Advancing the rights of victim/survivors of crime using Victoria’s Human Rights Charter:

Your advocacy guide
AIM OF THIS GUIDE:

This guide aims to help victim/survivors of crime in Victoria to protect their human rights under Victoria’s Charter of Human Rights and Responsibilities.

Who is the guide for?

The guide is designed to help victim/survivors of crime in Victoria and the organisations that work alongside them to advocate for their human rights. The guide is intended to help identify when the Human Rights Charter might be used to protect the human rights of victim/survivors of crime and explain how to get further advice and assistance.

The Human Rights Charter does not apply outside of Victoria.

Other laws which protect the rights of victim/survivors in Victoria

There are a number of different laws which protect the rights of victim/survivors in Victoria including:

— the Victims’ Charter which outlines 12 principles that criminal justice and victims’ support organisations should follow when dealing with victim/survivors of crime including providing information about the case, keeping people safe in court and privacy;

— sentencing and criminal procedure laws that give victim/survivors certain rights including the right to make a victim impact statement in court or to give evidence in court in ways which are less traumatic; and

— various laws which enable victim/survivors to seek compensation, either from the person who committed the crime or by applying for financial assistance through the Victims of Crime Assistance Tribunal; and

— laws which enable victim/survivors to seek an intervention order to protect them from harm, or that allow people who have an intervention order to change their tenancy agreement, for example to end the agreement early due to family violence.

This guide only focuses on ways that Victoria’s Human Rights Charter might be used to help victim/survivors of crime. To seek information about other laws, see the “Getting help” section at the end of this guide.
What are human rights?

Human rights are the basic freedoms that belong to every single one of us. They reflect values like equality, respect and dignity. They are the things we all need for our wellbeing and to live a dignified life.

Human rights help to keep our society fair, just and equal. They protect all of us.

Human rights have a long history going back centuries to documents like the Magna Carta, the American Bill of Rights and more recently the United Nations Declaration of Human Rights. Australia has agreed to comply with key international law treaties that protect human rights but these treaties aren’t enforceable under Australian law.

Unlike every other Western democracy, Australia has no national Human Rights Charter or Bill of Rights that comprehensively protects our human rights in Australian law. Instead, there is only an incomplete patchwork of laws that protect some rights.

At the state level, Victoria has protected key human rights in law through the Charter of Human Rights and Responsibilities. The Australian Capital Territory is the only other state or territory with a Human Rights Charter.

Rights protected in Victoria’s Human Rights Charter

Victoria’s Human Rights Charter protects twenty fundamental human rights including:

- The right to life.
- The right to equality.
- The right to be protected from cruel, inhuman or degrading treatment.
- The right to privacy.
- The right to protection of families.
- The right of every child to have protection as is in their best interests.
- The right to liberty and security of person.
- The right to a fair hearing.
How does Victoria’s Human Rights Charter protect rights?

The Human Rights Charter is designed to protect and promote the human rights of Victorians when dealing with the Victorian Government. It also promotes transparency in the way the Victorian Government and Parliament deal with human rights.

The Charter applies to public authorities including some private companies and community organisations

The Charter applies to public authorities in Victoria. Public authorities include Victorian government agencies and officials such as government departments, public servants, local councils, Victoria Police, the Office of Public Prosecutions and other government bodies like VicRoads and WorkSafe. Courts and tribunals have to comply with the Charter in some circumstances. The Charter also applies to some private and community bodies when they are doing certain things for the government. For example, a private prison company, a community housing provider and a private company delivering public transport may all be public authorities required to comply with the Charter. When in doubt, seek advice.

The Charter requires Victorian public authorities, including government departments, public servants, local councils, Victoria Police and other agencies, to:

— properly consider human rights when making laws, developing policies, delivering services and making decisions; and

— act compatibly with human rights.

The Charter requires that new laws must be assessed in Parliament against human rights standards. In some circumstances, the Victorian Parliament can expressly choose to override human rights.

In some circumstances, the Victorian Government can lawfully limit or restrict human rights. It can only do this if it has a good reason for restricting the right and it does it in a reasonable way that is justified in a free and democratic society.

If the Victorian Government doesn’t properly consider or act compatibly with human rights, a person affected may be able to take action in the courts. You can’t take direct legal action for a breach of the Charter but you can raise the Charter breach if you have another legal action available. In this way, the Charter can help to stop or change the way government acts, but you can’t get compensation for a Charter breach. Courts also can’t invalidate laws that breach human rights.

Courts are required to interpret laws consistently with human rights.

You can raise human rights issues directly with Victorian public authorities and you can also complain to the Victorian Ombudsman if a government agency breaches the Charter.

The Charter doesn’t apply to the Federal Government or other state and territory governments.

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Protecting human rights using the Charter: Examples from Australia and overseas

This guide provides examples of different ways the Human Rights Charter, and similar human rights laws overseas, have been used to protect victim/survivor rights. These examples are intended to assist you to identify ways the Human Rights Charter might help to protect the rights of victim/survivors of crime in Victoria.

1. Criminal justice processes that protect victim/survivors’ rights

Court proceedings can be intimidating, confusing and distressing for victim/survivors of crime. Giving evidence and being asked questions by the accused person’s lawyer and the judge can re-traumatise victim/survivors. It is important that court processes minimise distress to victims and give victim/survivors a proper opportunity to give evidence. This is especially the case for victim/survivors who are particularly vulnerable such as children or people with a mental illness or an intellectual disability. The Human Rights Charter can be used to promote court processes that protect victim/survivor rights. For example, the Victorian Government is currently running a new program to help vulnerable victim/survivors, such as children and people with mental illness or an intellectual disability, to give evidence in certain cases with support from a communication specialist known as an intermediary. Programs like this promote human rights to equality, fair hearing and safety.

EXAMPLE:
Helping child victims give evidence: Director of Public Prosecutions v Pottinger (County Court of Victoria, 2011)

In this case, the Director of Public Prosecutions raised children’s rights under the Charter to support seeking an extension of time to allow a child who was the victim/survivor of sexual assault to give evidence via audio-visual recording. This method of giving evidence is designed to reduce stress and trauma for the victim/survivor.

The Court took the Charter into account in agreeing to the extension. The Court decided that the application of the Charter led, in part, to the conclusion that it was in the interests of justice to grant the extension. This issue has now been raised in a number of similar cases.

EXAMPLE:
Balancing victims’ rights with an accused’s right to a fair trial: SN v Sweden (European Court of Human Rights, 2002)

A child victim/survivor was the only witness in a trial and the accused’s lawyer only had the opportunity to put questions to the victim/survivor via a police officer in an audiotaped interview. The European Court of Human Rights (ECHR) was called upon to balance the rights of the accused to a fair trial against the human rights of the victim/survivor. The Court decided that the accused had received a fair trial in the circumstances.

The Court recognised the traumatic impact that court proceedings can have on victim/survivors of sexual assault, especially when the victim/survivor is a child.

While this case was brought under European law, it highlights how the Charter might be used in Victoria to better protect the rights of victim/survivors with cognitive disabilities if laws and policies unreasonably prevent them from accessing justice.

EXAMPLE:
Better protecting victims with cognitive impairments: X and Y v The Netherlands with (European Court of Human Rights, 1985)

A 16 year old rape victim/survivor with a severe cognitive impairment was unable to make a complaint that could lead to criminal prosecution due to laws that required the victim/survivor to be capable of making the complaint herself. As a result, there was a gap in the law because the victim/survivor’s father could not make a complaint on her behalf and there was no alternative way to prosecute the rape.

The ECHR held this breached the victim’s right to private life. This was because the gap in the law meant the Netherlands Government had failed to protect the victim’s right to her private life, which included her physical safety. The Court held that the Netherlands should have had criminal laws in operation that could provide for the prosecution of the offending that was alleged to have occurred. The Court noted that such laws would deter the criminal behaviour from occurring in the first place.

Again, while this case was decided under European law, it highlights how the Charter might be used in Victoria to better protect the rights of victim/survivors with cognitive disabilities if laws and policies unreasonably prevent them from accessing justice.
2. Deciding whether or not to prosecute

International cases have highlighted that human rights issues are relevant when considering the extent to which a victim/survivor should be involved in investigations and court proceedings. Human rights law can help to resolve difficult issues around competing interests.

**EXAMPLE:**
Prosecuting family violence offences when the victim withdraws their complaint: *Opuz v Turkey (European Court of Human Rights, 2009)*

A woman was murdered by her daughter’s husband. Before the murder, there had been evidence of serious violence and threats being made by the husband against his wife and her mother. Prosecutions had previously been commenced, but were discontinued after the victim/survivors’ complaints were withdrawn (due to alleged pressure from the husband).

The ECHR considered the obligations of state authorities to prosecute such crimes in circumstances where a victim/survivor withdraws their complaint. The action of withdrawing a complaint could be considered an exercise of the victim/survivor’s right to privacy. The court found that prosecution without the consent of the victim/survivor may be justified in cases of family violence, in order to protect victim/survivor rights or to prevent a crime.

**EXAMPLE:**
Deciding not to prosecute: *R (On the application of B) v Director of Public Prosecutions (High Court of Justice of England and Wales, 2009)*

In the United Kingdom, victims have been able to use human rights laws to challenge prosecutors’ decisions not to prosecute crimes. In this case, a decision to abandon a prosecution because of the victim/survivor’s mental health issues was held to be invalid because, among other things, it was a violation of the victim/survivor’s rights under the human rights law.

While there are Australian cases that have decided that a victim/survivors cannot review a decision by a Director of Public Prosecutions, there have been more recent developments that suggest that this may no longer be the case. The Human Rights Charter could assist in advocacy to ensure that the Director of Public Prosecutions properly considers victim/survivors’ rights when deciding whether or not to prosecute and could assist in a possible court action to review a decision not to prosecute a particular crime.
3. Victim/survivors’ rights in the development of policy and legislation

The Human Rights Charter can also be used outside of the courtroom to advocate for victim/survivors’ rights and to help ensure that government agencies properly consider and act compatibly with human rights.

**EXAMPLE:**

**Advocating for victim/survivors of family violence**

In 2010, the Victorian Government was undertaking an expansion of a home detention program. The Federation of Community Legal Centres and a number of other organisations had serious concerns about the program and the risks of violence against co-residents by those subject to the home detention orders. The Federation provided a submission setting out the human rights relevant to the home detention program, emphasising the legal obligations of the Corrections Victoria to protect family members from family violence.

**EXAMPLE:**

**Improving processes for people with disabilities to report crimes**

In its submission to the 2015 Review of the Human Rights Charter, Victoria Police provided information regarding how it was improving its processes to promote and protect human rights by making crime reporting more accessible. Among other examples, Victoria Police acknowledged the difficulties that victim/survivors with disabilities face when reporting crime and stated that it had engaged members from its Disability Portfolio Reference Group to provide advice on how to make the process more accessible. As part of this, Victoria Police released an Easy English publication that was designed to help people with disabilities to report crime.

**EXAMPLE:**

**Improving the way victim/survivors are treated in criminal trials**

In 2016, the Victorian Law Reform Commission published a major report which made important recommendations to improve the way victim/survivors are treated in the criminal trial process. The Commission looked at how human rights law overseas and in Victoria had helped victim/survivors and recommended that the Human Rights Charter be amended to include a specific legal obligation to protect victim/survivors from unnecessary trauma, intimidation and distress when giving evidence.

**4. Other areas where the Human Rights Charter might be used to promote victim/survivor rights**

Human rights laws overseas, particularly in the UK and Europe, have been used more extensively to promote victim/survivor rights than in Victoria. Victorian courts have at times applied the Human Rights Charter narrowly.

Some other areas where the Human Rights Charter might be used in future advocacy or legal action include:

— Ensuring effective police responses to address a clear risk posed to the life of a person or their family as a result of the behaviour of an individual.

— Ensuring police properly investigate credible or arguable claims of serious crimes by individuals.

— Protecting privacy rights when an accused person seeks to access a victim/survivor’s confidential medical information from their medical provider without their consent (for example when the accused person issues a subpoena to try and access confidential counselling records).

— Ensuring that services that victim/survivors engage with, such as public housing, take into account their safety needs and promote accessibility for diverse groups such as people from culturally diverse backgrounds and people with disabilities.
Individuals, lawyers, advocates and organisations can use the Human Rights Charter in a range of ways to advance victim/survivor rights.

You can engage with the Victorian Government, the Parliament and law reform bodies when laws and policies are being developed to push for better laws and policies that comply with human rights.

You can also use the Human Rights Charter in individual cases to advocate with government agencies to stop action that would breach human rights.

In some circumstances, the Human Rights Charter can be used in legal action to stop or change government action that breaches human rights.

Below is a flowchart with some suggested steps for taking action using the Human Rights Charter and some information on where to get legal help.
Flowchart for taking human rights action

**STEP 1**
**Identify the policy, act or decision**
- Identify what is being done that you want stopped or changed.
- Identify who is being affected.
- Identify who made the policy, act or decision – is it a Victorian public authority?

The Human Rights Charter applies to Victorian public authorities which include government bodies, public servants, local councils and some private companies and community organisations that perform functions for government.

**STEP 2**
**Identify the restriction on human rights**
- Identify the human rights that are being restricted by the policy, act or decision.
- Is the restriction for a good reason?
- If so, is it being done in the least restrictive way?

The Victorian Government can restrict human rights but only for a good reason and then only if done in the least restrictive way.

**STEP 3**
**Raise the issue with the Victorian public authority**
- Gather the information you need to raise the issue.
- Identify the change you want to achieve.
- Raise the issue with the public authority.

It's normally best to first raise the issue directly with the relevant public authority in a constructive way that seeks to resolve the issue.

**STEP 4**
**Take further action**
- Consider contacting any relevant regulatory body
- Consider escalating the complaint in the public authority
- Consider a complaint to the Victorian Ombudsman
- Consider expert legal advice

Human Rights Law Centre
Getting help

There are a number of ways to get legal help about human rights issues for victim/survivors of crime and advice about options for taking action.

The Victims Support Agency provides information about reporting crimes, services that can help victims and victims’ rights: www.victimsofcrime.vic.gov.au

The Victims of Crime Helpline is a free service offering information, advice and referrals to help victims to manage and recover from the effects of crime. Call 1800 819 817, seven days a week, 8am to 11pm.

The Victims of Crime Commissioner can inquire into and report on systemic victims of crime issues. Call 1800 010 017. www.victimsofcrimecommissioner.vic.gov.au

Victoria Legal Aid has a free legal helpline. Call 1300 792 387. www.legalaid.vic.gov.au

The Aboriginal Family Violence Prevention & Legal Service provides assistance to Aboriginal and Torres Strait Islander victim/survivors of family violence and sexual assault and works with families and communities affected by violence. Call 1800 105 303. www.vfpls.org

The Human Rights Law Centre may be able to provide advice to lawyers and advocates on helping their clients with human rights issues. Call 8636 4450.

You can make human rights complaints to the Victorian Ombudsman. Call 1800 806 314 or go to www.ombudsman.vic.gov.au


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The guide is not legal advice

This guide provides general information only and is not legal advice. When in doubt, seek legal advice about your specific situation.

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