost information is set out according to the unit within a department incurring the cost so that the total represents both the direct and indirect costs. As this submission does not cover independent statutory bodies or other non-government organisations, the cost impacts on those entities is not included in this section, apart from the initial budget allocation provided to Victoria Police for Charter Act implementation activities and external legal costs incurred by Victoria Police for Charter Act-related legal advice.
181. This submission sets out the costs of:
- a) Charter Act implementation in certain departments and agencies (Corrections Victoria, DHS and Victoria Police);
 - b) the Human Rights Unit (HRU);
 - c) VEOHRC Charter Act-related work;
 - d) grants provided by DOJ for Charter education and legal advice;
 - e) other identified human rights staff in the VPS;

- f) Charter Act-related training and the development of resources;
- g) the initial audit done of legislation in preparation for the introduction of the Charter Act where external legal advice was obtained;
- h) legal advice on the drafting of statutory provisions or general legal advice in relation to the Charter Act;
- i) the preparation of SoCs where external legal advice was obtained; and
- j) Charter Act-related litigation involving DOJ, DHS and Victoria Police.

The submission does not include:

- k) the cost of time spent on attending to Charter Act related management and policy issues, other than the costs specifically identified;
- l) Charter Act implementation costs other than those reported for DOJ, DHS, Victoria Police and VEOHRC under headings a) and f);
- m) The costs of audit of legislation and policy for Charter Act compliance, other than the costs of external legal advice under heading g) and costs to Corrections Victoria under heading a);
- n) The costs of advice on statutory drafting or other issues in relation to the Charter Act, other than the costs of external legal advice under heading h);
- o) the costs of preparing Statements of Compatibility, other than the costs where external legal advice was obtained;
- p) the value of the time of public sector employees in undergoing training, nor the management and other overhead costs related to employees undergoing training;
- q) grants for Charter Act related projects or activities made by publicly funded bodies other than DOJ;
- r) expenditure by publicly funded non-government bodies on Charter Act education, promotion, advocacy, advice or other matters;
- s) expenditure incurred by Victoria Legal Aid, community legal centres or other publicly funded bodies for litigation involving Charter Act submissions (other than the expenditure by DOJ, DHS, Victoria Police or VEOHRC listed in the submission);
- t) the cost of time spent by public sector employees and the courts in relation to Charter Act related litigation, including the cost of the staff of legal sections within departments and other public bodies; and
- u) the internal and external costs incurred by the DPP, Crown Prosecutors and OPP in relation to Charter Act-related litigation and claims.

182. Table 14 at the end of this section consolidates the individual cost items that have been able to be identified. Over the five financial years from 2006/07 to 2010/11⁸⁷ the total expenditure on the items listed in paragraph 181(a) to (j) is calculated to have been \$13.5 million.⁸⁸ Allowing for higher establishment costs in the earlier years, the average annual expenditure for those items over the past three years has been \$2.4 million.

(a) Initial Charter Act implementation costs

183. In the 2006-07 Budget,⁸⁹ the government allocated \$6.7 million over four years to DOJ (HRU and Corrections Victoria), VEOHRC, DHS⁹⁰ and Victoria Police to audit legislation, policies and operational manuals to ensure compliance with the Charter Act; to develop and deliver specialised training for operational staff; and in respect of VEOHRC, to conduct educational activities and undertake its Charter Act reporting activities. Of the \$6.7 million, \$1.6 million was allocated to HRU, \$2.3 million was allocated to VEOHRC and \$2.6 million to Corrections Victoria, DHS and Victoria Police. There was also a \$0.2 million capital allocation. The funding to Corrections Victoria, DHS and Victoria Police was for 2006-07 and 2007-08 only. In addition, ongoing annual output funding of \$0.668 million beyond the forward estimates period (ie: for 2010-11 onwards) was provided to DOJ and VEOHRC for Charter Act-related activities. This funding increases annually in accordance with standard escalation factors. Expenditure on Charter Act implementation activities not met by this budgetary allocation has been met by reprioritisation of internal resources.

184. Implementation costs incurred by the HRU and VEOHRC are included in the data in the following sections that deal with expenditure by those entities. The balance of this section identifies expenditure incurred by DHS, Corrections Victoria and Victoria Police in preparing for the commencement of the Charter Act.

185. Between 2006 and 2008, DHS engaged 1.4 FTE staff (one at VPS 6 level and one at VPS 5 level) to develop and coordinate training for all staff across the department. This included the engagement of external trainers to develop an e-learning tool and to conduct components of the training. Charter Act-related information was incorporated into ongoing training for DHS staff. These costs are included in the table below. By the end of 2007-08, 5,800 staff had completed the online Charter Act training and discussed this with their managers as part of their performance planning.⁹¹ DHS also established a 'Charter Ambassador

⁸⁷ The data for 2010-11 is complete only to 31 May 2011.

⁸⁸ This includes \$1.81 million allocated to Victoria Police in the 2006-07 Budget for implementation costs. Other expenditure by Victoria Police has not been included in this submission as Victoria Police is making a separate submission.

⁸⁹ Victorian Government, 2006-07 Budget Paper 3, Appendix A, pp 321-323.

⁹⁰ In 2006-07, DHS incorporated DH.

⁹¹ VEOHRC, 2008 Report on Charter Act, p 24.

program' to raise awareness and understanding of the Charter Act across the department, the costs of which are included in the table below.

186. Corrections Victoria engaged a senior legal officer at VPS 5 level for 12 months to lead the audit of Corrections Victoria legislation and operating procedures following the commencement of the Charter Act. The project officer liaised with four prison staff (one at VPS 5 level and three prison supervisors) for two months on this project. Corrections Victoria also engaged a training officer at the level of VPS 4 for four months to develop and deliver briefings and training to staff at all levels across Corrections Victoria. Any costs of these activities that exceeded the budget allocation were met through internal reprioritisation of resources and are not included in the table below.
187. Victoria Police developed risk assessment and audit tools and developed a training and education program for sworn and unsworn officers to familiarise them with their responsibilities under the Charter Act. Victoria Police engaged the VGSO to conduct an audit of relevant legislation. Since the introduction of the Charter Act, Victoria Police has embarked on significant operational and corporate practice audits. The costs to Victoria Police of the risk assessment, the developing and delivering of training and education programs and the conduct of the operational and corporate practice audits are included in the table below, but not the time or other costs relating to officers undergoing training or education.

Table 1: Charter Act implementation by DHS, Corrections Victoria and Victoria Police

	2006-07	2007-08	Total
Victoria Police	\$900,000	\$906,000	\$1,806,000
Corrections Victoria	\$119,000	\$0	\$119,000
DHS	\$375,000	\$249,000	\$624,000
Total	\$1,394,000	\$1,155,000	\$2,549,000

(b) Human Rights Unit, DOJ

188. The HRU was established in 2006.⁹² The HRU has five main functions:

- managing the provision of advice on human rights issues to the Attorney-General and senior management;
- preparing information and training material and implementing programs to promote understanding of human rights issues across the public sector;
- providing policy advice across government in relation to legislative and regulatory proposals, including preparing Statements of Compatibility;
- supporting the intervention role of the Attorney-General in litigation (in conjunction with VGSO); and
- managing the preparation of Cabinet, Parliamentary and other documents in relation to human rights issues.

189. In addition, in 2009-10 and 2010-11 the HRU has conducted two projects – the Parole Boards project and the Charter Act review project.

190. The HRU has also developed the Charter Act guidelines⁹³ and provided funding to train judges and other judicial officers through the Judicial College of Victoria.⁹⁴

191. Table 2 shows the total costs expended by the HRU from 2006-07 to April 2011.

Table 2: HRU expenditure

	2006-07	2007-08	2008-09	2009-10	2010- 11	Total
Training	\$249,826	\$194,269	\$17,513	\$21,173	\$13,893	\$496,674
Employee costs	\$322,181	\$506,943	\$375,131	\$501,363	\$381,161	\$2,086,779
Project costs	\$0	\$0	\$0	\$55,775	\$297,915	\$353,690
Other	\$82,345	\$82,325	\$140,490	\$152,999	\$9,883	\$468,042
TOTAL	\$654,352	\$783,537	\$533,134	\$731,310	\$702,852	\$3,405,185

⁹² The establishment of a human rights unit within DOJ was recommended by the Human Rights Consultation Committee. See 2005 Consultation Committee Report, recommendation 24.

⁹³ See section 2.1.

⁹⁴ The amount provided was \$125,000 in 2006-07.

192. *Employee related costs.* Since it was established, the staffing profile of the HRU has consistently included one manager at VPS 6 level and between 2 and 3 legal policy officers at VPS 5 level. Additional officers were recruited in 2009-10⁹⁵ and 2010-11⁹⁶ to conduct projects in the Unit. The salaries of these additional officers are included in the project costs row.
193. *Costs associated with the provision of training by HRU.* The HRU provides Charter Act training to legal and legislative policy officers across the VPS and training to DOJ Business Units on request.⁹⁷ The year by year training costs incurred by the HRU reflect the emphasis on training as a key component of Charter Act implementation in 2006-07 and 2007-08, in preparation for the commencement of the obligation on public authorities. The amount of training and consequently the cost of training provided by the HRU has decreased significantly since 2008-09.
194. *Project related costs.* As noted above, two projects were conducted by the HRU in 2009-10 and 2010-11: the Parole Boards project and the Charter Act review project.
195. In 2009-10, the HRU commenced a joint project with the Parole Boards and DHS to assist the Adult and Youth Parole Boards to achieve compliance with the Charter Act. In 2009-10, one staff member at VPS 5 level was recruited for a period of 3 months for this project and in 2010-11, one staff member at VPS 6 level was recruited for a period of 12 months to manage the project.⁹⁸
196. In 2010-11, the Unit also commenced project work in preparation for the review of the Charter Act. In September 2010, 1.8 FTE staff at VPS 5 level were engaged for an 18 month period to work on the Charter Act review. An additional contractor was engaged in December 2010 for a six month period to assist with the Charter Act review. The Charter Act review staff also contributed to the general work of the HRU, particularly in the period prior to the referral of the review to SARC from December 2010 to April 2011.

⁹⁵ In 2009-10, one VPS 5 officer was recruited for a 3 month period to assist in preparing the Regulatory Impact Statement for the Parole Boards project.

⁹⁶ In 2010-11, 1.8 EFT VPS 5 officers were recruited for a period of 18 months to manage the Charter Act review project. One VPS 6 officer was recruited for a period of 12 months to manage the Parole Boards Project. The salary costs for this officer is divided equally between the HRU, Corrections and DHS.

⁹⁷ See section 2.1.

⁹⁸ The project finished in June 2011.

(c) VEOHRC’s Charter Act–related work

197. VEOHRC has a number of functions under the Charter Act.⁹⁹ These are:

- to provide education about the Charter Act and Charter Act rights;
- to report annually on the operation of the Charter Act;
- to intervene in court and tribunal proceedings that raise questions of law relating to the application of the Charter Act or the interpretation of a statute in accordance with the Act;
- when requested by the Attorney-General, to review the effect of statutory provisions and the common law on Charter Act rights and when requested by a public authority, to review the authority’s programs and practices to determine their compatibility with Charter Act rights; and
- to assist the Attorney-General with formal reviews of the Charter Act in 2011 and 2015.

198. VEOHRC has been provided with Charter Act-related funding allocations as set out in Table 3. In 2009-10, an additional \$83,000 was provided on an ongoing basis for VEOHRC’s Charter Act reporting, review and intervention functions, bringing the total ongoing funding for that function to \$485,000 per annum. At the same time, \$203,000 was provided on an ongoing basis for human rights education.

Table 3: VEOHRC’s Charter Act-related expenditure

	2006-07	2007-08	2008-09	2009-10	2010-11	Total
Charter Act education	\$500,000	\$500,000	\$337,000	\$203,000	\$209,000	\$1,749,000
Reporting, review and intervention	\$0	\$275,000	\$319,000	\$485,000	\$498,000	\$1,577,000
TOTAL	\$500,000	\$775,000	\$656,000	\$688,000	\$707,000	\$3,326,000

(d) Grants provided by DOJ for Charter Act education and legal advice

199. DOJ has funded a small number of grants for programs operated by the community sector and local government that educate the community and the not-for-profit sector about human rights and the Charter Act.

200. Grants were provided to organisations such as the Victorian Council of Social Service (**VCOSS**) and are currently provided to the Human Rights Law Centre.

⁹⁹ Charter Act, ss 40 and 41.

201. Table 4 sets out the amount of the grant and the project outputs. These grants do not include grants that may have been made by other publicly funded bodies, such as the Victoria Law Foundation or the Legal Services Board, for projects or programs relating to the Charter Act.

Table 4: Charter Act-related grant funding provided by DOJ

Grant recipient	2007-08	2008-09	2009-10	2010-11	Total	Project output
Human Rights Law Centre	\$55,000	\$100,000	\$150,000	\$130,000	\$435,000	Provision of legal advice and assistance on human rights issues.
Eastern Community Legal Centre	\$0	\$0	\$50,000	\$0	\$50,000 ¹⁰⁰	Human Rights are Aussie Rules project promoting rights through the concept of 'fair play' to school children.
Victorian Local Governance Association	\$45,112	\$50,000	\$120,000	\$26,250	\$241,362	Development of human rights milestones and audit toolkit for local councils (<i>Human Rights Matter Locally</i>); consultation on barriers to rights implementation by small rural shires.
Victorian Council of Social Services	\$75,000	\$45,000	\$125,000	\$0	\$245,000	Part time position (jointly funded with DHS & VEOHRC) responsible for community education, consultation & advocacy on behalf of disadvantaged communities.
Total	\$175,112	\$195,000	\$445,000	\$156,250	\$971,362	

¹⁰⁰ An additional \$50,000 is payable in relation to this project on receipt of the final project report.

(e) Identified human rights positions

202. Aside from the staff engaged by DHS, Corrections Victoria and Victoria Police for the initial implementation of the Charter Act,¹⁰¹ there are two departments that have ongoing identified human rights positions: DEECD and DHS. VGSO have also engaged solicitors to assist in conducting Charter Act-related work. Their costs are reflected in the direct costs of the advice and representation provided to departments in litigation, legislative and other matters in which Charter Act issues are raised.
203. In 2009, DEECD created an ongoing position of Human Rights Coordinator at VPS 5 level. The Human Rights Coordinator is located in the Conduct and Ethics branch of the human resources division. While the position was created as a result of the Charter Act's commencement, the Human Rights Coordinator's role is a more general role to coordinate and facilitate human rights activity across the department. This involves supporting a network of human rights representatives across the department whose role is to raise awareness and provide information and updates on human rights issues to staff across their Divisions, and developing training and resource material for staff.¹⁰² The Human Rights Coordinator also liaises closely with the Student Wellbeing Division in relation to human rights implementation in schools.
204. Within DHS responsibility for the Charter Act implementation lies with the Legal Branch. DHS employed 2.9 FTE staff in legal branch for 2.5 years to implement this workplan. When DH was formed in December 2009, the Legal Branch in DH provided a shared service to DH and DHS for Charter Act implementation until June 2010. DHS currently has one fixed term staff member at VPS 5 level until June 2012 responsible for Charter Act implementation. This staff member is located in a policy branch. DH has no dedicated human rights staff. The indicative staff costs associated with the DEECD and DHS identified human rights positions are set out in Table 5.

Table 5: Identified Human Rights Positions

	2007-08	2008-09	2009-10	2010-11	Total
Total	\$95,654	\$197,048	\$297,921	\$163,756	\$754,379

205. VGSO have engaged up to 5.6 FTE solicitors within their Workplace Relations and Human Rights team to assist with conducting Charter Act related work since June 2007. VGSO solicitors in the Workplace Relations and Human Rights team do not solely engage in Charter Act-

¹⁰¹ See 3.1(a) above.

¹⁰² The DEECD Human Rights Coordinator has developed a Charter Act page on the DEECD website, which is accessible to 1,600 schools, 900 regional offices and the central office. This page links to an online training module. DEECD report that 6,632 staff have completed the online training and an additional 410 staff have received tailored face to face training.

specific work. VGSO advises that around 50-80% of the work done by the team is Charter Act-specific. In addition, other solicitors in the office will occasionally advise on Charter Act issues that arise within their work.

206. Table 6 sets out the staffing profile of the Workplace Relations and Human Rights team since 2007. In 2006-2007 and 2007-2008, a proportion of Charter Act-specific work was undertaken by solicitors in other VGSO teams. The salary costs of VGSO solicitors are not counted separately as they are incorporated into legal costs charged for their services.

Table 6: VGSO Workplace Relations and Human Rights FTE¹⁰³

	2006-07	2007-08	2008-09	2009-10
FTE	1	1	5.6	5.6

(f) Training and the development of resources

207. As noted in section 2.1, extensive training was conducted across the VPS in 2006-08 in preparation for the commencement of the Charter Act.
208. As noted in section 3.1(a), DHS, Corrections Victoria and Victoria Police expended significant resources on training and the development of Charter Act-related resources in 2006-07 and in 2007-08. The costs set out in section 3.1(a) cover the costs of the trainers and the development of the training programs. They do not cover the time or other costs of the staff who have undergone training unless specified.
209. Aside from the initial expenditure by those three departments, most departments stated that their legal and policy officers attended the DOJ HRU's one day Legal and Legislative Policy Officer Training course, which was provided free of charge in the first two years following the commencement of the Charter Act and at \$150 per officer after that time. HRU also provides Charter Act training without charge to DOJ business units (including Corrections Victoria and the Sheriff's Office) on request.¹⁰⁴
210. Most departments stated that new staff complete training on the Charter Act as part of their induction training and provide a range of other learning and information dissemination activities, such as shared learning forums and the establishment of Human Rights networks. These activities are reported as cost-neutral as they form part of existing training (in the case of Charter Act information in induction training) or leverage off existing forums (such as staff meetings or in-house seminars).

¹⁰³ Figures for 2010-11 will not be available until 30 June 2011.

¹⁰⁴ From 2009-2011, HRU provided training to 420 staff in DOJ Business Units including staff in Regional Justice Service Centres, Corrections, Sheriffs, Privacy Coordinators and Office of Correctional Service Review.

211. Many departments have developed some internal resources, such as modules in their induction programs, tailored Charter Act implementation guides and analysis tools, to support the implementation of the Charter Act. These resources have generally been developed by internal staff, drawing on the Charter Act material prepared by the HRU. As such, the costs associated with preparing these materials and conducting training are absorbed into existing training budgets.
212. Some departments have paid for the development of Charter Act-specific resources or report significant expenditure on Charter Act-related training.
213. DHS sponsored fifteen staff to undertake a Graduate Certificate program at the Australian Centre for Human Rights Education, RMIT at a total cost of \$96,000. DHS developed an online learning tool at a cost of \$14,950 per year. In addition, tailored training material and a train-the-trainer course were developed for the Disability Services Division at a cost of \$6,520.
214. DEECD reports that it spent \$8,745 on developing its online training module.
215. VGSO reports that it has spent approximately \$19,500 on the development of the Human Rights Portal.¹⁰⁵

Table 7: Charter Act-related training and resource development costs

	Training	Resource	Total
DHS	\$102,520	\$29,900 ¹⁰⁶	\$132,420
DEECD		\$8,745	\$8,745
VGSO		\$19,500	\$19,500
Total	\$102,520	\$58,145	\$160,665

(g) Audit of legislation and policy for compatibility with the Charter Act

216. As noted in section 2.1(a) all departments conducted an audit of key legislation, policies and procedures for Charter Act compatibility. This review commenced in 2006-07 and was finalised in 2008-09.
217. There is information on the direct external legal costs associated with the audit. The audit information for the period 2006-07 to 2008-09 is set out in Table 8.

Table 8: Audit-related external legal costs

	2006-07	2007-08	2008-09	Total
Audit Costs	\$165,824	\$400,576	\$60,076	\$626,476

¹⁰⁵ See section 2.1.

¹⁰⁶ This is based on the cost of the e-learning module having operated for two years.

218. Where departments and divisions in departments provided information on indirect costs associated with conducting the audit, the average level of the staff member conducting the audit was VPS 5. However, there was a high level of variation between departments. In some instances, a senior staff member at the level of VPS 5 or 6 was given sole carriage of this task. In other cases it was conducted by a number of staff at the level of VPS 2, 3 and 4, under the supervision of a senior staff member.
219. Departments were not able to provide information about the time associated with conducting the audit. Therefore, it is not possible to calculate the indirect costs associated with performing this task with any level of accuracy.

(h) Drafting of statutory provisions and general legal advice

220. Charter Act rights are one of many considerations taken into account when drafting legislation. Indirect costs associated with consideration of Charter Act issues are therefore difficult to disaggregate from other costs. OCPC advised that they did not incur significant costs associated with the requirements under the Charter Act.
221. However, where Charter Act issues are complex, drafters may confer with HRU or VGSO for advice. Officers also request legal advice from VGSO on other matters, such as the compatibility of proposed policies and procedures, or general advice in relation to the operation of the Charter Act.

Direct costs

222. The external legal costs identified as relating to the drafting of statutory provisions and the provision of general advice are those identified as Charter Act-related advice that are not audit-related or do not relate to the preparation of SoCs. These are set out in Table 9.
223. External legal advice may be sought in relation to a number of issues at the same time (for example constitutional issues as well as Charter Act issues). Therefore, it is likely that the Charter Act component of the costs in Table 9 is slightly lower than the cost in the Table.

Table 9: Costs associated with drafting statutory provisions or other legal advice

	2006-07	2007-08	2008-09	2009-10	2010-11	Total
Cost	\$20,048	\$65,677	\$96,624	\$27,058	\$63,564	\$272,971

Indirect costs

224. Legal and legislative policy officers may confer with HRU or obtain legal advice where Charter Act issues in the proposed legislation are complex. In such cases, seeking and considering advice on Charter Act issues is an extra step in the drafting process and consequently adds to the time taken to finalise the drafting.
225. It is difficult to quantify the extra time required for consideration of Charter Act issues during the drafting process. Accordingly, it is not possible to provide an indirect cost in relation to this function.

(i) Development of SoCs

226. This submission provides two sets of information in relation to the costs associated with the development of SoCs: an analysis of the cost of preparing SoCs by Bill complexity and the data relating to expenditure on external legal advice for SoCs.

The cost of preparing SoCs by Bill complexity

227. The data used for calculating the cost of SoCs by Bill complexity is based on information available for Bills tabled from 1 January 2010 to 30 June 2010 (the sample period)¹⁰⁷ provided by departments or otherwise available.
228. As noted in section 2.1 above, there are significant differences among departments in the approach taken to preparing and settling SoCs.

Indirect costs

229. The preparation of SoCs takes time. The amount of time taken to prepare SoCs varies considerably and depends on the complexity of the issues. Where the work is done internally, senior officers at VPS Level 5 or 6 generally prepare SoCs. It is difficult to provide information about how long it takes to prepare SoCs for individual Bills or to calculate an indirect cost for this task.

¹⁰⁷ See section 2.1 and Appendix A.

230. Information regarding time spent is available in relation to only seven Bills in the sample period. Of these, one is a low complexity Bill, two are medium complexity Bills and four are high complexity Bills. The median time taken to prepare SoCs for those seven Bills was 18.5 hours. The median time taken to prepare SoCs for the four high complexity Bills was 41 hours.

Table 10: Estimated Indirect Costs for preparing SoCs

Complexity	Number	Median Time (hours)	Median Officer Level	Cost
Low	1	7.5 hours	VPS 3	\$257
Medium	2	11.25 hours	VPS 4	\$451
High	4	41.25 hours	VPS 6	\$2,566

231. There is insufficient data available to produce an accurate estimate of the indirect costs of preparation of SoCs since the commencement of the Charter Act. A rough guide based on the estimated proportion of high, medium, low and very low complexity SoCs that have been tabled and a notional allocation of hours for each type produces a figure of \$200,000 over the five year period. This has not been included in the final aggregation of costs because of the lack of validating data.

Direct costs

232. For the sample period, external legal cost data is available about the cost of preparing or settling the SoC in relation to 32 out of 45 Bills. For 18 of these 32 Bills (56%), external legal costs were incurred in preparing SoCs. Of the 18 Bills for which external legal costs were incurred, 8 were low complexity, 5 were medium complexity and 5 were high complexity. The total amount incurred for preparing the SoCs for these 18 Bills was \$100,462.¹⁰⁸ The median cost is \$4,762.
233. External legal costs were not incurred in relation to 14 Bills out of the 32 Bills (44%) for which information was available.
234. Of the 18 Bills in the sample period where external legal costs were incurred, the highest cost incurred was \$20,130, in relation to the Credit (Commonwealth Powers) Bill 2010. The lowest cost was \$1,681 in relation to the Liquor Control Reform Amendment (Anzac Day) Bill 2010. For the 9 very low complexity Bills, no external legal costs were incurred for preparing the SoCs.
235. For the 16 low complexity Bills in the sample period, external legal costs were incurred for preparing SoCs for 8 Bills (50%). The median cost of advice for these Bills was \$2,448. There were no external legal costs incurred for the remaining 8 low complexity Bills.

¹⁰⁸ The amount incurred for two of these 18 Bills is not available.

236. For the 10 medium complexity Bills, external legal costs were incurred for preparing SoCs for 5 Bills (50%). The median cost of advice on these Bills was \$5,434. There were no external legal costs incurred for the remaining 5 medium complexity Bills.
237. For the 10 high complexity Bills, external legal costs were incurred for preparing 5 SoCs, although the amount is only available for 3 of these. The median cost of advice of the 3 high complexity Bills for which data is available was \$15,697. There were no external legal costs incurred for the remaining 5 high complexity Bills.

Table 11: External Legal Costs incurred for SoCs by complexity

Complexity	% Direct costs incurred	Median direct cost
Very low	0%	\$0.00
Low	50%	\$2,448
Medium	50%	\$5,434
High	50%	\$15,697

238. The data does not support a correlation between complexity and the tendency to pay for legal advice for SoCs. However, as would be expected, the data does support a correlation between complexity and the cost of the advice, indicating that more complex SoCs take more time to prepare.
239. In the sample period the available data shows that there were only two Bills in relation to which direct and indirect legal costs were incurred. Due to the small size of the sample the data may be unreliable. Therefore, this submission does not try to aggregate direct and indirect costs.

Table 12: External Legal Costs associated with Developing SoCs

	2006-07	2007-08	2008-09	2009-10	2010-11	Total
Cost	\$0	\$86,504	\$98,195	\$110,872	\$174,768	\$470,339

(j) Litigation – External costs

240. The total cost paid for external advice in relation to Charter Act litigation from 2007-2008¹⁰⁹ to May 2011 was \$952,373. This cost was incurred by DOJ, DHS and Victoria Police.
241. Of this, \$426,097 or 45% was incurred for legal advice in relation to interventions by the Attorney-General under section 34 of the Charter Act, including preliminary advice about whether to intervene in a proceeding.

¹⁰⁹ There are no Charter Act related litigation costs in 2006-07 recorded.

242. As noted above in relation to obtaining legal advice, many of the departments who reported they had been involved in litigation in which the Charter Act had been raised noted the difficulties associated with isolating the cost of legal advice and representation associated with the Charter Act submissions.
243. Nonetheless, estimates of the percentage of time and costs associated with litigating cases deemed significant by VGSO, such as the *Momcilovic* case¹¹⁰ in the High Court, have been provided by VGSO. The costs in Table 13 have been adjusted to reflect these percentages. While other departments may be involved in litigation in which the Charter Act may be raised, it has not been identified as litigation involving the Charter Act.

Table 13: Litigation External Costs by Year

	2007-08	2008-09	2009-10	2010-11	Total
Total	\$39,556	\$165,212	\$387,609	\$ 359,995	\$952,373

244. There is no data available about the amount of time spent by internal legal divisions within government departments in preparing for and conducting Charter Act litigation.

¹¹⁰ See paragraphs [146]-[150] above.

Summary

245. Table 14 sets out the consolidated costs identified in this preceding section.

Table 14: Quantified Charter Act-related costs 2006-2011

	2006-07	2007-08	2008-09	2009-10	2010-11	TOTAL
DHS, Corrections Victoria and Victoria Police Charter Act Implementation	\$1,394,000	\$1,155,000	\$0	\$0	\$0	\$2,549,000
HRU	\$654,352	\$783,537	\$533,134	\$731,310	\$702,852	\$3,405,185
VEOHRC	\$500,000	\$775,000	\$656,000	\$688,000	\$707,000	\$3,326,000
Grants	\$0	\$175,112	\$195,000	\$445,000	\$156,250	\$971,362
Identified Human Rights Positions	\$0	\$95,654	\$197,048	\$297,921	\$163,756	\$754,379
Audit of legislation and policy	\$165,824	\$400,576	\$60,076	\$0	\$0	\$626,476
Training and development of resources	\$0	\$19,500	\$102,520	\$23,695	\$14,950	\$160,665
Drafting statutory provisions and legal advice	\$20,048	\$65,677	\$96,624	\$27,058	\$63,564	\$272,971
Development of SoCs	\$0	\$86,504	\$98,195	\$110,872	\$174,768	\$470,339
Litigation	\$0	\$39,556	\$165,213	\$387,609	\$359,995	\$952,373
Total	\$2,734,224	\$3,596,116	\$2,103,810	\$2,711,465	\$2,343,135	\$13,488,750

3.2 Benefits

246. This section lists the estimated benefits of the Charter Act to the Victorian community. The quantification of benefits for governance and social policy initiatives such as the Charter Act is challenging and subject to significant assumptions about the causative impacts of the initiatives.
247. Quantification of benefits usually relies on the calculated aggregation of benefits accruing to individuals as a result of a particular policy initiative. Changes in governance arrangements (such as the ways in which laws are developed, made and interpreted) and social policy initiatives (such as improving the quality of service provision decision making) are primarily collective benefits that accrue, often over a long period, to the community generally and the benefits may be difficult to allocate on an individual basis.
248. The government's preferred approach is to identify some of the commonly cited benefits of the Charter Act, identify the parts of the submission that are relevant to those benefits, and allow the Committee and the general public to consider the identified costs in the context of the identified benefits.

(a) Estimated benefits of the Charter Act

249. The benefits of the Charter Act identified by the Human Rights Consultation Committee (**HRCC**) report, the second reading speech¹¹¹ and VEOHRC's Charter reports,¹¹² can be categorised as follows:
- recording basic rights in a single consolidated document;
 - improving the overall compatibility of legislation and policies with human rights by requiring the government to take into account the impact of proposed laws and policies on human rights;
 - increasing transparency and enhancing discussion about human rights and the reasonableness of proposed limitations on rights;
 - improving service delivery by ensuring services are delivered by public authorities in ways that are compatible with human rights; and
 - helping increase respect in the Victorian community for people's rights.
250. This section of the submission provides comments for further consideration in relation to certain benefits. However, as most of the benefits accrue to the community, the government considers that the achievement of these benefits, and their value, should be assessed by the community as a whole. Consequently, this submission does not

¹¹¹ Available at <http://www.parliament.vic.gov.au/static/www.legislation.vic.gov.au-bills-archive.html> (reviewed on 5 July 2011).

¹¹² See in particular VEOHRC, 2007 Report on Charter Act, pp 6-7.

comment on a number of these benefits, other than through the information provided in the body of the submission.

Recording basic rights in a single consolidated document

251. The second reading speech for the Charter Act stated “the Bill will benefit all Victorians by recording in one place the basic civil and political rights we all hold and expect government to observe.” It was further noted:

there are, of course, many laws operating at both the commonwealth and state level that protect human rights and set out the responsibilities of governments, organisations and citizens in the general community. However, as these rights are included in a variety of places they are often hard to find. In addition, there are gaps in the existing legal protection of human rights.¹¹³

252. Data in sections 2.1 and 2.3 of this submission shows the effects of having a single consolidated document recording basic rights on the development and drafting of statutory provisions, and the delivery of services by government.

Improving the overall compatibility of legislation and policies with human rights by requiring the government to take into account the impact of proposed laws and policies on human rights

253. The second reading speech stated that “the Bill will promote better government, by requiring government laws, policies and decisions to take into account civil and political rights”¹¹⁴ and further that section 38 “seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts.”¹¹⁵ The 2005 Consultation Committee Report stated “the Committee believes that by infusing human rights considerations at all levels of government, and in the policy and law-making process, there is a greater prospect of preventing laws and policies which are incompatible with human rights.”¹¹⁶

254. Data relevant to assessing this benefit is data showing the ways in which human rights have been taken into consideration in the legislative and policy development processes. The key mechanism by which human rights are formally considered is through the SoC process. The data in sections 2.1 and 2.3 contains examples that show how consideration of Charter Act rights has impacted on the form of provisions in Bills and the framing of policies to balance competing considerations.

¹¹³ Charter of Human Rights and Responsibilities Bill 2006, Second Reading Speech, 4 May 2006, Hansard, p 1290.

¹¹⁴ Charter of Human Rights and Responsibilities Bill 2006, Second Reading Speech, 4 May 2006, Hansard, p 1290.

¹¹⁵ Charter of Human Rights and Responsibilities Bill 2006, Second Reading Speech, 4 May 2006, Hansard, p 1293.

¹¹⁶ 2005 Consultation Committee Report, p 67.

255. Since the introduction of the Charter Act, two laws have been passed that have been only partially compatible with rights in the Charter Act.¹¹⁷ In addition, the test in section 7(2) of the Charter Act leaves room for competing views on the reasonableness of a limitation on a given Charter Act right. SARC in its Alert Digests has often commented on the view taken of the Charter Act rights in SoCs. These observations show that the Charter Act does not in and of itself prevent incompatible provisions being passed¹¹⁸ and may indicate that, for some people, the Charter Act provides less than optimal protection of rights.

Increasing transparency and enhancing discussion about human rights and the reasonableness of proposed limitations to rights

256. The 2005 Consultation Committee Report noted that a human rights Charter “would ensure there is proper debate about whether any proposed measures strike the right balance between the rights of Victorians and the objective that the government is seeking to achieve.”¹¹⁹ In relation to SARC’s role, the Human Rights Consultation Committee agreed with the view that a scrutiny committee “could contribute to a deeper and more considered form of deliberation on the rights implications of all Bills”¹²⁰ and that “a parliamentary committee could expose legislation to effective scrutiny in a way that is independent of the executive and also allow[s] for public participation in the process”.¹²¹

257. This benefit was also discussed in relation to declarations of inconsistent interpretation.¹²² For example, the Human Rights Consultation Committee’s view was that declarations are important to the effectiveness of the Charter as they “are a channel through which the dialogue between the courts and the Parliament takes place.”¹²³ Similarly the second reading speech stated that the declaration of inconsistency mechanisms “ensure that there is transparency and parliamentary accountability in the way the government responds to such findings by the court. This is consistent with the dialogue model of human rights that seeks to address human rights issues through a formal dialogue between the three branches of government while recognising the ultimate sovereignty of Parliament to make laws for the good government of the people of Victoria.”¹²⁴

¹¹⁷ See above paragraph [40].

¹¹⁸ It was not the intention that the Charter Act prevent incompatible provisions being passed.

¹¹⁹ 2005 Consultation Committee Report, p 10.

¹²⁰ 2005 Consultation Committee Report, p 76 citing submission from Australian Human Rights Commission.

¹²¹ 2005 Consultation Committee Report, citing submission from SARC.

¹²² Described in the HRCC report as ‘declarations of inconsistency’.

¹²³ 2005 Consultation Committee Report, p 86.

¹²⁴ Charter of Human Rights and Responsibilities Bill 2006, Second Reading Speech, 4 May 2006, Hansard, 1293.

258. Sections 2.1 and 2.2 contain information about how SoCs have informed debate about human rights issues.
259. As there has only been one declaration of inconsistent interpretation,¹²⁵ it is not possible to assess whether declarations of inconsistent interpretation have provided this benefit. However, where courts have *not* issued declarations, the provision or provisions under consideration have been judged as reasonable limitations under the Charter Act.

Improving service delivery by ensuring services are delivered by public authorities in ways that are compatible with human rights

260. The Human Rights Consultation Committee thought that a “duty to comply with human rights would impose new checks and balances on how government undertakes its work. The Committee believes that human rights standards are both necessary and desirable, are consistent with good practice in service delivery and help to build trust in our public services.”¹²⁶
261. The impact of the Charter Act on the provision of services is discussed in section 2.3. Evidence provided by service users and organisations who represent the interests of service users will also be important in considering whether the Charter Act has improved service delivery.

¹²⁵ See paragraph [148] above.

¹²⁶ 2005 Consultation Committee Report p.63.

4. Operation of the Charter Act

262. The fourth Term of Reference requires SARC to inquire into and report on “options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria”.
263. Section 4 of this submission addresses this term of reference in relation to technical issues that have arisen in the implementation of the Charter Act. These technical issues have arisen during the application of the Charter Act in legal proceedings, or the implementation of the Charter Act by government and other public authorities.
264. The submission does not address more substantial options for reform or improvement of the regime for protecting and upholding rights and responsibilities.

4.1 The definition of functional public authorities

265. Section 38 of the Charter Act imposes obligations on public authorities to comply with Charter Act rights and to give proper consideration to these rights. These obligations apply to private entities only to the extent that they may be exercising “functions of a public nature” on behalf of the state or a public authority (section 4). An issue for consideration in the review may be whether the application of the Charter Act to private entities needs to be clarified.
266. A public authority is defined in section 4(1) as:
- (a) a public official within the meaning of the Public Administration Act 2004; or
 - (b) an entity established by a statutory provision that has functions of a public nature; or
 - (c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise); or
 - (d) Victoria Police; or
 - (e) a Council within the meaning of the Local Government Act 1989 and Councillors and members of Council staff within the meaning of that Act; or
 - (f) a Minister; or
 - (g) members of a Parliamentary Committee when the Committee is acting in an administrative capacity; or
 - (h) an entity declared by the regulations to be a public authority for the purposes of this Charter.
267. The first category of public authorities, outlined in sections 4(1)(a)-(b) and 4(1)(d)-(h) of the Charter Act, is comprised of what is commonly referred to as *core* public authorities, such as public officials, Ministers and Victoria Police.
268. The second category, addressed in section 4(1)(c) of the Charter Act, is what are sometimes referred to as *functional* public authorities, meaning entities whose functions are or include “functions of a public nature when they are exercising those functions on behalf of the State or a public authority...”.

269. The inclusion in section 4 of these entities is said to reflect “the reality that modern governments utilise diverse organisational arrangements to manage and deliver government services”.¹²⁷
270. Section 4(2) of the Charter Act outlines a non-exhaustive list of factors that may be taken into account when determining if a function is of a public nature. These are:
- (a) that the function is conferred on the entity by or under a statutory provision;
 - (b) that the function is connected to or generally identified with functions of government;
 - (c) that the function is of a regulatory nature;
 - (d) that the entity is publicly funded to perform the function;
 - (e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.¹²⁸
271. There is a relative lack of jurisprudence, especially appellate jurisprudence in particular, on section 4(1)(c).
272. In contrast to the position in Victoria, there is a substantial body of jurisprudence in the UK examining the status of functional public authorities under the *Human Rights Act 1998* (UK) (**UK HRA**). The status of private entities, which might be said to perform at least some functions of a public nature is consequently much clearer in that jurisdiction. This jurisprudence has also been the subject of considerable debate.¹²⁹ It is to be expected that, in time, a body of jurisprudence will be developed in Victoria that will also determine the status of functional public authorities.

4.2 Obligations of courts and tribunals

273. An issue that may be considered by the review is whether the Charter Act should be amended to modify the obligations of courts and tribunals.
274. Section 4(1)(j) of the Charter Act excludes Victorian courts and tribunals from the definition of public authorities, except when “acting in an administrative capacity”.
275. Section 6(2)(b) provides that the Charter Act applies to “courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3”.
276. Part 2 sets out a list of rights in Victorian law, including rights that appear to confer specific duties and powers on courts and tribunals. An example

¹²⁷ See Charter Act, Explanatory Memorandum, p 4.

¹²⁸ See also Charter Act s 4(4) (providing that an entity may be acting on behalf of the State or a public authority even in circumstances where no agency relationship exists) and s 4(5) (providing that the fact that an entity is publicly funded to perform a function does not necessarily mean it is exercising that function on behalf of the State or a public authority).

¹²⁹ See, for example, Clayton and Tomlinson, *The Law of Human Rights* (second edition, 2009), p 238 and the articles there cited.

is section 24(2), which grants courts and tribunals the power to “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 this Charter”.

277. Division 3 of Part 3 includes the powers and functions associated with interpretation of legislation and declarations of inconsistent interpretation.
278. The reference in section 6(2)(b) to the substantive rights in Part 2 has caused uncertainty, as it appears to require courts and tribunals to directly apply rights in the Charter Act.¹³⁰ This is apparently inconsistent with the exclusion of courts and tribunals from the definition of public authorities.¹³¹
279. In *De Simone v Bevnol Constructions & Developments Pty Ltd*, the Court of Appeal (Neave JA and Williams AJA) stated that:

Difficulties arise in reconciling s 4 (1)(j), which excludes courts acting in a judicial capacity from the definition of public authorities, and s 6(2)(b) which says that the Charter applies to courts and tribunals to the extent that they have functions under Part 2 and Division 3 of Part 3. ...

In *Kortel v Mirik and Mirik*, Bell J acknowledged the difficulty of reconciling s 4(1)(j) and s 6(2)(b) of the Charter. He said that the question arose whether s 6(2)(b), together with ss 8 and 24(1), put “a positive obligation on the court to ensure a fair hearing” and that the resolution of that question turned on the proper construction of the expression to the extent that courts and tribunals have functions under Part 2 and Division 3 of Part 3, considered in the context of the objects and the scheme of the Charter as a whole.

... Given that s 6(2)(b) refers to both the interpretive functions of courts and tribunals in Part 3, Division 3, and to their functions under Part 2, it appears that ... s 6(2)(b) implicitly reads down s 4 (1)(j), so that Part 2 applies directly to courts and tribunals. It follows that ss 24 and 25 apply directly to courts and tribunals, when they exercise their functions.¹³²

280. In *Kracke*, Bell J applied the reasoning in *De Simone* and listed additional rights that would apply directly to courts and tribunals. His Honour held that:

under s 6(2)(b), the Charter applies to courts and tribunals “to the extent that they have functions under Part 2 and Division 3 of Part 3”. The functions under Part 2 that potentially apply are the functions of applying or enforcing the human rights specified in Part 2 that relate to court or tribunal proceedings, being those specified in ss 10(b) (in its reference to punishment), 21(5)(c), 21(6), 21(7), 21(8), 23(2), 23(3), 24(1), 24(2), 24(3), 25, 26 and 27 of the Charter. The actual engagement and application of these human rights for courts and tribunals

¹³⁰ Rather than, for example, applying them through the interpretive provision in section 32 of the Charter Act.

¹³¹ See, e.g., *Kracke* at [236]-[282]; *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237 at 246-247; *Kortel v Mirik and Mirik* [2008] VSC 103 at [5], [10]-[13], [17]-[18].

¹³² *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237 at 246-247.

depends upon the scope of the right concerned and the facts and circumstances of the individual proceeding.¹³³

281. The 2005 Consultation Committee Report deals specifically with the question of whether courts should be public authorities and, therefore, bound directly by the Charter Act, including in the development of the common law. The 2005 Consultation Committee Report recommended against direct application. It also noted the constitutional difficulty of direct application of the Charter Act to courts in the development of the common law, given the position of the High Court that there is one unified common law in Australia.¹³⁴

4.3 Notice requirements

282. Section 35(1)(a) of the Charter Act requires a party to a proceeding in the Supreme or County Court to give notice to the Attorney-General and the VEOHRC if “a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter”. Section 35(1)(b) requires a party to any proceeding to give notice to the Attorney-General and the VEOHRC if “a question is referred to the Supreme Court under section 33”.

283. The giving of notice in accordance with section 35 is mandatory, except where Victoria or the VEOHRC is already a party to the relevant proceeding (s 35(2)).

284. Notifications must be in the prescribed form as set out in Form 1 of *Charter of Human Rights and Responsibilities (General) Regulations 2007*.

285. Neither the Charter Act nor the Regulations specify when notice is to be given or when the Attorney-General and the VEOHRC are to indicate whether they intend to intervene in a proceeding.

286. An issue which may be considered as part of the review is whether the Charter Act should be amended to specify further exceptions to the notice requirement, remove the notice requirement or intervention rights and/or recognise judicial discretion to waive the notice requirement in appropriate circumstances.

287. In *Benbrika*, Bongiorno J characterised the mandatory notice requirement as overly prescriptive and an impediment to the effective operation of the Charter Act. He observed:

Section 35 of the Charter contains no severance provision, nor does it contain any urgency exception such as are found in s 78B of the *Judiciary Act 1903* (Cth). These are major impediments to the smooth operation of the Charter which need the urgent attention of the legislature. The section needs to preserve a

¹³³ At [254].

¹³⁴ 2005 Consultation Committee Report, p 59.

residual discretion in the judge to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason. This is, for obvious reasons, particularly important in criminal proceedings. Without such a power there is a real danger that the notice provisions of the Charter will be used to delay or even disrupt the orderly conduct of criminal trials.¹³⁵

288. Bongiorno J declined to apply the Charter Act in the *Benbrika* case because the notice requirement in section 35(1) had not been complied with, and also because of the potential for considerable delay, which he characterised as “at least inconvenient and perhaps even intolerable”.¹³⁶

289. Following amendment in 2008, the ACT HRA provides some further exceptions to the notice requirements. Section 34 provides:

- (1) This section applies
 - (a) if—
 - (i) a question arises in a proceeding in the Supreme Court that involves the application of this Act; or
 - (ii) the Supreme Court is considering making a declaration of incompatibility in a proceeding; and
 - (b) the Territory is not a party to the proceeding.
- (2) The Supreme Court must not allow the proceeding to continue or make the declaration unless the court is satisfied that—
 - (a) notice of the proceeding has been given to the Attorney-General and the commission; and
 - (b) a reasonable time has passed since the giving of the notice for the Attorney-General and the commission to decide whether to intervene in the proceeding.
- (3) For subsection (2), the Supreme Court may—
 - (a) direct a party to give notice of the proceeding to the Attorney-General and the commission; and
 - (b) continue to hear evidence and argument concerning matters severable from any matter involving the application of this Act.
- (4) Subsection (2) does not prevent the Supreme Court from hearing and deciding a proceeding, to the extent that the proceeding relates to the grant of urgent relief of an interlocutory nature, if the court considers it necessary in the interests of justice.

290. Another issue which may be considered is whether the timeframes for providing notice should be revised.

291. The Supreme Court of Victoria has issued a Practice Note that requires timely notification of Charter Act issues in an effort to avoid delays and the wastage of costs.¹³⁷ It provides that:

- Practitioners are expected to assess whether notification under section 35 is required at the commencement of a proceeding, and to inform the court about the issue at the first directions hearing or mention of a matter;

¹³⁵ At 416.

¹³⁶ At 416.

¹³⁷ Supreme Court of Victoria, *Practice Note No. 3 of 2008: Notification of Matters Arising Under the Charter of Human Rights and Responsibilities Act 2006* (2008), p 2.

- In the ordinary course of events, 14 days is the expected response time to a section 35 notice;
- If a Charter Act issue arises at a later stage of a proceeding, that notice should be given under section 35 within seven days of the issue coming to the attention of the party to the proceeding. The court should be informed of this fact immediately;
- If a Charter Act notice is required in an urgent matter, this should be communicated to the Attorney-General and VEOHRC at the earliest opportunity; and
- Compliance with the requirements of the Practice Note will be taken into account in relation to the question of costs.

4.4 Discrepancies between rights in the ICCPR and the Charter Act

292. Although the starting point for the rights in the Charter Act was the ICCPR, there are a number of differences between the rights contained in the two documents. Some rights in the ICCPR were not included in the Charter Act, while other rights in the Charter Act are not in the ICCPR. In other cases, the formulation of rights was modified. A summary of significant differences can be found in **Appendix B**.

293. A number of ICCPR rights were omitted from the Charter Act because it was considered that they were Commonwealth matters.¹³⁸ These include:

- rights relating to marriage in articles 23(2)-23(4) of the ICCPR;
- the right of a child to acquire a nationality in article 24(3) of the ICCPR; and
- the protection of aliens from arbitrary expulsion from a country in article 13 of the ICCPR.

294. Other ICCPR rights were omitted on the basis that they were not relevant to Victoria today.¹³⁹ These include:

- rights and obligations concerning countries that have not yet abolished the death penalty in articles 6(2) and 6(4)-6(6) of the ICCPR;
- the right of children to birth registration and to a name in article 24(2) of the ICCPR; and
- the prohibition on war propaganda in article 20(1) of the ICCPR.

¹³⁸ 2005 Consultation Committee Report, pp 43 and 45.

¹³⁹ 2005 Consultation Committee Report, pp 42 and 45.

295. Some other omissions include:

- “the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity” in article 18(4) of the ICCPR. The 2005 Consultation report recommended that this provision be omitted “as it is concerned that it may have the unintended consequence of leading to an enforceable right to education when the Committee has decided that economic, social and cultural rights should not be included in the Charter at this first stage”;¹⁴⁰
- the right to self-determination in article 1(1) of the ICCPR. The 2005 Consultation Report stated there was a “lack of consensus both domestically and internationally on what the right of self-determination comprises beyond the idea that it involves participation in decision-making”. For this reason, self-determination was included in the list of rights in section 44(2) of the Charter Act, which must be considered for inclusion in this review;
- the right to compensation for unlawful arrest or detention in article 9(5) of the ICCPR. The 2005 Consultation Report considered that this right would be inconsistent with the recommendation that a separate right of damages not be available for breaches of the Charter Act, a recommendation implemented in section 39(3) of the Charter Act;¹⁴¹ and
- Article 10(3) of the ICCPR, which provides that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” The 2005 Consultation Report argued this was “not an appropriate provision for inclusion” because the prison system may have other aims and that this was a matter for public debate.¹⁴²

296. There are other areas of note where the rights in the Charter Act are worded significantly differently to rights in the ICCPR:

- The provision in article 7 of the ICCPR, prohibiting torture and cruel, inhuman or degrading treatment, stating that “[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation.” It is often considered this provision covers experiments that are so egregious as to constitute cruel, inhuman or degrading treatment.¹⁴³ Section 10(3) of the Charter Act includes a prohibition on medical

¹⁴⁰ 2005 Consultation Committee Report, p 44.

¹⁴¹ 2005 Consultation Committee Report, p 43.

¹⁴² 2005 Consultation Committee Report, p 43.

¹⁴³ Novak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition, 2005), p 189.

treatment without consent, which has the effect of considerably extending this right.¹⁴⁴ The reasons for the inclusion of medical treatment in the scope of this right are not clear from the 2005 Consultation Report, although the report generally notes that the intention is that the section will be consistent with existing Victorian law, such as the section 5(1) of the *Medical Treatment Act 1988*,¹⁴⁵ and

- The provision permitting the exclusion of the public and media from court hearings. Article 14 of the ICCPR sets out the right to have a fair and public hearing in civil and criminal matters. This right was included with some adaptation as section 24 of the Charter Act. The exception to this right, which permits the exclusion of the media and the public from courts, is quite different in the Charter Act than in the ICCPR.¹⁴⁶ The 2005 Consultation Report stated that the differences were required “to ensure that the Charter is consistent with existing Victorian law”.¹⁴⁷

¹⁴⁴ See the discussion on this distinction in Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, p 254.

¹⁴⁵ 2005 Consultation Committee Report, p 42.

¹⁴⁶ The ICCPR relevantly provides that: “The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice...” By contrast, the exception in the Charter Act reads: “Despite subsection (1), 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 this Charter.”

¹⁴⁷ 2005 Consultation Committee Report, p 44.

Appendix A – Statements of compatibility tabled between 1/07/09 – 30/6/10

Bill name	Complexity	No. rights engaged	Rights engaged	Justified imitations	Length (pages)
Appropriation (2010/2011) Bill 2010	Very Low	0	0	0	1.0
Appropriation (Parliament 2010/2011) Bill 2010	Very Low	0	0	0	0.5
Associations Incorporation Amendment Bill 2010	Medium	3	15, 24, 25(2)(k)	1	3.0
Building Amendment Bill 2010	Low	1	25(1)	1	1.5
Cemeteries and Crematoria Amendment Bill 2009	Low	2	13, 18	1	1.5
Child Employment Amendment Bill 2010	High	6	8, 13, 17, 20, 24, 25(2)(k)	2	4.0
Civil Procedure Bill 2010	Low	2	13, 24(1)	1	4.0
Constitution (Appointments) Bill 2009	Very Low	0	0	0	1.0
Control of Weapons Amendment Bill 2010	High	6	8, 13, 17, 20, 21, 24	1* (partial incomp)	4.0
Courts Legislation Amendment (Judicial Resolution Conference) Bill 2009	Low	1	24	0	1.0
Courts Legislation Miscellaneous Amendments Bill 2010	Low	1	24	0	1.5
Credit (Commonwealth Powers) Bill 2010	High	6	13, 15, 20, 24, 25(1), 25(2)(k)	2	10.5

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Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009	High	9	17, 23, 24, 25(2)(b), 25(2)(d), 25(2)(g), 25(4), 25(3), 27	1	9.0
Deakin University Bill 2009	Low	1	20	0	1.0
Domestic Animals Amendment (Dangerous Dogs) Bill 2010	Low	2	20, 24	0	1.5
Drugs, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Bonges) Bill 2010	Low	1	20	0	0.5
Education and Training Reform Amendment (Overseas Students) Bill 2009	Low	2	13, 24	0	2.5
Education and Training Reform Amendment (School Age) Bill 2009	Medium	4	14, 15, 17, 8	0	1.5
Education and Training Reform Further Amendment Bill 2010	Low	2	13, 17	0	1.5
Electoral Amendment (Electoral Participation) Bill 2010	Medium	4	8, 13, 15, 18	1	3.0
Electricity Industry Amendment (Critical Infrastructure) Bill 2009	Very Low	0	0	0	0.5
Emergency Services Legislation Amendment Bill 2009	Very Low	0	0	0	1.0
Energy and Resources Legislation Amendment Bill 2009	Medium	3	12, 19, 20	1	1.5
Energy and Resources Legislation Amendment Bill 2010	Medium	5	13, 15, 24, 25(1), 25(2)(k)	0	3.0

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Environment Protection Amendment (Landfill Levies) Bill 2010	Very Low	0	0	0	0.5
Equal Opportunity Bill 2010	High	6	8, 13, 15, 16, 24, 25(1)	5	18.5
Fair Trading Amendment (Unfair Contract Terms) Bill 2010	Very Low	0	0	0	1.0
Fair Work (Commonwealth Powers) Amendment Bill 2009	Very Low	0	0	0	0.5
Fire Services Funding (Feasibility Study) Bill 2009	Low	2	13, 15	1	2.5
Firearms and Other Acts Amendment Bill 2010	Medium	4	13, 20, 24, 25(1)	0	2.0
Gambling Regulation Amendment (Licensing) Bill 2010	Medium	4	13, 16, 20, 24	1	3.5
Gambling Regulation Amendment (Racing Club Venue Operator Licences) Bill 2009	Very Low	0	0	0	0.5
Gambling Regulation Further Amendment Bill 2009	Low	2	13, 20	0	2.0
Government (Political) Advertising Bill 2010	Very Low	0	0	0	0.5
Health and Human Services Legislation Amendment Bill 2010	Very Low	0	0	0	0.5
Health Practitioner Regulation National Law (Victoria) Bill 2009	Medium	3	13, 15, 20	0	3.5
Juries Amendment (Reform) Bill 2010	Low	1	24	0	1.5
Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Bill 2010	High	6	12, 13, 17, 20, 24, 25(3)	2	5.5

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Justice Legislation Amendment Bill 2010	High	12	10, 12, 13, 17, 21, 23, 24, 25(2)(g), 25(2)(k), 25(4), 26, 27	2	9.0
Justice Legislation Further Amendment Bill 2009	High	7	13, 17, 20, 21, 23, 24, 25(2)(k)	1	3.5
Justice Legislation Miscellaneous Amendments Bill 2009	High	5	12, 13, 15, 20, 21	3	3.5
La Trobe University Bill 2009	Low	1	20	0	1.0
Land (Revocation of Reservations and Other Matters) Bill 2009	Low	1	12	0	1.0
Land Legislation Amendment Bill 2009	Medium	4	8, 13, 20, 24	0	3.5
Liquor Control Reform Amendment (ANZAC Day) Bill 2010	Low	2	20, 24	0	1.0
Liquor Control Reform Amendment (Licensing) Bill 2009	Low	1	13	0	1.0
Liquor Control Reform Amendment (Party Buses) Bill 2009	Low	1	25(1)	1	1.0
Local Government (Brimbank City Council) Bill 2009	Low	1	18	1	1.5
Local Government Amendment (Conflicting Duties) Bill 2009	Low	1	18	1	1.5
Local Government Amendment (Offences and Other Matters) Bill 2009	Low	2	18, 20	1	1.5
Major Transport Projects Facilitation Bill 2009	High	6	12, 13, 15, 19, 20, 24	0	3.0

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Melbourne Cricket Ground and Yarra Park Amendment Bill 2009	Medium	3	12, 15, 20	1	2.0
Members of Parliament (Standards) Bill 2010	Medium	4	13, 15, 16, 18	2	2.5
Monash University Bill 2009	Low	1	20	0	1.0
Offshore Petroleum and Greenhouse Gas Storage Bill 2010	High	6	12, 13, 20, 24, 25(1), 25(2)(k)	2	4.0
Parks and Crown Land Legislation (Mount Buffalo) Bill 2010	Medium	3	12, 19, 20	2	3.0
Parks and Crown Land Legislation Amendment (East Gippsland) Bill 2009	Medium	3	12, 19, 20	0	1.5
Parks and Crown Land Legislation Amendment (River Red Gums) Bill 2009	Medium	3	12, 19, 20	0	1.5
Personal Property Securities (Commonwealth Powers) Bill 2009	Low	2	13, 20	0	2.5
Personal Safety Intervention Orders Bill 2010	High	9	8, 9, 12, 13, 14, 15, 20, 21, 24	5	6.5
Pharmacy Regulation Bill 2010	Low	2	13, 24	0	2.5
Planning Legislation Amendment Bill 2009 (No.2)	Medium	3	13, 15, 18	2	3.0
Prahran Mechanics' Institute Amendment Bill 2010	Low	1	20	0	0.5
Primary Industries Legislation Amendment Bill 2010	Medium	4	13, 15, 20, 24	0	3.5
Racing Legislation Amendment (Racing Integrity Assurance) Bill 2009	Low	2	13, 24	0	2.5

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Radiation Amendment Bill 2010	Low	1	13	0	1.0
Sentencing Amendment Bill 2009	Medium	5	8, 14, 15, 19, 27	0	1.5
Serious Sex Offenders (Detention and Supervision) Bill 2009	High	7	10, 12, 13, 16, 21, 22, 24	3	6.5
State Taxation Acts Amendment Bill 2010	Very Low	0	0	0	0.5
State Taxation Acts Further Amendment Bill 2009	Low	2	13, 15	1	2.0
Statute Law Amendment (Evidence Consequential Provisions) Bill 2009	High	13	8, 12, 13, 14, 15, 17, 20, 21, 23, 24, 25(2)(k), 25(3), 27	3	6.0
Statute Law Amendment (National Health Practitioner Regulation) Bill 2010	Very Low	0	0	0	0.5
Subordinate Legislation Amendment Bill 2010	Low	2	15, 18	0	2.0
Summary Offences and Control of Weapons Acts Amendment Bill 2009	High	8	12, 13, 15, 16, 17, 20, 21, 25	5* (2 incomp)	7.0
Superannuation Legislation Amendment Bill 2010	Medium	3	8, 13, 20	3	3.5
Supported Residential Services (Private Proprietors) Bill 2010	High	7	8, 10, 13, 15, 20, 24, 25(2)(k)	2	4.0
Therapeutic Goods (Victoria) Bill 2010	Medium	4	13, 15, 20, 25(1)	1	5.0
Tourist and Heritage Railways Bill 2010	Low	1	13	1	1.5

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Transport Legislation Amendment (Compliance, Enforcement and Regulation) Bill 2010	High	8	8, 12, 13, 15, 20, 24, 25(1), 25(2)(k)	4	5.0
Transport Legislation Amendment (Hoon Boating and Other Amendments) Bill 2009	High	6	12, 13, 20, 24, 25(2)(k), 26	1	5.0
Transport Legislation Amendment (Ports Integration) Bill 2010	Low	2	12, 20	1	1.5
Trustee Companies Legislation Amendment Bill 2010	Low	2	17, 20	0	0.5
University of Melbourne Bill 2009	Low	1	20	0	1.0
Valuation of Land Amendment Bill 2009	Low	2	13, 24	0	2.0
Victorian Renewable Energy Amendment Bill 2009	Low	1	20	0	1.0
Water Amendment (Non Water User Limit) Bill 2009	Low	1	20	0	0.5
Water Amendment (Victorian Environmental Water Holder) Bill 2010	Very Low	0	0	0	0.5
Working with Children Amendment Bill 2010	Low	1	13	0	2.0

Appendix B - Summary of differences between the ICCPR and the Charter Act

Significant differences between human rights in the Charter Act and the ICCPR								
Charter Act section	Human Right	Charter Act text	ICCPR article	ICCPR text	Notes on differences	ACT HRA	UK HRA	NZ BOR
8(2)	Enjoyment of rights without discrimination	Every person has the right to enjoy his or her human rights without discrimination.	2(1)	Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.	Section 8(2) of the Charter Act and article 2(1) of the ICCPR are similar insofar as they provide that every person has the right to enjoy his or her human rights without discrimination. However, as s 3(1) of the Charter Act defines discrimination by reference to the <i>Equal Opportunity Act 1995</i> (Vic), there are differences in the attributes protected under s 8 of the Charter Act and article 2(1) of the ICCPR. Article 2(1) of the ICCPR is non-exhaustive list of protected attributes, unlike the list of protected attributes in the <i>Equal Opportunity Act 1995</i> .	8(2)	14	19
8(3)	Right to equality before the law	Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.	26	All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.	There appear to be no significant differences between s 8(3) of the Charter Act and article 26 of the ICCPR. Article 26 of the ICCPR repeats the list of prohibited grounds of discrimination in art. 2(1) of the ICCPR, so the same issue arises as in relation to s 8(2) of the Charter Act.	8(3)	N/A	N/A
8(4)	Special measures not discrimination	Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.	N/A	N/A	Although there is no provision equivalent to s 8(4) of the Charter Act in the ICCPR, the section is consistent with established principles of international human rights law.	N/A	N/A	19(2)
9	Right to life	Every person has the right to life and has the right not to be arbitrarily deprived of life.	6(1)	Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.	There appear to be no significant differences between s 9 of the Charter Act and article 6(1) of the ICCPR. Articles 6(2)-6(6) of the ICCPR are not included in the Charter Act. Articles 6(2), 6(4), 6(5) and 6(6) concern countries that have not abolished the death penalty and are not relevant to Australia. Article 6(3) relates to obligations under the Genocide Convention.	9(1)	2	8
10	Protection from torture and cruel, inhuman or degrading treatment	A person must not be— (a) subjected to torture; or (b) treated or punished in a cruel, inhuman or degrading way; or (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.	7	No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.	Sections 10(a)-(b) of the Charter Act are modelled on article 7 of the ICCPR with unimportant differences in terminology. Section 10(c) is significantly broader than article 7 of the ICCPR insofar 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 s 5(1) of the <i>Medical Treatment Act 1988</i> . Article 7 of the ICCPR focuses on experimentation as an example of cruel, inhuman or degrading treatment.	10	3	9--11

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Significant differences between human rights in the Charter Act and the ICCPR								
Charter Act section	Human Right	Charter Act text	ICCPR article	ICCPR text	Notes on differences	ACT HRA	UK HRA	NZ BOR
11	Freedom from forced work	<p>(1) A person must not be held in slavery or servitude.</p> <p>(2) A person must not be made to perform forced or compulsory labour.</p> <p>(3) For the purposes of subsection (2) forced or compulsory labour does not include—</p> <p>(a) 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 ordered to perform work in the community; or</p> <p>(b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or</p> <p>(c) work or service that forms part of normal civil obligations.</p> <p>(4) In this section court order includes an order made by a court of another jurisdiction.</p>	8	<p>(1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.</p> <p>(2) No one shall be held in servitude.</p> <p>(3)</p> <p>(a) No one shall be required to perform forced or compulsory labour;</p> <p>(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;</p> <p>(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:</p> <p>(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;</p> <p>(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;</p> <p>(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;</p> <p>(iv) Any work or service which forms part of normal civil obligations.</p>	<p>There are some differences between s 11 of the Charter Act and article 8 of the ICCPR.</p> <p>Section 11(1) of the Charter Act is an amalgamation of articles 8(1) and 8(2) of the ICCPR. However, the words "slavery and the slave-trade in all their forms shall be prohibited", which appear in article 8(1) of the ICCPR are not replicated in s 11(1) of the Charter Act.</p> <p>The exception in article 8(3)(b) of the ICCPR for "hard labour" is not replicated in the Charter Act.</p> <p>The exception in s 11(3)(a) of the Charter Act for work or service normally required of a person includes the words "or ordered to perform work in the community". These words do not appear in article 8(3)(c)(i) of the ICCPR.</p> <p>The exception in s 11(3)(b) of the Charter Act for work or service required because of an emergency omits the term "calamity" used in article 8(c)(iii). Presumably this is because the term is outdated. The exception in article 8(3)(c)(ii) of the ICCPR to the freedom from forced labour for military service and national service is not replicated in the Charter Act. The 2005 Report of the Human Rights Consultation Committee and the Charter Act explanatory memorandum note that the omission is because military and national service are generally Commonwealth matters.</p> <p>The Charter Act includes s 11(4), which defines the term "court order" as including "an order made by a court of another jurisdiction".</p>	26	4	N/A
12	Freedom of movement	<p>Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.</p>	12	<p>(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.</p> <p>(2) Everyone shall be free to leave any country, including his own.</p> <p>(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.</p> <p>(4) No one shall be arbitrarily deprived of the right to enter his own country.</p>	<p>Section 12 of the Charter Act appears to be a combination of articles 12(1), 12(2) and 12(4) of the ICCPR. There are slight differences in wording, due to the amalgamation of several clauses. However, it appears that these differences are of no consequence. For example, s 12 of the Charter Act provides for "the right to move freely", whereas article 12(1) of the ICCPR provides for "the right to liberty of movement".</p> <p>Article 12(3) of the ICCPR, an internal limitations provision is not replicated in s 12 of the Charter Act. Instead, limitations to section 12 are covered by the general limitations provision in section 7(2) of the Charter Act.</p>	13	N/A	18

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Significant differences between human rights in the Charter Act and the ICCPR								
Charter Act section	Human Right	Charter Act text	ICCPR article	ICCPR text	Notes on differences	ACT HRA	UK HRA	NZ BOR
13(a)	Right to privacy	A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.	17(1)	No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.	<p>There are some minor differences between s 13(a) of the Charter Act and article 17(1) of the ICCPR.</p> <p>The first difference, which appears to be of no consequence, is that s 13(a) of the Charter Act provides that "[a] person has the right", whereas article 17(1) of the ICCPR provides that "[n]o one shall be subjected to" .</p> <p>A second difference is that there is no express provision in the Charter Act equivalent to article 17(2) of the ICCPR, which provides that "[e]veryone has the right to the protection of the law against such interference or attacks".</p>	12	8	N/A
13(b)	Right to reputation	A person has the right not to have his or her reputation unlawfully attacked.	17(1)	No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.	<p>There are some differences between s 13(b) of the Charter Act and article 17(1) of the ICCPR.</p> <p>One difference is that s 13(b) of the Charter Act provides for a right "not to have his or her reputation unlawfully attacked", whereas s 17(1) of the ICCPR covers "honour and reputation".</p> <p>The second difference, which appears to be of no consequence, is that s 13(a) of the Charter Act provides that "[a] person has the right", whereas article 17(1) of the ICCPR provides that "[n]o one shall be subjected to" .</p> <p>A third difference is that there is no express provision in the Charter Act equivalent to article 17(2) of the ICCPR, which provides that "[e]veryone has the right to the protection of the law against such interference or attacks".</p>	12	8	N/A
14	Freedom of thought, conscience, religion and belief	(1) Every person has the right to freedom of thought, conscience, religion and belief, including—(a) the freedom to have or to adopt a religion or belief of his or her choice; and(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.(2) 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.	18(1)-(2)	(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.(2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.	<p>The main difference between s 14(1) of the Charter Act and article 18(1) of the ICCPR is the use in the Charter Act of the term "demonstrate". The Charter Act guarantees a "freedom to demonstrate his or her religion or belief", whereas the ICCPR guarantees the freedom "to manifest his religion or belief". There is a significant body of international human rights jurisprudence on the term "manifest".</p> <p>The main difference between s 14(2) of the Charter Act and article 18(2) of the ICCPR concerns the inclusion in the Charter Act of the words "or restrained". While the Charter Act provides that "[a] person must not be coerced or restrained in a way that limits his or her freedom ...", the ICCPR provides that "[n]o one shall be subject to coercion which would impair his freedom ...".</p> <p>Article 18(3) of the ICCPR, an internal limitations provision, is not replicated in s 14 of the Charter Act. Limitations to this right are covered in the general limitations provision in section 7(2) of the Charter Act.</p> <p>Article 18(4) of the ICCPR is omitted from the Charter Act. The provision provides that "States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions". The 2005 Report of the Human Rights Consultation Committee notes that this provision was omitted as it was "concerned that it may have the unintended consequence of leading to an enforceable right to education when the Committee has decided that economic, social and cultural rights should not be included in the Charter at this first stage".</p>	15	9	13, 15

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Significant differences between human rights in the Charter Act and the ICCPR								
Charter Act section	Human Right	Charter Act text	ICCPR article	ICCPR text	Notes on differences	ACT HRA	UK HRA	NZ BOR
15	Freedoms of opinion and expression	(1) Every person has the right to hold an opinion without interference. (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether— (a) orally; or (b) in writing; or (c) in print; or (d) by way of art; or (e) in another medium chosen by him or her. (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary— (a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality.	19	(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.	There are no significant differences between ss 15(1) and 15(2) of the Charter Act and articles 19(1) and 19(2) of the ICCPR. There appears to be one minor difference between s 15(3) of the Charter Act and article 19(3) of the ICCPR, both of which provide for an internal limitation provision. The Charter Act provides for "lawful restrictions reasonably necessary" whereas the ICCPR deals with restrictions that "are provided by law and are necessary". The principal difference concerns inclusion in the Charter Act of the term "reasonably". Section 7(2) of the Charter Act remains relevant to ss 15(1) and 15(2).	16	10	14
16(1)	Freedom of assembly	Every person has the right of peaceful assembly.	21	The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.	There are no significant differences in the framing of the freedom of assembly in s 16(1) of the Charter Act and art. 21 of the ICCPR, other than inclusion in art. 21 of an internal limitations provision which is not included in the Charter Act. The right is subject to the general limitations provision in section 7(2) of the Charter Act.	15(1)	11	16
16(2)	Freedom of association	Every person has the right to freedom of association with others, including the right to form and join trade unions.	22(1)	Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.	There appear to be no significant differences between s 16(2) of the Charter Act and article 22(1) of the ICCPR. Article 22(1) does, however, include the phrase "for the protection of his interests", which is not reflected in s 16(2) of the Charter Act. Article 22(2), an internal limitations provision, is not repeated in the Charter Act, although the Charter Act has a general limitations provision in s 7(2). Article 22(3) concerning the International Labour Organization Convention on Freedom of Association and Protection of the Right to Organize is also not reflected in s 16(2) of the Charter Act.	15(2)	11	17

Significant differences between human rights in the Charter Act and the ICCPR								
Charter Act section	Human Right	Charter Act text	ICCPR article	ICCPR text	Notes on differences	ACT HRA	UK HRA	NZ BOR
17(1)	Right to protection of families	Families are the fundamental group unit of society and are entitled to be protected by society and the State.	23(1)	The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.	<p>There are some differences between s 17(1) of the Charter Act and article 23(1) of the ICCPR.</p> <p>One difference concerns use of the term "families" in the Charter Act rather than "family" as in art. 23(1) of the ICCPR. The 2005 Report of the Human Rights Consultation Committee notes that "use of the term 'Families' is appropriate as it recognises that families can take many and varied forms, all of which are worthy of protection".</p> <p>Another difference concerns the description of "families". The ICCPR describes families as the "natural and fundamental group unit of society", whereas the Charter Act refers to them as the "fundamental group unit of society". The Charter Act omits the word "natural". In addition, the Charter Act explanatory memorandum notes that "[i]t is not Parliament's intention to create a right to found a family in the Charter".</p> <p>Articles 23(2)-23(4) of the ICCPR on marriage are not included in the Charter Act. The 2005 Report of the Human Rights Consultation Committee notes that this is because marriage is essentially a Commonwealth matter.</p>	11(1)	N/A	N/A
17(2)	Right to protection of children	Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.	24(1)	Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.	<p>There are some differences between s 17(2) of the Charter Act and article 24(1) of the ICCPR.</p> <p>Section 17(2) provides that "[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child." Article 24(1) provides that "[e]very child shall have, without any discrimination as to race, colour, sex ..., the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."</p> <p>Articles 24(2) and 24(3) of the ICCPR are not included in the Charter Act. Regarding the omission of the right of children to birth registration and to a name (article 24(2)), the 2005 Report of the Human Rights Consultation Committee notes that "[w]hile these rights were more relevant in the post-World War II context in which the ICCPR was drafted, they are less relevant for inclusion in a modern Victorian Charter and are covered by other Victorian laws." The Report notes that the right of children to acquire a nationality (article 24(3)) was omitted from the Charter Act because nationality is essentially a Commonwealth matter.</p>	11(2)	N/A	N/A
18(2)(a)	Right to vote and be elected	Every eligible person has the right, and is to have the opportunity, without discrimination to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors.	25(b)	Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.	Section 18(2)(a) appears to modify article 25(b) of the ICCPR by confining the right to vote and to occupy public office to "eligible" persons.	17(b)	N/A	12
18(2)(b)	Right of access to public service and public office	Every eligible person has the right, and is to have the opportunity, without discrimination to have access, on general terms of equality, to the Victorian public service and public office.	25(c)	Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions to have access, on general terms of equality, to public service in his country.	Section 18(2)(b) appears to modify article 25(c) of the ICCPR by confining the right of access to public service and public office to "eligible" persons.	17(c)	N/A	12

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Significant differences between human rights in the Charter Act and the ICCPR								
Charter Act section	Human Right	Charter Act text	ICCPR article	ICCPR text	Notes on differences	ACT HRA	UK HRA	NZ BOR
19(1)	Cultural rights	All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.	27	In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.	Unlike article 27 of the ICCPR, s 19(1) of the Charter Act does not apply only to "minorities". It applies to persons with a particular cultural, religious, racial or linguistic "background", reflecting the wording of the <i>Multicultural Victoria Act 2004</i> (Vic). In other words, the cultural rights of all people with a particular cultural, religious, racial or linguistic background are protected.	27	N/A	20
19(2)	Cultural rights of Aboriginal persons	Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—(a) to enjoy their identity and culture; and(b) to maintain and use their language; and(c) to maintain their kinship ties; and(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.	N/A	N/A	Section 19(2) of the Charter Act establishes that Aboriginal persons in Victoria have a right to enjoy their own culture. There is no equivalent provision in the ICCPR, although s 19(2) draws on article 27 of the ICCPR.	N/A	N/A	N/A
20	Right to property	A person must not be deprived of his or her property other than in accordance with law.	N/A	N/A	There is no provision in the ICCPR equivalent to s 20 of the Charter Act. Article 17 of the Universal Declaration of Human Rights does, however, recognise that: "(1) Everyone has the right to own property alone as well as in association with others; (2) No one shall be arbitrarily deprived of his property."	N/A	First Protocol, 1	N/A
21(1)-(7)	Rights to liberty and security of person	(1) Every person has the right to liberty and security. (2) A person must not be subjected to arbitrary arrest or detention. (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law. (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her. (5) A person who is arrested or detained on a criminal charge— (a) must be promptly brought before a court; and (b) has the right to be brought to trial without unreasonable delay; and (c) must be released if paragraph (a) or (b) is not complied with. (6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to attend— (a) for trial; and (b) at any other stage of the judicial proceeding; and (c) if appropriate, for execution of judgment. (7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must— (a) make a decision without delay; and (b) order the release of the person if it finds that the detention is unlawful.	9	(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.	There are no significant differences between sections 21(1)-21(3) of the Charter Act and article 9(1) of the ICCPR. These provisions deal with the rights to liberty and security of the person, the right not to be subjected to arbitrary arrest or detention, and the right not to be deprived of liberty except on grounds and in accordance with law. Section 21(4) of the Charter Act in relation to the right to be informed of the reason for arrest or detention, modifies article 9(2) of the ICCPR in that it applies to arrest or detention. Article 9(2) of the ICCPR applies to arrest only. Section 21(4) of the Charter Act also refers to the right to be informed "about any proceedings to be brought against him or her". The ICCPR refers to the right to be informed "of any charges". There are no significant differences between ss 21(5) and 21(6) of the Charter Act and article 9(3) of the ICCPR. There are no significant differences between s 21(6) of the Charter Act and article 9(4) of the ICCPR. However, note use of "must" in the Charter Act. There is no provision in the Charter Act equivalent to article 9(5) of the ICCPR, which establishes an enforceable right to compensation for unlawful arrest or detention. The 2005 Report of the Human Rights Consultation Committee noted that "the Committee does not consider that this compensation provision should be included in the Charter as it may amount to a right to damages. The Committee also notes that unlawful detention may give rise to a claim for damages under existing tort law". This is consistent with s 39(3) of the Charter Act, which sets out that a person is not entitled to damages because of breach of the Charter Act.	18(1)-18(7)	5	22, 23(1)-23(3)

Significant differences between human rights in the Charter Act and the ICCPR								
Charter Act section	Human Right	Charter Act text	ICCPR article	ICCPR text	Notes on differences	ACT HRA	UK HRA	NZ BOR
22	Right to humane treatment when deprived of liberty	(1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. (2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary. (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.	10(1)-(2)(a)	(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. (2)(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.	There are some differences between s 22 of the Charter Act and articles 10(1)-(2)(a) of the ICCPR. Section 22(1) of the Charter Act, which provides that "[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person", is essentially identical to article 10(1) of the ICCPR. Sections 22(2) and 22(3) of the Charter Act are more expansive than article 10 of the ICCPR insofar as they apply to the protection to persons who have been detained without charge and not only to accused persons. Section 22(2) modifies article 10(2)(a) of the ICCPR by requiring the segregation of accused persons or persons detained without charge from convicted persons "except where reasonably necessary". The ICCPR requires an accused person to be segregated "save in exceptional circumstances". There is no provision in article 10 of the ICCPR equivalent to s 22(3) of the Charter Act, which provides that "[a]n accused person who is detained without charge must be treated in a way that is appropriate for a person who has not been convicted".	19	N/A	23(5)
23	Rights of children in the criminal process	(1) An accused child who is detained or a child detained without charge must be segregated from all detained adults. (2) An accused child must be brought to trial as quickly as possible. (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.	10(2)(b), 10(3)	(2)(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. (3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.	There are some differences between ss 23(1) and 23(2) of the Charter Act and article 10(2)(b) of the ICCPR. Section 23(1) of the Charter Act is more expansive than article 10(2)(b) of the ICCPR insofar as it applies to the protection of children who have been detained without charge and not only to accused children. Section 23(3) of the Charter Act provides that "[a] child that has been convicted of an offence must be treated in a way that is appropriate for his or her age." Section 23(3) omits the phrase "and legal status" included in article 10(3) of the ICCPR. The Charter Act does not include that part of article 10(3) of the ICCPR that states that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". The 2005 Report of the Human Rights Consultation Committee notes that "this is not an appropriate provision for inclusion in the Charter as the prison system may have other aims apart from the reform and rehabilitation of offenders and this remains a matter for public debate".	20	N/A	N/A

Victorian Government submission: SARC review of the Charter Act

Significant differences between human rights in the Charter Act and the ICCPR								
Charter Act section	Human Right	Charter Act text	ICCPR article	ICCPR text	Notes on differences	ACT HRA	UK HRA	NZ BOR
24	Right to a fair hearing	<p>(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.</p> <p>(2) Despite subsection (1), 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 this Charter.</p> <p>Note - For example, section 19 of the Supreme Court Act 1986 sets out the circumstances in which the Supreme Court may close all or part of a proceeding to the public. See also section 80AA of the County Court Act 1958 and section 126 of the Magistrates' Court Act 1989.</p> <p>(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.</p>	14(1)	<p>All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.</p>	<p>The 2005 Report of the Human Rights Consultation Committee notes that the "Charter contains a modified form of ICCPR article 14(1) which concerns the exclusion of the press and the public from a trial. The Charter provision includes an additional subsection to allow exclusion where 'an Act or the rules of the court or tribunal permit the exclusion'. The Committee considers that this addition is required to ensure that the Charter is consistent with existing Victorian law. The Charter also modifies the ICCPR provision by permitting the suppression of all or part of a judgment where the court considers that there are special circumstances which make it reasonably necessary to do so".</p>	21	6(1)	25(a)
25	Rights in criminal proceedings	<p>(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—(a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and(b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and(c) to be tried without unreasonable delay; and(d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the Legal Aid Act 1978; and(e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the Legal Aid Act 1978; and(f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the Legal Aid Act 1978; and(g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and(h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and(i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and(j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and(k) not to be compelled to testify against himself or herself or to confess guilt.(3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.(4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.</p>	14(2)-(5)	<p>(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. (4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. (5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.</p>	<p>There appear to be no significant differences between s 25(1) of the Charter Act in relation to the right to be presumed innocent until proven guilty and article 14(2) of the ICCPR.</p> <p>There are some differences between s 25(2) of the Charter Act on minimum guarantees in criminal proceedings and article 14(3) of the ICCPR. The Charter Act modifies article 14(3) by ensuring, where necessary, that people will be entitled to specialised communication tools and technology in order to understand the nature and reason for the criminal charge and to participate in the judicial process.</p> <p>Article 14(3) is also modified as it relates to the provision of legal assistance by making reference to the <i>Legal Aid Act 1978 (Vic)</i> to ensure consistency with Victorian law. A qualification is made in relation to the examination of witnesses, consistent with Victorian laws regarding cross-examination of certain witnesses, such as children and victims of sexual assault. The purpose of these modifications was identified in the 2005 Report of the Human Rights Consultation Committee in this way: "The Charter provision modifies the ICCPR article 14(3) in a number of important respects. First, the Committee has modified the provision to reflect the fact that some people charged with a criminal offence will need, and are entitled to, specialised communication tools and technology to understand the nature of and reason for the criminal charge and to participate in the judicial process. Secondly, the Committee has adopted the subsections dealing with the provision of legal assistance to include references to the <i>Victorian Legal Aid Act 1978</i> to ensure consistency with current Victorian law. In addition, the Charter provision qualifies the rights of a criminal accused in relation to the attendance and examination of witnesses by including the words 'unless otherwise provided by law'. The Committee considers that this qualification is necessary to ensure that the special rules in relation to the cross-examination of children or of victims of sexual assault would continue to apply".</p> <p>There appear to be no significant differences between s 25(3) of the Charter Act in relation to the rights of children in criminal proceedings and article 14(4) of the ICCPR. There appear to be no significant differences between s 25(4) of the Charter Act in relation to the right to review of conviction and sentence and article 14(5) of the ICCPR.</p>	22	6	24(a), 24(c)-24(d), 25(b)-25(i)

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Significant differences between human rights in the Charter Act and the ICCPR								
Charter Act section	Human Right	Charter Act text	ICCPR article	ICCPR text	Notes on differences	ACT HRA	UK HRA	NZ BOR
26	Right not to be tried or punished more than once	A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.	14(7)	No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.	There are no significant differences between s 26 of the Charter Act and article 14(7) of the ICCPR.	24	N/A	26(2)
ICCPR rights not included in the Charter Act (aside from those noted above)								
N/A	Right to self-determination	N/A	1	(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.	The 2005 Report of the Human Rights Consultation Committee notes the following about the exclusion of the right to self-determination: "The Committee notes that there is a lack of consensus both domestically and internationally on what the right of self-determination comprises beyond the idea that it involves participation in decision-making. The Committee is concerned that, in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences. The Committee wants to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities' understanding of the term. This is not something that can be achieved in a Charter that must be general in its terms and operate across all of the varied communities in Victoria. Accordingly, the Committee recommends that the Charter not include a right to self-determination. However, as we set out below, we do recommend the inclusion of specific cultural rights for Indigenous peoples. ... the Committee also believes that the specific recognition of the rights of Indigenous peoples should form part of the preamble to the Charter. This could mean that self-determination principles underpin policy decisions relating to Indigenous peoples. It may also ensure that the other rights in the Charter are applied equally and fairly to Indigenous peoples."	N/A	N/A	N/A
39(3)	Legal proceedings / remedies	A person is not entitled to be awarded any damages because of a breach of this Charter.	2(3)	Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.	The Charter Act does not provide for a direct cause of action or remedy for breaches of the Charter Act, nor does it permit the award of damages for breaches of the Charter Act. However, this is a matter for consideration in this review pursuant to section 44(2) of the Charter Act.	40C	8	
N/A	Prohibition of Propaganda for War and Advocacy of Hatred	N/A	20	(1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.	The 2005 Report of the Human Rights Consultation Committee notes the following about the exclusion of article 20 of the ICCPR: "ICCPR article 20(1), which prohibits war propaganda, is not included in the Charter. The Committee considers that the provision was primarily included in the ICCPR as a response to the experience of World War II and is less relevant to a modern Victorian Charter. ICCPR article 20(2), which prohibits advocacy			

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					of national, racial or religious hatred that incites discrimination, hostility or violence, has also been omitted because it does not express a human right per se, but is rather a direction to government. In addition, the Victorian <i>Racial and Religious Tolerance Act 2001</i> deals with such matters."			
N/A	Priority of the use of natural wealth and resources	N/A	47	Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.	The 2005 Report of the Human Rights Consultation Committee notes the following about the exclusion of article 47 of the ICCPR: "ICCPR article 47 has also not been included in the Charter. This provision concerns the inherent right of all peoples to enjoy and utilise their natural wealth and resources. The Committee has decided not to include this as an express right because of the difficulties internationally found in the interpretation of the term 'peoples' and because the Charter is concerned with individual rights rather than rights attaching to groups."			