Protecting human rights for Victorians who are homeless or at risk of homelessness using Victoria’s Human Rights Charter:

Your advocacy guide
AIM OF THIS GUIDE:

This guide aims to help Victorians who are homeless or at risk of homelessness protect their human rights under Victoria’s Charter of Human Rights and Responsibilities.

Who is the guide for?

The guide is designed to help people experiencing or at risk of homelessness and the organisations that work with them to advocate for their human rights. This guide is designed to help identify when the Charter might be able to help protect the human rights of people who are homeless or at risk of homelessness and how to get further help.

The guide is focused on human rights that are specific to people who are homeless or at risk of homelessness. The Charter does not apply outside Victoria.

What are human rights?

Human rights are rules that governments around the world have promised to comply with that seek to ensure that every one of us, no matter who we are or where we are, can live a decent, dignified life.

Human rights reflect values like freedom, respect, equality and dignity.

Respect for human rights helps to keep our society fair, just and equal.

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.

While Australia has promised to comply with many key international human rights treaties, people can’t enforce these treaties directly 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 an incomplete patchwork of laws, like anti-discrimination laws, that protect rights.

However, at the state level, Victoria has protected key human rights in law through the Charter. The Australian Capital Territory is the only other state or territory with a Human Rights Charter.
Rights protected in Victoria’s Human Rights Charter

The Charter protects twenty fundamental human rights. The rights which are most relevant in the housing and homelessness context are:

— The right to recognition, equality and non-discrimination.
— The right to protection from cruel, inhuman or degrading treatment.
— The right not to have privacy, family or home arbitrarily interfered with.
— The right of every child to have protection as is in their best interests.
— The right to protection of families.
— The right to a fair hearing.
— The right to liberty and security.

Unfortunately, the Charter does not protect economic and social rights like the right to food, housing, health and education.

How does Victoria’s Human Rights Charter protect rights?

The 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 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 act compatibly with human rights or properly consider human rights, the Charter gives people the ability 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 the 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 the relevant Victorian Government agency and you can 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.

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 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.

In a housing and homelessness context, although not confirmed by the Supreme Court, from an advocacy perspective there is a strong argument that community housing providers are public authorities and are therefore bound by the Charter (see, eg, Goode v Common Equity Housing Limited (Victoria Civil and Administrative Tribunal, 2016)).
1. Evictions from social housing

Social housing refers to both public housing and community housing. Public housing is managed by the Victorian Department of Health and Human Services (the Department). Community housing is managed by not-for-profit organisations.

In Victoria, in addition to their rights and responsibilities under the Residential Tenancies Act, social housing landlords are also required to comply with the Charter when making eviction decisions.

The Charter requires social housing landlords to consider a tenant’s individual circumstances, including their family, any health problems and their risk of homelessness, and allows these issues to be balanced against the competing obligations of social housing landlords such as the safety or comfort of other tenants. Essentially, the Charter encourages social housing landlords to consider alternatives to eviction.

The Charter can be used by advocates to negotiate on behalf of social housing tenants to prevent eviction and to take court action to review certain landlord decisions to evict tenants from social housing.

However the effectiveness of the Charter in this context is limited for two reasons. Firstly, the Victorian Civil and Administrative Tribunal (VCAT) is not allowed to consider Charter compliance in eviction cases so court action to challenge a social housing landlord’s eviction must be taken in the Supreme Court. Secondly, there is a very narrow timeframe to use the Charter to review eviction proceedings in the Supreme Court. This must be done either after the decision to issue the notice to vacate but before VCAT has made a possession order, or after the decision to purchase a warrant before the locks are changed. You should promptly seek legal advice.

EXAMPLE:
Negotiating with a social housing landlord to avoid eviction

Jessica (not her real name) contacted Justice Connect Homeless Law when her landlord, a community housing provider, obtained a possession order from VCAT, and was about to obtain a warrant for possession which would allow the landlord to forcibly evict her. The landlord was concerned about clutter on the property. Jessica did not have any other long-term housing options.

Jessica had previously told her landlord that the clutter was a symptom of her mental illness, and that she was seeing medical professionals to assist with this.

Justice Connect negotiated with the landlord not to purchase a warrant to remove her from the property and to explore other options that might help to address their concerns. Justice Connect argued that the landlord was required to properly consider and act compatibly with Jessica’s human rights under the Charter, particularly the right not to have her home or privacy arbitrarily or unlawfully interfered with.

The landlord had failed to adequately take Jessica’s mental health issues and inevitable homelessness into account prior to deciding to evict her, noting that Jessica’s two mental health support workers had not been contacted to better understand the reasons for non-compliance, or the effect that eviction would have on her.

These negotiations resulted in an agreement that Jessica would remain in the premises, provided that she continued to engage with the relevant support services.

EXAMPLE:
Taking court action to prevent eviction: Burgess v Director of Housing (Supreme Court of Victoria, 2014)

Ms Burgess lived in a public housing property, and her teenage son stayed regularly at the property. Ms Burgess had a history of substance dependence, anxiety and depression and was serving a sentence for drug offences. Ms Burgess was served with notices to vacate by the Director of Housing (Director), including in relation to ‘illegal use’ of the property. VCAT made an order of possession, and the Director applied for a warrant of possession to forcibly evict her.

Ms Burgess took legal action using the Charter in the Supreme Court to review the Director’s decision to seek to evict Ms Burgess.

The Court decided that the Director’s decision to issue the notice to vacate and the subsequent decision to apply for a warrant of possession failed to take into account certain matters that the Director was required to consider, including family and child rights under the Charter. Accordingly, the decisions to issue the notices to vacate and to apply for a warrant of possession were unlawful.

The Court ruled that the decision to issue the notice to vacate couldn’t be invalidated because the possession order had already been made by VCAT. However the Court invalidated the decision to purchase the warrant and Ms Burgess was able to stay in her property and continue with her rehabilitation and reintegration into the community.
2. People in prison and social housing

People without access to adequate housing upon release from prison are at risk of entering a cycle that perpetuates homelessness and increases the risk of reoffending. Eviction of prisoners threatens their health, exposes their families to hardship, and compromises their ability to secure employment or reintegrate into the community on release. The Charter can also be used to sustain social housing for people on remand (in prison awaiting trial or sentence) or serving short prison sentences.

**EXAMPLE:**

**Keeping prisoners housed through temporary absence extension**

Temporary absence policies allow public and some community housing tenants to pay a reduced rate of rent while they’re absent from the property for particular reasons, including when imprisoned. The aim is to avoid prisoners exiting prison into homelessness. Under Department policy, temporary absence may be granted for 6 months but can be extended in ‘exceptional circumstances’. In deciding whether to extend a temporary absence or issue a notice to vacate once a temporary absence period expires, the Director of Housing must consider human rights. This is required by both Department policy and the Charter.

An important Charter right in relation to prisoners’ accommodation is the right not to have one’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with. Department policy suggests that action it takes will not be arbitrary if the Director considers the tenant’s personal circumstances and action is consistent with policy including the requirement to balance the tenant’s need for the absence with the aim of ensuring that housing stock is effectively and efficiently utilised. Relevant personal circumstances include the length of imprisonment, the prisoner’s options if the tenancy is terminated, whether termination would cause the prisoner to lose family or service supports and community connections, and whether the policy objective could be achieved by less restrictive means. For example, if it is clear that eviction would leave the prisoner homeless, and that homelessness would have severe mental health implications that cause the prisoner significant hardship, eviction is arguably a disproportionate response unjustified by the need to efficiently manage housing stock. For people in prison who have children, the right to protection of family and children will also be relevant.
3. Family violence and social housing

Family violence can trigger evictions and is the most common cause of homelessness.

Advocacy to prevent the eviction of victims of family violence can draw on the requirement that social landlords properly consider Charter rights when making decisions.

**EXAMPLE:**
**Using the Charter to protect tenancy rights for victims of family violence**

Charter rights are relevant to applications by victims of family violence to have a tenancy put in their name, including having perpetrators removed from the lease.

Jacinta (not her real name) was living in public housing as a co-tenant with her partner who was violent. He was not paying rent and they fell into arrears.

She was able to obtain an interim family violence intervention order excluding her ex-partner from the property, but the Director of Housing had already commenced eviction proceedings on the basis of rental arrears.

Justice Connect Homeless Law negotiated with the Director, including by reference to Jacinta’s rights under the Charter not to have her home and privacy arbitrarily interfered with. They highlighted that evicting Jacinta while the application for a final intervention order was pending would exacerbate her mental health and put her at risk of losing her long-term home.

After the final intervention order was granted, Justice Connect was able to make an application under the family violence provisions in the Residential Tenancies Act for a tenancy to be created in Jacinta’s name alone.

Ultimately, the application succeeded and this resulted in a new tenancy agreement being created in Jacinta’s name only at the premises, as well as the clearing of all arrears that had arisen since the exclusion of her ex-partner.

**EXAMPLE:**
**Using the Charter to stop an eviction after damage by a family member**

Jacqueline (not her real name), who lived in community housing, received a notice to vacate when her son physically damaged the property. Her son experienced mental illness and had a history of violent behaviour. Jacqueline herself had an acquired brain injury. The landlord commenced eviction proceedings against Jacqueline despite support workers’ efforts to intervene, resulting in a possession order being made at VCAT.

Jacqueline obtained legal support but the landlord refused to negotiate, even when informed of its Charter obligations. The landlord only agreed to cancel the eviction and waive financial liability for the damage when an urgent injunction application was lodged in the Supreme Court. This case study demonstrates the importance of access to appropriate and timely legal advice in situations where social housing landlords refuse to accept that they are bound by the Charter.
4. Homelessness, public space and criminalisation

People experiencing homelessness are more likely to receive fines or charges for public space offences because they live in public places. Common offences include having an open container of liquor in public, begging, being drunk in a public space, littering, public transport offences and parking or tollway offences when sleeping in cars.

Laws, policies and practices that regulate public space also have a disproportionate impact on people experiencing homelessness when neutral laws (for example, laws prohibiting jaywalking or public drunkenness) are enforced in a different or discriminatory way. People can accrue many fines, infringements and charges during periods of homelessness, leading to significant debt and criminalisation.

The Charter can be used to reduce the negative impact of laws regulating public space on people experiencing homelessness, in particular through informing and influencing the conduct of local councils in formulating and implementing responses to homelessness.

**EXAMPLE:**
Avoiding the criminalisation of sleeping in cars

In January 2011, the Shire of Yarra Ranges proposed a local law prohibiting sleeping in cars. Although the intention of the local law was to target backpackers who had been using local parks and amenities without permits, the effect would have been to criminalise poverty and homelessness by penalising people who were sleeping in their cars due to lack of alternative accommodation.

Advocates launched a campaign encouraging the council to move away from a punitive approach in favour of addressing the causes of homelessness. In particular, the campaign focused on local issues such as the increasing levels of homelessness in the local community and the importance of local services. Human rights, in particular the rights to life, security and freedom of movement, were used to reinforce and provide a framework for these practical, local arguments.

The result of the two-pronged campaign, which combined a practical, local evidence base with rights-based arguments, was that the councillors deferred consideration of the local law until the law was redrafted and implementation guidelines were developed. These guidelines aim to ensure that people experiencing homelessness are not penalised by this local law.

This example demonstrates how Charter obligations can be used to ensure that public authorities, including local councils, create better local policies and laws that accommodate the human rights of those experiencing homelessness.
**Example:**
**Preventing the introduction of laws that criminalise homelessness**

In 2017, the City of Melbourne proposed to amend a local law to expand the ban on ‘camping’ and introduce a new prohibition on leaving items unattended. These amendments would ultimately have led to the criminalisation of homelessness by effectively making it an offence to sleep on the street and to leave possessions unattended in a public place.

As a result, a coalition of homelessness and justice agencies publicly campaigned against the proposed amendments on a number of bases, including that they contravened key human rights obligations contained in the Charter and under international law. In particular, it was argued that the proposed law would actively restrict the right to freedom of movement and may also limit rights to peaceful assembly, association and freedom of expression.

The United Nations Special Rapporteur on the right to adequate housing also publicly condemned the proposed amendments on the basis that they breached international human rights law and strongly encouraged the City of Melbourne to focus on its human rights obligations.

Due to the significant campaigning by homelessness and justice agencies, as well as widespread public concern, the proposed amendments were not passed. The human rights concerns raised as part of the campaign were instrumental in prompting the City of Melbourne to consider the disproportionate impact of such provisions on people experiencing homelessness.

**Example:**
**International advocacy through UN mechanisms**

There are a range of UN mechanisms that can assist in challenging laws and policies that negatively impact on people experiencing homelessness.

There are different UN experts called Special Rapporteurs who report on, and consider complaints in relation to the measures which nations, including Australia, take to protect people living in poverty.

For example, when the Hungarian Constitutional Court annulled legislation which prohibited rough sleeping, UN Special Rapporteurs urged the Hungarian Government to uphold that decision, to amend anti-homelessness legislation and to adopt a national housing strategy that took into account the needs of those inadequately housed.

There are also a number of UN treaty bodies that review Australia’s and other nation’s compliance with human rights obligations. Some of these bodies can consider complaints.

For example, the National Law Center on Homelessness and Poverty (NLCHP) in the United States has used UN treaty body reporting mechanisms to draw attention to harsh laws and policies that affect people experiencing homelessness and to help generate local pressure for reform.
Taking action

Individuals, lawyers, advocates and organisations can use the Charter in a range of ways to advance housing 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 Charter to advocate for individual clients to stop action that would breach their human rights.

In some circumstances, the 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 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
Flowchart in eviction cases

**STEP 1**
Does the Charter apply?
Is the decision-maker a public authority?
Is there a decision or conduct (actual or proposed) that engages the tenant’s Charter rights such as a notice to vacate or order for possession (eviction almost always satisfies this requirement)?

**STEP 2**
Has the landlord engaged with the Charter?
Is the landlord/decision-maker aware of the Charter?
Is the landlord/decision-maker aware of the impact of its actions on the tenant, and the tenant’s human rights?

**STEP 3**
Analyse the landlord’s engagement with the Charter
Has the landlord/decision-maker turned its mind to the impact its decision/conduct will have on the tenant’s Charter rights, and balanced this against competing objectives?
Has the landlord considered less rights-restrictive alternatives (e.g. a payment plan to address arrears, engagement with supports to address conduct, transfer to another property, rather than eviction into homelessness)?

**STEP 4**
Determine the scope for Charter action
The stage of the eviction (or other process) will inform what options are available.
Be mindful of narrow timeframes for Charter-based legal action. For example, a decision to issue a notice to vacate cannot be reviewed if the VCAT process is finished, but there is still room to negotiate and to challenge the decision to purchase a warrant.

When in doubt, promptly seek legal advice about your specific situation and remember that there are very narrow and strict timeframes involved.
Getting help

There are a number of ways to get legal help about human rights issues and advice about options.

If you are homeless or at risk of eviction into homelessness, Justice Connect Homeless Law may be able to provide free legal help. Call 1800 606 313 (free call from landlines) or 03 8636 4408. www.justiceconnect.org.au/our-programs/homeless-law/get-help

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

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. www.hrcl.org.au

Acknowledgements

This guide was prepared by the Human Rights Law Centre in partnership with Justice Connect Homeless Law with funding from the Victorian Legal Services Board Grants Program.

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.

The information in this guide was current as at June 2018.