



More Accessible, More Effective and Simpler to
Enforce: Strengthening Victoria's Human Rights
Charter

HRLC Submission to the 2015 Review of the Victorian Charter of
Human Rights

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Contact

Ben Schokman
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4450

F: + 61 3 8636 4455

E: ben.schokman@hrlc.org.au

W: www.hrlc.org.au

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1. Overview

1.1 Executive Summary

1. Respect for human rights is essential for a community that is fair, just and inclusive. Adequate protection and realisation of human rights requires effective legal protections, strong institutions and an informed community.
2. The HRLC welcomes the Victorian Government's commitment to uphold and strengthen the Victorian Charter and ensure it is robust and effective. The HRLC also welcomes the Government's broader election commitments to:
 - (a) make the development of a human rights culture in Victoria a key priority;
 - (b) place human rights education and compliance in the key performance indicators of Government Departments; and
 - (c) develop and deliver human rights education to the Victorian public.
3. It is clear that in its first eight years of operation the Victorian Charter has played an important role in protecting human rights and ensuring that human rights are appropriately considered by all aspects of governmental activity. There is strong evidence that the Charter has:
 - (a) increased consideration of human rights in the development of laws and policies;
 - (b) led to improvements in public service design, delivery and outcomes; and
 - (c) remedied a range of individual and systemic injustices.
4. Despite these clear benefits, it is evident that the Charter's operation and impact can be enhanced. In the HRLC's experience, many lawyers, advocates and, most importantly, community members have observed that the Charter's effectiveness can at times be limited due to a range of related reasons that include:
 - (a) the level of engagement with and understanding of the Victorian Charter within some public authorities;
 - (b) the lack of a simple, effective enforcement mechanism;
 - (c) uncertainty regarding some of the Charter's key operative provisions, and in particular the complexity involved in bringing human rights complaints before courts and tribunals;

- (d) a perception that the Charter not been taken seriously by the Victorian Government and Ministers, which has a flow on effect to decision makers and service delivery providers; and
 - (e) a lack of awareness of the Victorian Charter within the community and especially for particularly vulnerable groups.
5. This review is therefore a significant opportunity to consolidate, clarify and strengthen the operation of the Victorian Charter so that human rights become meaningful for everyday Victorians. The HRLC considers that a number of measures can be taken to:
- (a) further build and embed a culture within public authorities that respects and gives effect to human rights; and
 - (b) make the Victorian Charter more accessible, more effective and simpler to understand and enforce.

1.2 Recommendations

6. The HRLC makes the following recommendations:

Recommendation 1:

The Victorian Charter should be amended to empower the VEOHRC to receive and conciliate human rights complaints using a similar process to that available for discrimination complaints under the Equal Opportunity Act 2010.

Recommendation 2:

The jurisdiction of the Ombudsman should be expanded to include “public authorities” that have obligations arising under the Charter.

Recommendation 3:

To enhance the consideration of statutory provisions by Parliament, section 30 of the Victorian Charter should be amended to:

- *provide greater formal opportunity for public submissions and hearings on Bills that raise significant human rights concerns;*
- *provide that, other than in exceptional circumstances, legislation is not to be passed by Parliament before SARC has provided its human rights report. The definition of “exceptional circumstances” should be confined to circumstances of public imperative or emergency, and should not extend to circumstances experienced in the natural processes of parliament, such as bipartisan support for a bill;*
- *require the responsible Minister to respond substantively to any concerns raised by SARC prior to the passage of a Bill; and*
- *consider expanding the size of SARC or establishing a specialised Human Rights Sub-Committee with adequate resources.*

Recommendation 4:

The detail and length of Statements of Compatibility should be commensurate with the human rights implications of the proposed legislation or legislative instrument.

Recommendation 5:

Adequate resources should be allocated to developing a human rights culture across government, including training and education at all levels and the development of clear action plans to promote the effective implementation of the Victorian Charter.

Recommendation 6:

The Victorian Charter should:

- *require all public authorities to develop an action plan for the protection and promotion of human rights and compliance with the Victorian Charter;*
- *require human rights key performance indicators to be included in public authority action plans;*
- *require that all public authorities undertake an annual audit of their human rights compliance and publish the results of the audit including performance against key performance indicators and information on complaints received, as well as any actions taken or, alternatively, the reasons for not taking remedial action; and*
- *vest the VEOHRC with an own motion power to inquire into and audit the compliance of a public authority's policies, programs and practices with human rights.*

Recommendation 7:

The Victorian Government should increase investment in measures to engage, educate and empower the Victorian community about human rights and the operation of the Victorian Charter, including:

- *raising community awareness, education and engagement about the Victorian Charter;*
- *targeted training to advocates and support workers; and*
- *primary and secondary school education.*

Recommendation 8:

Adequate resources should be provided to community legal centres and other support services to assist affected individuals to bring complaints for breaches of their human rights.

Recommendation 9:

Consideration should be given to whether the Victorian Charter should be amended to include an “opt-in” provision for the private sector.

Recommendation 10:

The definition of “public authority” in section 4 should be enhanced by specifying certain functions that “are taken to be of a public nature” along similar lines to the ACT Human Rights Act.

Recommendation 11:

Section 39 should be replaced with a provision that:

- *establishes a free-standing direct cause of action for breaches of protected human rights which is justiciable and enforceable in all appropriate courts or tribunals; and*
- *empowers the court or tribunal to grant such relief or remedy, or make such order, within its powers, as is “just and appropriate”, including making an award of damages where appropriate.*

Recommendation 12:

The Victorian Charter should be amended to make it clear that statutory provisions must be interpreted in a way that gives the greatest effect to relevant human rights, so far as it is possible to do so consistently with the purpose of the statutory provision.

This could be achieved by:

- *repealing sections 32 and 36 and replacing them with a provision as outlined in paragraph 65; or*
- *amending section 7 to provide that the limitations clause is relevant only to the task of legislators under section 28 and the Supreme Court and Court of Appeal under section 36; or*
- *alternatively, amending the term “compatible with human rights” used in sections 28 (Statements of compatibility), 32 (Interpretation) and 38 (Conduct of public authorities) to “compatible with human rights as permissibly limited under section 7”.*

Recommendation 13:

Section 7 of the Victorian Charter should be amended to recognise that certain human rights are absolute by expressly stating which rights are absolute and that no limitation of absolute rights is permissible in any circumstances.

Recommendation 14:

Section 6(2)(b) of the Victorian Charter should be amended and clarified so that the capacity of courts and tribunals to consider and enforce the human rights set out in the Charter is not restricted.

Recommendation 15:

Section 31 of the Charter, which enables Parliament to make an override declaration, should be repealed as it is unnecessary in a statutory model of human rights protection.

Recommendation 16:

Section 35 of the Victorian Charter requiring notices to the Attorney General and the VEOHRC should be repealed. Alternatively, section 35 could be amended to provide courts and tribunals with a discretion to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason.

Recommendation 17:

The Victorian Charter should protect the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community. The protected rights contained in the Victorian Charter should therefore be expanded to protect other fundamental rights enshrined in the International Covenant on Economic, Social and Cultural Rights, as well as the right of self-determination.

Recommendation 18:

All civil, political, economic, social and cultural rights in the Victorian Charter should be legally enforceable and justiciable. In respect of economic and social rights, the state should be obliged to take reasonable steps to ensure the progressive realisation of the right within the maximum of available resources, with the reasonableness of administrative action being subject to judicial review in the ordinary way.

As an alternative to providing judicial remedies for breaches of economic and social rights, the Victorian Charter could provide for the VEOHRC to receive complaints from individuals who allege a breach of their economic or social rights.

Recommendation 19:

Sections 34 and 40 of the Victorian Charter should be repealed because both the Attorney-General and VEOHRC already have the ability to apply to the court or tribunal for leave to intervene as amicus curiae.

Recommendation 20:

Current exemptions from the Victorian Charter for the Adult Parole Board, Youth Parole Board and Youth Residential Board should be removed.

Recommendation 21:

The Victorian Charter does not need to be amended to provide for any further periodic reviews.

1.3 About this Submission

7. The Human Rights Law Centre (**HRLC**) is pleased to provide this submission to the eight-year review of the *Charter of Human Rights and Responsibilities Act 2006* (**Victorian Charter** or **Charter**). The HRLC considers the eight-year review of the Victorian Charter to be an important opportunity to improve the protection and promotion of human rights in Victoria.
8. The HRLC has significant expertise and experience in the operation of the Victorian Charter and has been actively involved in its implementation and operation. The Centre has undertaken a range of activities in relation to the Victorian Charter, including undertaking casework and litigation, providing legal advice and assistance, performing policy analysis and advocacy, and carrying out extensive education and training. This submission seeks to provide technical advice and guidance on the content, operation and impact of the Victorian Charter drawing on the HRLC's first-hand experience.

9. The HRLC refers to and relies on our detailed submission to the four-year review of the Victorian Charter in 2011.¹ That submission addressed:
 - (a) the overall impacts and benefits of the Charter;
 - (b) the Charter's impact on legislative and policy formulation;
 - (c) the Charter's impact on decision making and service delivery;
 - (d) the Charter's impact on Victorian law; and
 - (e) myths and misconceptions associated with the Charter's operation.
10. That submission made 20 key recommendations to improve the Charter's effectiveness. In our view, the vast majority of the evidence contained in that submission, and the findings and recommendations that were made, remain highly relevant for the purposes of the current eight-year review.
11. The HRLC also made two supplementary submissions to the 2011 review:
 - (a) a further submission, entitled *Reviewing the Evidence and Addressing Myths and Misunderstandings: Response to Submissions to the Review of the Victorian Charter*,² and
 - (b) HRLC Responses to Questions on Notice from SARC, which addresses specific questions relating to damages for breaches of human rights, the operation of section 38 of the Charter, and the overall costs and benefits of the Charter.
12. Where appropriate, this submission cross-references relevant discussions in these previous HRLC submissions.

¹ Available at <http://hrlc.org.au/files/HRLC-Submission-to-the-Review-of-the-Victorian-Charter.pdf>.

² Available at <http://hrlc.org.au/files/Further-HRLC-Submission-to-the-Review-of-the-Victorian-Charter.pdf>

2. The 2011 Review

13. The four-year of the Victorian Charter was undertaken in 2011 by the Scrutiny of Acts and Regulations Committee (SARC). In the HRLC's view, unfortunately the Committee's report did not reflect the content of the vast majority of submissions and many aspects of the report lacked any sound evidential basis. An analysis of submissions to SARC for the 2011 review discloses that community support for the Charter is extremely high. Of the total 3,834 submissions, 95% supported retaining or strengthening the Charter and many submission cited significant evidence of its benefits in its first four years of operation. This consisted of evidence as to the Charter's effect in promoting greater government accountability, more responsive public services and more compassionate treatment for some of Victoria's most vulnerable people, including people with disability, people with mental illness, children and the homeless. In addition to the strong evidence as to its benefits, there was also evidence as to the minimal costs associated with the Charter's implementation and ongoing operation.
14. The HRLC's own submission included the following key findings from the Charter's first four years of operation:

Overall Impacts and Benefits

- The Charter's mechanisms have encouraged Victoria's strong democratic and legal institutions to give increased consideration to human rights in undertaking their roles and functions.
- While the Victorian Charter has by no means been a panacea to all forms of unfairness and injustice in Victoria, it has played an important role in ensuring that human rights are appropriately considered by all aspects of governmental activity. This includes in the development of laws and policies, in decision-making that affects every day Victorians, and in the role of courts and tribunals.
- The wide range of areas in which the Victorian Charter has played a role suggests that the protection of human rights is relevant to Victorians in many different contexts.

Impact on Legislative and Policy Formulation

- The Victorian Charter has substantially strengthened the consideration of human rights in the development and drafting of new legislation and policies.
- The Victorian Charter's mechanisms for promoting the compatibility of new legislation with human rights – namely, the preparation of Statements of Compatibility and the review by SARC of all Bills introduced into Parliament – have improved the

transparency and accountability of the Victorian Parliament and Government. Formal scrutiny processes have also ensured that the needs of all Victorians are more appropriately considered in legislative and policy formulation and that, generally speaking, limitations on rights have only been imposed after careful consideration as to their reasonableness, necessity and proportionality.

- The operation of the Victorian Charter has maintained Parliamentary sovereignty. Parliament has been able to pass legislation even where it may not be compatible with human rights. Where courts have interpreted legislation in a way that was not intended by Parliament, the Parliament has been free to amend the law if it chooses to do so.

Impact on Decision Making and Service Delivery

- The Victorian Charter has had its greatest practical impact at the interface between service delivery providers and decision makers and the Victorian community, particularly with respect to marginalised or disadvantaged individuals and groups.
- The decision-making framework provided by the Victorian Charter has offered useful guidance to public authorities and employees. This decision making framework promotes appropriate consideration and weight to be given to fundamental rights and freedoms, that these rights and freedoms are counterbalanced by other relevant public interest considerations, and that limitations on human rights are rational and proportionate.
- The Victorian Charter has contributed to cultural change within public authorities and encouraged human rights — and the principles of freedom, respect, equality and dignity — to be embedded in their work.

Impact on Victorian Law

- There has been no “flood of litigation” or discernible increase in the number, length or complexity of cases being brought before Victorian courts and tribunals as a result of the Victorian Charter.
- Courts have taken a moderate approach to the application and interpretation of the Victorian Charter. Indeed, the actual impact of the Victorian Charter in the courtroom has been significantly less than many predictions or descriptions. Where the Charter has had an impact, it has overwhelmingly been in a beneficial way and has been successfully used to challenge arbitrary or unjust policies and decisions.
- The Charter has not altered the constitutional balance between the Victorian Parliament, Executive and Judiciary. The role played by courts and tribunals under the

Victorian Charter has enhanced the dialogue between the three arms of government and strengthened accountability and checks and balances.

- The Victorian Charter has been considered across a wide range of civil litigation, but has arisen most often in relation to cases dealing with access to justice, housing and homelessness, equality and non-discrimination, and mental health.
- Decisions by Victorian courts regarding the Victorian Charter have had very little impact on criminal law, where the common law already entrenches many fundamental rights and protections.

15. The HRLC considers that these findings and recommendations remain relevant for the purposes of the eight-year review. The remainder of this submission builds on these findings and focuses on recommendations to clarify the operation and strengthen the impact of the Charter.

3. Enhancing the Effectiveness of the Charter

16. In its first eight years, there is strong evidence that the Charter has:
- (a) increased consideration of human rights in the development of laws and policies;
 - (b) led to improvements in public service design, delivery and outcomes; and
 - (c) remedied a range of individual and systemic injustices.
17. In the HRLC's view, these benefits have depended on the effectiveness of the Charter's "dialogical" model and the interdependent and complementary Charter provisions relating to legislative scrutiny (Part 3, Div 1), public authority obligations (Part 3, Div 4) and access to legal remedies for breaches of human rights (Part 3, Div 3-4).
18. Notwithstanding these benefits, many lawyers, advocates and community members observe that the Charter's effectiveness can at times be limited due to:
- (a) a lack of understanding of (or sometimes even awareness of the existence of) the Charter within some public authorities;
 - (b) the Charter not being taken seriously by the Victorian Government and Ministers, which has a flow on effect to decision makers and service delivery providers;
 - (c) the Charter being viewed as an administrative or other burden, rather than providing a supportive and empowering framework; and/or
 - (d) perceptions that the Charter is "toothless" and that there are no consequences for public authorities for a breach of the Charter.
19. The HRLC considers that a number of measures can be taken to address these concerns and to improve and enhance the Charter's effectiveness and impact.

3.1 Functions of VEOHRC and the Ombudsman

20. Both the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and the Ombudsman have played important roles in the Charter's operation to date. The Commission's education and training function is discussed in Section 3.3 below.
21. In terms of VEOHRC's and the Ombudsman's complaint functions, the HRLC emphasises the importance of having a range of non-legal remedies available to individuals. Non-legal remedies must be available *in addition to* having access to legal remedies (legal remedies are discussed in Section 4.2 below). Non-judicial processes play an important role in ensuring that individuals are able to challenge situations in which their human rights may not have been

appropriately considered, but without the requirement to bring a complaint in a court or tribunal.

22. In order to strengthen the operation of administrative remedies, the HRLC recommends that the Victorian Charter be amended to empower the VEOHRC to receive and conciliate human rights complaints using a similar process to that available for discrimination complaints under the *Equal Opportunity Act 2010* (Vic).
23. In relation to the Ombudsman, the HRLC observes that many “functional” public authorities bound by the Victorian Charter are not subject to the jurisdiction of the Ombudsman or other Victorian complaint and dispute resolution bodies. Consideration should therefore be given to expanding the jurisdiction of the Ombudsman to include “public authorities” that have obligations arising under the Charter. In addition to receiving complaints, the HRLC notes that the Victorian Charter has been central to a number of Ombudsman Victoria investigations and reports into systemic issues in Victoria. Expanding the Ombudsman’s jurisdiction to include “public authorities” would also contribute to strengthening and enhancing the operation of the Charter by providing important transparency and accountability for all public authorities.

Recommendation 1:

The Victorian Charter should be amended to empower the VEOHRC to receive and conciliate human rights complaints using a similar process to that available for discrimination complaints under the Equal Opportunity Act 2010.

Recommendation 2:

The jurisdiction of the Ombudsman should be expanded to include “public authorities” that have obligations arising under the Charter.

3.2 Role of the Scrutiny of Acts and Regulations Committee (SARC)

24. The Victorian Parliament, including through the work of parliamentary committees, has a critical role to play in promoting human rights and discharging the state’s legal obligation to respect, protect and fulfil human rights. The Victorian Parliament’s role in the consideration of Statements of Compatibility is discussed in Section 3.3(a) below.

25. The Scrutiny of Acts and Regulations Committee (SARC) plays an important role in increasing and enhancing parliamentary dialogue about human rights in the consideration of new legislation. However, the HRLC considers that this process could be improved. In particular, the HRLC is concerned that some Bills are rushed through Parliament without undertaking the important scrutiny processes played by SARC, and that this has the effect of undermining the benefits of the Charter's operation. Often, legislation that is rushed through Parliament raises significant human rights concerns. It is important that Parliamentary and community debate is able to take place around these matters of public interest and importance.

Recommendation 3:

To enhance the consideration of statutory provisions by Parliament, section 30 of the Victorian Charter should be amended to:

- provide greater formal opportunity for public submissions and hearings on Bills that raise significant human rights concerns;*
- provide that, other than in exceptional circumstances, legislation is not to be passed by Parliament before SARC has provided its human rights report. The definition of "exceptional circumstances" should be confined to circumstances of public imperative or emergency, and should not extend to circumstances experienced in the natural processes of parliament, such as bipartisan support for a bill;*
- require the responsible Minister to respond substantively to any concerns raised by SARC prior to the passage of a Bill; and*
- consider expanding the size of SARC or establishing a specialised Human Rights Sub-Committee with adequate resources.*

3.3 Developing a Human Rights Culture in Victoria

26. One of the most important aspects of the Victorian Charter is cultural change within government and public authorities. Cultural change is essential in order to develop laws and policies and make decisions that appropriately consider human rights. Developing a culture of human rights is therefore crucial to the Charter's effectiveness, both in terms of empowering the community but also to address the concerns expressed by many lawyers, advocates and community members about the lack of awareness of the Victorian Charter within public authorities or the Charter not being taken seriously.

27. This section outlines four areas in which the human rights culture in Victoria could be further developed in order to enhance the Charter's effectiveness.

(a) Role of Parliament

28. Statements of Compatibility play an important role in contributing to cultural change within the Victorian Parliament. The HRLC's 2011 submission identified the ways in which Statements of Compatibility can be used by Parliament to:

- (a) increase parliamentary debate and scrutiny of proposed laws by reference to human rights principles;
- (b) enable public participation on matters of important public interest;
- (c) enhance transparency and accountability of government; and
- (d) reinforce that the Victorian Charter absolutely retains parliamentary sovereignty.

29. This level of discussion of human rights issues also has an important instrumental and normative value in acculturating human rights in government processes.

30. The HRLC considers that the Statements of Compatibility mechanism can be improved. Statements should not be overly technical or lengthy, nor should they be too brief or cursory. In order to best achieve the purpose of strengthening parliamentary scrutiny of new laws and more effectively contribute to developing a human rights culture in the Victorian Parliament, Statements of Compatibility should be commensurate with the human rights implications of the proposed legislation or legislative instrument.

Recommendation 4:

The detail and length of Statements of Compatibility should be commensurate with the human rights implications of the proposed legislation or legislative instrument.

(b) Role of Public Authorities

31. Public authorities have a central role to play in the development of a stronger human rights culture in Victoria. The HRLC's 2011 submission outlined in some detail the positive impacts that the procedural obligation contained section 38 of the Charter has had on developing a human rights culture within public authorities. The benefits of the Charter include:

- (a) providing a useful framework for public authorities to develop and review policies, programs and practices, and to make decisions to achieve common sense and rights-respecting decisions and outcomes;
 - (b) contributing to cultural change within public authorities and working to embed human rights in everyday processes;
 - (c) empowering people to take action where rights may have been infringed; and
 - (d) enhancing the accountability of public institutions to the community.
32. In the HRLC's view, high-level leadership within government and public authorities is essential in encouraging and supporting a strong human rights culture within public authorities and in the effective operation of the Charter. The level of support and attitude towards the Charter by Ministers, advisors and senior departmental officials is crucial to ensuring that the Charter has a positive and significant influence on the way that public authorities undertake their functions.
33. In addition, strengthening particular operative provisions of the Charter would also have a significant impact on the development of a human rights culture. Section 4 of this submission (see below) outlines a range of possible amendments to the operation of the Victorian Charter designed to simplify, clarify and strengthen its operation. Many of these changes, including in particular the establishment of a direct cause of action for breaches of the Charter, would play a valuable role in contributing to a stronger human rights culture within public authorities. For example, the HRLC has observed the valuable role that the Charter has played in advocacy and potential litigation, which has led to better outcomes and, in a number of circumstances, a systemic change in policy or a change in the method by which a particular policy or service is delivered to be more compatible with human rights.

Recommendation 5:

Adequate resources should be allocated to developing a human rights culture across government, including training and education at all levels and the development of clear action plans to promote the effective implementation of the Victorian Charter.

34. An important aspect of developing a strong human rights culture within public authorities is providing for a number of different accountability mechanisms to ensure the effective operation of the Victorian Charter. In addition to the availability of a range of legal and non-legal remedies discussed throughout this submission, regular reporting and auditing frameworks would play an important role in identifying systemic and structural issues and to monitor and evaluate the effectiveness of actions that are taken to address such issues.
35. In the HRLC's view, accountability of policy-makers and public service delivery could be enhanced through regular audits and reports, as well as a formal requirement for the development of action plans on Charter implementation. Human rights actions plans should include key performance indicators on human rights. There are a number of international resources available to assist in developing appropriate indicators and the HRLC is currently working with Victoria Police to assist it to develop human rights indicators.
36. It is critical to the effective implementation of the Victorian Charter that any shortcomings in public authorities' human rights performance are quickly identified and remedied. It is also critical to measure and recognise progress on protecting human rights. The Victorian Charter should mandate regular public reporting by public authorities against their action plans.
37. Separately, the VEOHRC should be provided with an own motion power to inquire into and audit the compliance of a public authority's policies, programs and practices with human rights.
38. The HRLC considers that these requirements would ensure that appropriate consideration of human rights is institutionalised into the policies and practices of public authorities and develops a strong human rights culture. If public authorities do not have adequate auditing and reporting procedures, the implementation and incorporation of human rights requirements into day to day activities stalls, which risks compromising the effectiveness of the Victorian Charter. An annual audit of human rights compliance could easily be incorporated into existing reporting processes and requirements that are already undertaken by public authorities.

Recommendation 6

The Victorian Charter should:

- *require all public authorities to develop an action plan for the protection and promotion of human rights and compliance with the Victorian Charter;*
- *require human rights key performance indicators to be included in public authority action plans;*
- *require that all public authorities undertake an annual audit of their human rights compliance and publish the results of the audit including performance against key performance indicators and information on complaints received, as well as any actions taken or, alternatively, the reasons for not taking remedial action; and*
- *vest the VEOHRC with an own motion power to inquire into and audit the compliance of a public authority's policies, programs and practices with human rights.*

(c) Community Education

39. Effective protection of human rights requires a strong human rights culture where people know their rights and have the capacity to enforce those rights. In addition to the Victorian Charter's operation as a legislative instrument, a range of further measures and initiatives remain necessary in order to engage, educate and empower the community to develop a stronger human rights culture.

Recommendation 7:

The Victorian Government should increase investment in measures to engage, educate and empower the Victorian community about human rights and the operation of the Victorian Charter, including:

- *raising community awareness, education and engagement about the Victorian Charter;*
- *targeted training to advocates and support workers; and*
- *primary and secondary school education.*

(d) Ensuring Access to Justice

40. Access to justice is a fundamental component of the right to a fair hearing and a critical element of the promotion, protection and fulfilment of other human rights. Accordingly, in addition to education and awareness raising, various practical resources are required to develop a stronger human rights culture by supporting individuals to enforce their legal rights. This includes the availability and accessibility of appropriate and affordable legal advice, representation and advocacy services.

Recommendation 8:

Adequate resources should be provided to community legal centres and other support services to assist affected individuals to bring complaints for breaches of their human rights.

3.4 Application of the Charter to Non-State Entities

41. Public authorities play an essential role in the effective operation and impact of the Victorian Charter. The important role played by public authorities, including “functional” public authorities, in developing a human rights culture is discussed above in Section 3.3(b). Important considerations around the interpretation of the definition of “public authority” in section 4 of the Victorian Charter is discussed in detail below in Section 4.1.
42. One question worthy of consideration is whether the Victorian Charter could play a role in binding the private sector. The HRLC recognises that business and private entities acting in a private capacity can (and already do) make important contributions to the enjoyment of human rights and, conversely, can have a significant detrimental impact on the enjoyment of human rights.
43. The ACT Human Rights Act has been amended to include a provision allowing entities that are not public authorities under that Act to *opt-in* to the obligations on public authorities.³ The opt-in procedure came into force on 1 January 2009 and is intended to promote a meaningful dialogue within the community about human rights, engender cultural change by developing a

³ See s 40D of the ACT Human Rights Act.

rights-consciousness in the ACT and recognise the contribution of the private sector to the well-being of society.⁴

Recommendation 9:

Consideration should be given to whether the Victorian Charter should be amended to include an “opt-in” provision for the private sector.

⁴ See Explanatory Statement to Human Rights Amendment Bill 2007, Presented by Mr Simon Corbell MLA, Attorney General.

4. Improving the Operation of the Charter

44. This section of the submission addresses the interpretation by courts and tribunals of the Victorian Charter's key operative provisions. The HRLC considers that courts and tribunals have played an important, although not to be overstated, function in the operation of the Victorian Charter to date. Courts and tribunals have ensured that the Victorian Charter has served its purpose to ensure a "dialogue" about human rights and that laws, policies and practices are developed with appropriate consideration to human rights.
45. However, some of the Charter's operative provisions are, or have become, unnecessarily complex due to drafting of the Charter's provisions, decisions of courts and tribunals, or the attitude adopted by some "functional" public authorities. This complexity can operate as a barrier for affected individuals and thereby limit the effectiveness and impact of the Charter. There are a number of amendments that could be made to the operative provisions of the Victorian Charter to simplify, clarify and strengthen its operation.

4.1 Public Authorities

46. The interpretation of the definition of "public authority" in section 4 of the Victorian Charter is an important aspect of the operation and effectiveness of the Charter. However, there is currently some uncertainty about the definition of a "public authority", both among affected individuals and many organisations who may indeed be "functional" public authorities.
47. Given the extent of private and community sector involvement in public service delivery, together with the diversity of organisational arrangements and structures to manage and deliver those services, it is important that a clear view is taken of the definition of "public authority" to ensure that it applies to the appropriate range of government services and achieves the underlying purpose of the Victorian Charter. The state's obligation to respect human rights should not be contingent on the vehicle that the state chooses to deliver public services.
48. The focus of the definition of a public authority must be on the nature of the *function* being undertaken by the entity. As stated by Justice Bell in *Metro West v Sudi*, the matter of determining whether an entity is exercising a "public function" should be "approached as a matter of substance and not form or legal technicality".⁵

⁵ See *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009).

49. The HRLC considers that, for the purposes of clarity and consistency, the Victorian Charter should be amended to specify that certain functions “are taken to be of a public nature”. We note that this has been done in the ACT Human Rights Act, which was amended in 2008 to include the following functions:⁶

- (a) the operation of detention places and correctional centres;
- (b) the provision of any of the following services:
 - (i) gas, electricity and water supply;
 - (ii) emergency services;
 - (iii) public health services;
 - (iv) public education;
 - (v) public transport;
 - (vi) public housing.

Recommendation 10:

The definition of “public authority” in section 4 should be enhanced by specifying certain functions that “are taken to be of a public nature” along similar lines to the ACT Human Rights Act.

50. The requirement contained in section 38 of the Victorian Charter for public authorities both to act compatibly with human rights (the *substantive* obligation) and to give proper consideration to human rights when making decisions and implementing legislation (the *procedural* obligation) has played a key role in the Charter’s operation to date. This provision is discussed further below in relation to its interaction with section 39 of the Charter (see next Section 4.2) and in relation to operation of the limitations provision (see Section 4.4).

4.2 Legal Proceedings and Remedies

51. It is an essential tenet of human rights law that individuals must be able to access an effective remedy where their rights have been infringed. Different types of remedies may be appropriate in different circumstances. Accordingly, it is essential that there is a range of judicial *and* non-judicial remedies for breaches of the Victorian Charter. Remedies for a person whose human rights have been infringed should range from:

- (a) seeking redress in the courts; to

⁶ *Human Rights Amendment Act 2008* (ACT) s 7. See, eg, ACT Human Rights Act s 40A(3).

- (b) lodging a complaint and engaging in dispute resolution processes such as conciliation and mediation; to
- (c) seeking redress with the relevant public authority (for example, by requesting an internal review where appropriate).

52. Access to non-judicial remedies under the Victorian Charter are discussed above in Section 3.1.

53. It is important to recognise that access to remedies is a matter of last resort where other mechanisms and processes have failed to give proper consideration to human rights. In these instances, access to an effective remedy is an essential aspect of protecting and promoting human rights, including by operating as an incentive and deterrent for public authorities to ensure that human rights breaches do not occur in the first place.

(a) *The Need for a Free-Standing Cause of Action*

54. Currently, section 39 of the Victorian Charter requires individuals to establish an existing cause of action before being able to rely on the human rights protected in the Victorian Charter in legal proceedings. The HRLC's strong view remains that section 39 is unnecessarily complex. The result is that for some individuals, access to appropriate remedies for infringements of their rights remains illusory.⁷

55. The HRLC observes that the requirement in section 39 of the Charter to establish an existing cause of action in order to bring a complaint has led to much confusion and unnecessary complication. The complexity of establishing a cause of action for a breach of the Victorian Charter, particularly for individuals who may not be able to access legal advice or representation, often acts as a barrier to such individuals being able to access an effective remedy for a breach of their rights.

56. The lack of an available and accessible remedy thereby limits the effectiveness of the Victorian Charter in addressing human rights breaches and enforcing human rights obligations. It also has the effect of creating an impression that human rights will not be treated with the seriousness and importance that they deserve. Indeed, the complicated nature of the operation of section 39 has led many people to mistakenly think that there are no legal remedies available for breaches of the Charter. This misperception causes much damage to the potential impact of the Charter because:

⁷ For a comprehensive analysis and criticism of section 39 of the Victorian Charter, see Jeremy Gans, 'The Charter's Irremediable Remedies Provision' (2009) 33 *Melbourne University Law Review* 105. Gans argues that the provision is entirely unsatisfactory and that it should be replaced with the remedies provision that was adopted in the ACT's *Human Rights Act*.

- (a) many individuals whose rights may have been infringed do not end up using the Victorian Charter because they mistakenly believe that there is no remedy available to them; and
 - (b) some public authority officials do not give appropriate consideration to human rights because they think that no legal action may be taken to challenge their decision and so they take the requirement to give proper consideration to human rights less seriously.
57. The HRLC submits that a separate cause of action would avoid such complexity and confusion and create a simpler way for aggrieved individuals to be able to access a court or tribunal.
58. Guidance can be gleaned from the *Human Rights Act 2006 (ACT)* and the *Human Rights Act 1998 (UK)*, both of which provide for an independent cause of action. Both of these pieces of legislation enable individuals to:
- (a) initiate proceedings directly against public authorities who they claim have breached their human rights; or
 - (b) rely on human rights in any legal proceedings.
59. A free-standing cause of action will ensure that, where necessary, individuals are able to access effective remedies for human rights breaches.
60. The evidence and experience in other jurisdictions which have enacted an independent cause of action for human rights violations is that this has not led to a significant increase in litigation or been costly for the government and public authorities as a result of awards of compensation against them.⁸ The evidence to date indicates that any similar concerns regarding a free-standing cause of action for the Victorian Charter's operation would be unfounded.
- (b) What Remedies Should be Available?**
61. The HRLC submits that the remedies that are available under the Victorian Charter for breaches of protected human rights should be expanded to include such remedies as are "just and appropriate".⁹ Such judicial remedies are available under domestic human rights frameworks in South Africa, Canada, New Zealand, the United States and the United Kingdom.

⁸ Gabrielle McKinnon, *Strengthening the ACT Human Rights Act 2004* (2005) Australian National University, 2, available at <http://acthra.anu.edu.au/publications/index.html>.

⁹ See, eg, UK Human Rights Act section 8.

62. While some may be concerned about allowing for a breach of the Victorian Charter to result in damages, that concern is unfounded. The UK Human Rights Act extends the power to award damages for a breach to any court that has the power to order payment of damages or compensation in a civil case.¹⁰ However, damages have rarely been awarded under the UK Human Rights Act, with judicial review and declaratory and injunctive relief more often providing effective remediation of breaches or proposed breaches of human rights.

Recommendation 11:

Section 39 should be replaced with a provision that:

- *establishes a free-standing direct cause of action for breaches of protected human rights which is justiciable and enforceable in all appropriate courts or tribunals; and*
- *empowers the court or tribunal to grant such relief or remedy, or make such order, within its powers, as is “just and appropriate”, including making an award of damages where appropriate.*

4.3 Human Rights in Statutory Construction

63. The role and interpretation of section 32 of the Victorian Charter in statutory construction has been the subject of some litigation and much debate throughout the Charter’s first eight years of operation. Particularly following the High Court’s decision in *Momcilovic*, the application of section 32 has become both complex and uncertain. The HRLC considers that the role that the Victorian Charter plays in statutory construction can be simplified and clarified in order to improve and strengthen the operation of the Charter.
64. One cause for confusion and complication is in relation to the role that the limitations provision contained in section 7(2) plays in the application of section 32. The HRLC’s views on this question are discussed in the next section, with the recommendation that section 7(2) has no role to play in the operation of section 32.
65. Another option to resolve the confusion and complexity surrounding section 32 would be to repeal section 32 along with section 36 of the Charter, which empowers the Supreme Court and Court of Appeal to make a Declaration of Inconsistent Interpretation when a law cannot be interpreted compatibly with rights, and replace them with a provision which states that:

¹⁰ UK Human Rights Act section 8.

- (a) by way of express provision, Parliament may enact legislation which is valid and operates notwithstanding any incompatibility with human rights;
- (b) absent such express provision, a law is not to be construed and applied in a way which abrogates, abridges or infringes human rights; and
- (c) any law which cannot be so construed and applied is invalid to the extent of that inconsistency.

66. This approach would be faithful to the constitutional balance and roles of parliament and courts, and would strengthen both the remedial capacity of the interpretative provision and the requirement that courts give fidelity and primacy to Parliament's purpose.¹¹ The requirement of an express provision that legislation is to operate notwithstanding any incompatibility with human rights in order for it to so operate would also enhance transparency and accountability in the legislative process.

¹¹ Such a model, similar to the 1960 Canadian Bill of Rights, was endorsed by The Hon Michael McHugh, 'A Human Rights Act, the Courts and the Constitution', Speech, Sydney, 5 March 2009, 35. Section 2 of the Canadian Bill of Rights provides that: "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared".

Recommendation 12:

The Victorian Charter should be amended to make it clear that statutory provisions must be interpreted in a way that gives the greatest effect to relevant human rights, so far as it is possible to do so consistently with the purpose of the statutory provision.

This could be achieved by:

- *repealing sections 32 and 36 and replacing them with a provision as outlined in paragraph 65; or*
- *amending section 7 to provide that the limitations clause is relevant only to the task of legislators under section 28 and the Supreme Court and Court of Appeal under section 36; or*
- *alternatively, amending the term “compatible with human rights” used in sections 28 (Statements of compatibility), 32 (Interpretation) and 38 (Conduct of public authorities) to “compatible with human rights as permissibly limited under section 7”.*

4.4 Operation of the Limitations Clause in Section 7(2)

67. Section 7(2) of the Victorian Charter provides that it is permissible for the human rights protected in the Act to be limited in certain circumstances. The operation of section 7(2) has been the subject of much litigation and, as a result, its operation is unnecessarily complicated and uncertain.
68. The HRLC considers that section 7(2) should be amended to provide that the proportionality test is relevant only to:
- (a) the task of legislators under section 28; and
 - (b) the tasks of courts under section 36.
69. Section 7(2) should have no role to play in relation to either interpreting the Charter consistently with human rights (by operation of section 32) or in the actions of public authorities under the Charter (by operation of section 38). It should not purport to permit interpretations of legislation pursuant to section 32 that would be compatible with rights as *already limited*. Nor should it purport to authorise executive action pursuant to section 38 that is compatible with rights as *already limited*.

70. In the HRLC's view, where a statutory provision is said to limit a human right, whether such limits can be justified under section 7(2) should not be considered first before then considering whether it is possible to reinterpret the provision compatibly with human rights under section 32. Rather, where it is alleged that a statutory provision limits human rights, it should be considered whether it is possible to interpret the provision in a way that is compatible with human rights in accordance with section 32 of the Charter. Consideration of section 7(2) should only arise in the event that it is not possible to interpret the provision compatibly with human rights under section 32.
71. This position is supported by the fact that most human rights are subject to their own "internal" limitations, whether:
- (a) provided for in the articulation of the rights itself (such as the right to privacy, which is expressly qualified by reference to "unlawful or arbitrary" interference); or
 - (b) by consequence of their scope and the threshold at which they are considered to be breached (such as the right to freedom of movement, which may be subject to acceptable restrictions in certain circumstances).
72. The current drafting of the Victorian Charter is therefore open to the interpretation that human rights should be subjected to a "double limitation" by:
- (a) first, considering whether a limitation on a right can be justified under section 7(2); and
 - (b) then applying the "internal limitation" in interpreting the provision in a way that is compatible with human rights in accordance with section 32 or whether an executive action was compatible with human rights.¹²
73. Accordingly, the HRLC considers that the Victorian Charter should be amended to provide that the limitations clause is relevant only to the task of legislators, which would both clarify and strengthen the operation of the Victorian Charter. This would legislatively codify the view of the majority of the High Court in *Momcilovic*.
74. Our recommendations in this regard are contained in the previous section.
75. The HRLC is also concerned that the current drafting of the Victorian Charter leaves open the possibility of absolute rights being limited pursuant to section 7(2), which would be strictly prohibited under international law. Section 7 of the Victorian Charter should be amended to recognise that certain human rights are absolute by expressly stating which rights are absolute and that no limitation of absolute rights is permissible in any circumstances.

¹² Bell J discussed the relationship between section 7 and internal limitations of rights in *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646.

Recommendation 13:

Section 7 of the Victorian Charter should be amended to recognise that certain human rights are absolute by expressly stating which rights are absolute and that no limitation of absolute rights is permissible in any circumstances.

4.5 Obligations of Courts

76. The application of the Victorian Charter to courts and tribunals was discussed in some detail in the HRLC's 2011 submission.¹³ The HRLC agrees that with the issue identified by Bell J in *Kracke* that there is a need to reconcile the interpretation of section 4(1)(j), which excludes courts and tribunals from the definition of "public authority" except when they are acting in an administrative capacity, with section 6(2)(b), which makes the Charter applicable to courts and tribunals to the extent that they have functions under Part 2 of the Charter.
77. The HRLC's view is that courts and tribunals should have the "function" of protecting and promoting *all* of the rights set out in Part 2 of the Charter that are relevant or arise before the court or tribunal.

Recommendation 14:

Section 6(2)(b) of the Victorian Charter should be amended and clarified so that the capacity of courts and tribunals to consider and enforce the human rights set out in the Charter is not restricted.

4.6 Override Declarations

78. Section 31 of the Victorian Charter enables the Parliament, in "exceptional circumstances", to expressly declare that an Act or a provision of an Act has effect despite being incompatible with the Charter. Override declarations are, in theory, the mechanism by which governments, in extraordinary circumstances, are able to pass laws that derogate from (meaning to temporarily suspend) human rights guarantees that it would otherwise recognise.

¹³ At paras 65-68.

79. The HRLC considers that section 31 of the Victorian Charter is redundant and should be repealed. An override declaration is unnecessary in the Victorian Charter because:
- (a) Parliament already has the ability to pass legislation that is not compatible with human rights, if it so intends; and
 - (b) due to the operation of section 7(2) of the Charter, if there is a genuine state of emergency then the performance of a limitations analysis would allow for the proper restriction of rights, taking into account the gravity of the situation the state faced.
80. Typically, a derogation or override provision has relevance in a Constitutional Charter model, such as in Canada, where the Charter otherwise *prevents* Parliament from passing laws that are incompatible with human rights.¹⁴ However, the Victorian Charter does not need to provide Parliament with the power to pass an override declaration and the HRLC recommends that section 31 be repealed.

Recommendation 15:

Section 31 of the Charter, which enables Parliament to make an override declaration, should be repealed as it is unnecessary in a statutory model of human rights protection.

4.7 Declarations of Inconsistent Interpretation

81. Since the introduction of the Victorian Charter, the Supreme Court has issued only one Declaration of Inconsistent Interpretation.¹⁵ The operation of Declarations of Inconsistent Interpretation reflects the Charter's dialogue model of human rights protection, whereby a court can not invalidate a statutory provision but instead refers the question back to Parliament for its further consideration.
82. However, given the confusion and uncertainty around the operation of section 32, as well as some concerns raised around the operation of section 36 by the High Court in *Momcilovic*, consideration could be given to repealing sections 32 and 36 and replacing them with a provision as outlined in paragraph 65. As explained above, this approach would be faithful to

¹⁴ For further discussion and analysis of the necessity and difficulty of override provisions in legislative charters, see Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32 *Melbourne University Law Review* 422.

¹⁵ See *R v Momcilovic* [2010] VSCA 50 (17 March 2010).

the constitutional balance and roles of parliament and courts, but also provide a clearer and simpler “dialogical” model that would result in stronger protection of rights.

4.8 Notification Provisions

83. The HRLC considers that section 35 of the Victorian Charter, which requires that the Attorney-General and VEOHRC be notified of proceedings brought under the Victorian Charter, should be repealed. While the notification provision may have assisted the Attorney-General and VEOHRC in the first eight years of the Charter’s operation, there has been concern raised that section 35 is a major impediment to the “smooth operation of the Charter which need[s] the urgent attention of the Legislature”.¹⁶ Repeal of section 35 would contribute to simplifying the operation of the Charter.

Recommendation 16:

Section 35 of the Victorian Charter requiring notices to the Attorney General and the VEOHRC should be repealed. Alternatively, section 35 could be amended to provide courts and tribunals with a discretion to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason.

¹⁶ See comments made by Bongiorno J in *R v Benbrika & Ors (Ruling No 20)* [2008] VSC 80 (20 March 2008), [18].

5. Other Desirable Amendments

84. This section outlines a number of other desirable amendments that would enhance the effectiveness and operation of the Charter and contribute to stronger rights protection in Victoria.

5.1 Inclusion of Additional Human Rights

85. Currently, the Victorian Charter protects twenty civil and political rights only, largely derived from the *International Covenant on Civil and Political Rights (ICCPR)*. It is appropriate and imperative that the Victorian Charter protect the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community.¹⁷ The protected rights contained in the Victorian Charter should therefore be expanded to protect other fundamental rights enshrined in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

(a) Why Should Additional Rights be Protected?

86. The HRLC makes this recommendation for the following reasons:

- (a) economic and social rights are the rights that matter most to many Victorians and yet are also the rights that are the most vulnerable;
- (b) the comprehensive recognition and protection of *all* rights is vital because human rights are interdependent and indivisible;
- (c) the protection of economic and social rights is likely to lead to better policy development and decision making by government and, as a result, play an important role in addressing disadvantage and creating a fairer and more equal Victorian community; and
- (d) the inclusion of economic and social rights would ensure that Victoria plays its role in fulfilling Australia's international human rights obligations.

87. Each of these reasons is discussed in further detail in the HRLC's 2011 submission.¹⁸

88. In the HRLC's view, it is most significant that, in large part, the Victorian Charter in its first eight years of operation has had its greatest relevance and impact in relation to economic and

¹⁷ See, for eg, the Victorian Equal Opportunity and Human Rights Commission, *Talking Rights: Consulting with Victorians about economic, social and cultural rights and the Charter* (2011) which examines the need and support for the Charter to enshrine economic, social and cultural rights in the Victorian community.

¹⁸ See pages 63-67.

social rights. Two of the most significant areas where courts and tribunals have considered the Victorian Charter are housing and mental health – areas which fall squarely within the purview of economic and social rights. Particularly given the interdependent and indivisible nature of all human rights, it would be far more useful and beneficial – as well as more direct and transparent – to protect economic and social rights under the Charter.

89. The inclusion of economic and social rights is highly likely to enhance the development of laws and policies and decisions that are made by public authorities. This is especially the case given the Charter's emphasis on ensuring that human rights are appropriately considered in the development and application of laws, policies and practices. If the Charter required consideration of the essential aspects of economic and social rights then much more guidance and assistance would be provided to policy makers and decision makers in the development of laws, policies and decisions relating to areas such as housing, health and education.

(b) How Should Additional Rights be Protected?

90. The HRLC's 2011 submission comprehensively addresses the question of the justiciability of economic and social rights. The HRLC considers that all civil, political, economic, social and cultural rights should be legally enforceable and justiciable under the Victorian Charter. In relation to economic and social rights, the state should be obliged to take *reasonable* steps to ensure the progressive realisation of the right within the maximum of available resources, with the reasonableness of administrative action being subject to judicial review in the ordinary way. More specific information and guidance is provided in our previous submission.
91. As an alternative to providing judicial remedies for breaches of economic and social rights, the Victorian Charter could provide for VEOHRC to receive complaints from individuals who allege a breach of their economic or social rights.
92. In the event that the full inclusion of economic and social rights is not considered desirable, consideration could be given to amending Part 2 of the Charter to include human rights enshrined in the *International Covenant on Economic, Social and Cultural Rights*, but perhaps limiting the application of those rights to the functions set out in Part 3, Div 1 relating to the scrutiny of new legislation. This would be harmonious with the model of legislative scrutiny at the federal level pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2010* (Cth).

Recommendation 17:

The Victorian Charter should protect the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community. The protected rights contained in the Victorian Charter should therefore be expanded to protect other fundamental rights enshrined in the International Covenant on Economic, Social and Cultural Rights, as well as the right of self-determination.

Recommendation 18:

All civil, political, economic, social and cultural rights in the Victorian Charter should be legally enforceable and justiciable. In respect of economic and social rights, the state should be obliged to take reasonable steps to ensure the progressive realisation of the right within the maximum of available resources, with the reasonableness of administrative action being subject to judicial review in the ordinary way.

As an alternative to providing judicial remedies for breaches of economic and social rights, the Victorian Charter could provide for the VEOHRC to receive complaints from individuals who allege a breach of their economic or social rights.

5.2 Intervention Provisions

93. Both the Attorney-General and VEOHRC have a right under the Victorian Charter to intervene, or be joined as a party to, any proceedings in which Charter issues are raised.¹⁹ This right operates irrespective of whether the state is already a party to the proceeding. The HRLC considers that these provisions should be repealed because both the Attorney-General and VEOHRC already have the ability to apply to the court or tribunal for leave to intervene as *amicus curiae*.

¹⁹ Victorian Charter, sections 34 and 40.

Recommendation 19:

Sections 34 and 40 of the Victorian Charter should be repealed because both the Attorney-General and VEOHRC already have the ability to apply to the court or tribunal for leave to intervene as amicus curiae.

5.3 Removal of Exemptions from the Charter

94. The ongoing exemption from the Victorian Charter for the Adult Parole Board, Youth Parole Board and Youth Residential Board cannot be justified. Decision making is improved when there is transparency and accountability. The Adult Parole Board has not benefitted from its Charter exemption and the related exemption in section 69(2) of the Corrections Act 1986 (Vic) from the requirement to comply with the rules of natural justice. Problems around parole board decision making were highlighted by the Adrian Bayley case and recent review. Making parole comply with human rights standards would reduce the risk of bad decisions that undermine safety. It would also make parole more transparent and accountable to the community, including victims of crime who feel that their voices are not being heard adequately.
95. Similarly the removal of the Charter exemption for the Youth Parole Board will strengthen its decision making processes and help to avoid decisions like the transfer of children to adult prisons which the Ombudsman criticised in his 2013 report.

Recommendation 20:

Current exemptions from the Victorian Charter for the Adult Parole Board, Youth Parole Board and Youth Residential Board should be removed.

6. Further Review of the Charter

96. Governments have the ability to review legislation at any time that they deem necessary. The HRLC considers that a legislative requirement for a further periodic review of the Victorian Charter is no longer required.

Recommendation 21:

The Victorian Charter does not need to be amended to provide for any further periodic reviews.