Protecting human rights for people in prison using Victoria’s Human Rights Charter:

Your advocacy guide
AIM OF THIS GUIDE:

This guide aims to help people in prison 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 people in prison 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 and how to get further help.

The guide is focused on human rights that are specific to people in prison. 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 everyone 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 prison context are:

— The right to humane treatment when deprived of liberty.
— The right to recognition, equality and non-discrimination.
— The right to protection from cruel, inhuman or degrading treatment.
— The right not to be subjected to medical treatment without full, free and informed consent.
— Freedom from forced work.
— The right not to have privacy, family or home arbitrarily interfered with.
— Freedom of religion.
— The right of every child to have protection as is in their best interests.
— The right to protection of families.
— The right to take part in public life.
— The right to liberty and security.
— The right to a fair hearing.

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 applies to public authorities including some private companies and community organisations, but not the parole board.

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 community housing provider and a private company delivering public transport may be public authorities required to comply with the Charter. Private companies running prisons on behalf of the Victorian Government are public authorities under the Charter. When in doubt, seek advice.

The Victorian Government has exempted the Adult and Youth Parole Boards from the Charter so they do not have to properly consider or act compatibly with human rights in their operations.

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.

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Rights under the Corrections Act and Corrections Regulations

In addition to the rights set out in the Charter, the Corrections Act and the Corrections Regulations set out a number of legal obligations on prison authorities about prison conditions and entitlements. These include:

— the right to be in the open air for at least an hour each day;
— the right to be provided with suitable clothing;
— the right to have access to reasonable medical care;
— the right to practice a religion of the prisoner's choice; and
— the right to take part in educational programmes in the prison.

The Charter provides that legislation such as the Corrections Act and Corrections Regulations must be interpreted consistently with human rights. International law and decisions of international and foreign courts and tribunals may be considered when interpreting this legislation.
Protecting human rights using the Charter: Examples from Victoria and overseas

This guide provides examples of different ways the Charter, and similar human rights laws overseas, have been used to protect the rights of people in prison. These examples are intended to help you to think about how the Charter might help protect the rights of people in prison in different circumstances.

1. Ensuring humane conditions in prisons

The Charter requires prison authorities to ensure that people who are detained in prisons, youth detention centres or other places of detention like police cells, must be treated with humanity and respect for their dignity. It requires that prison authorities must not treat or punish people in a cruel, inhuman or degrading way.

The Charter also has specific protections for children. It requires that prison and youth justice authorities give children such protection as is in their best interests and needed by them by reason of them being a child.

The Charter, through advocacy or legal action, can help to stop inhuman conditions in prisons such as prolonged solitary confinement, routine strip searches or excessive overcrowding. The equality rights in the Charter and anti-discrimination laws can also help where harsh conditions have a particularly negative impact on certain groups, such as people with a mental illness or intellectual disability.

EXAMPLE:
Getting kids out of an adult prison
Certain Children v Minister for Families & Children (Victorian Court of Appeal, 2016) and Certain Children v Minister for Families & Children (Victorian Supreme Court, 2017)

After riot damage to a youth justice centre, the Victorian Government set up a new youth justice centre in a unit in the maximum security adult Barwon Prison and started transferring children as young as 15 there. The conditions in the unit were extremely harsh including extended solitary confinement, regular handcuffing and the denial of proper education.

A number of Aboriginal children took legal action using the Charter and other laws to challenge their transfer to the prison. In response, the Victorian Government agreed to remove all Aboriginal children from the adult prison. A number of non-Aboriginal children then brought a similar legal action challenging the decision to set up the unit in the adult prison and transfer children there.

The Supreme Court and then the Court of Appeal ruled that the decision was unlawful because the Minister failed to properly consider human rights under the Charter including the right to humane treatment and the right to protection of children as is in their best interests.

When the Minister then made a fresh decision that kept the children in the adult prison, certain children brought a final challenge using the Charter and other laws. The Supreme Court again ruled that the government’s actions breached the children’s rights to humane treatment in custody and their right to protection of children as is in their best interests.

EXAMPLE:
Challenging harsh conditions for kids in jail: Brough v Australia (UN Human Rights Committee, 2006)

Corey Brough was a 16 year old Aboriginal boy with a mild intellectual disability who was sent to a segregated area of an adult prison in NSW. He was locked in an isolated cell for long periods, placed under constant camera surveillance and forcibly stripped to his underwear. The United Nations Human Rights Committee found that this treatment breached his human rights under international law including his right to humane treatment in custody and his right to adequate protection of children. The Committee emphasised Corey’s particular vulnerabilities as an Aboriginal boy with a disability. While this case was brought under international law because NSW does not have a Human Rights Charter, similar arguments could be brought under Victoria’s Charter if treatment like this happened in Victoria.

EXAMPLE:
Stopping prolonged solitary confinement, routine strip searches and other harsh conditions:
Taunoa v Attorney-General (NZ Supreme Court, 2007)

A number of prisoners took legal action arguing that a harsh behavioural management regime imposed by New Zealand prison authorities breached their human rights under New Zealand’s Bill of Rights Act. The regime included extended solitary confinement, unlawful routine strip searches, unhygienic cell conditions, failure to monitor mental health, prisoners sometimes being left naked in cells, no rehabilitation programs and more. The prisoners won their case, securing a ruling that their right to humane treatment in detention was violated. While this case was brought under New Zealand law, a similar case could be brought under Victoria’s Charter if treatment like this happened in Victoria.

EXAMPLE:
Challenging harsh conditions in prison: Brough v Australia (UN Human Rights Committee, 2006)

Corey Brough was an 18 year old Aboriginal boy with a mild intellectual disability who was sent to a segregated area of an adult prison in NSW. He was locked in an isolated cell for long periods, placed under constant camera surveillance and forcibly stripped to his underwear. The United Nations Human Rights Committee found that this treatment breached his human rights under international law including his right to humane treatment in custody and his right to adequate protection of children. The Committee emphasised Corey’s particular vulnerabilities as an Aboriginal boy with a disability. While this case was brought under international law because NSW does not have a Human Rights Charter, similar arguments could be brought under Victoria’s Charter if treatment like this happened in Victoria.
2. Ensuring access to health care

Prisoners typically experience more health issues than the general population, with particularly high rates of mental illness, intellectual disability and blood borne viruses such as Hepatitis C.

Prisoners are not able to access Medicare and rely on prison authorities for access to medical care inside the prison or by permission to leave the prison to access external services. The Corrections Act confirms prisoners’ right to have access to reasonable medical care and treatment necessary for the preservation of health. This includes, with the approval and at the prisoner’s own expense, access to a private registered medical practitioner, dentist, physiotherapist or chiropractor chosen by the prisoner.

The Charter strengthens this right to access medical care under the Corrections Act. The Charter and the Corrections Act can be used through advocacy or legal action to help to secure access to health care.

Example:
Court rules that woman in prison should be able to access IVF treatment at her expense Castles v Secretary to the Department of Justice (Victorian Supreme Court, 2010)

Kimberley Castles was receiving in vitro fertilisation (IVF) treatment for a year before she was imprisoned for social security fraud and sentenced to three years prison. Soon after being sentenced, she was transferred to a minimum security prison which was focussed on preparing women for community reintegration. She was entitled to conjugal visits from her husband at the prison and had the possibility of home detention after one year in prison. In prison, she was approaching the age at which she would no longer be eligible for IVF treatment.

She asked for permission to continue the IVF treatment at her own expense while she was imprisoned but the prison authorities refused. She challenged the refusal under the Corrections Act and the Charter.

The Court ruled that she should be permitted to have the IVF treatment at her own expense. It said that IVF treatment was both necessary for the preservation of her reproductive health and reasonable, consistently with her right as a person deprived of liberty to be treated with humanity and with respect for her human dignity.

While the Court ultimately made the decision based on the right to access reasonable medical care under the Corrections Act, it also considered human rights under the Charter.

The court said that the starting point is that prisoners should not be subjected to hardship or constraint other than that which results from the deprivation of liberty. The Court said that the right to humane treatment in detention required prison authorities to treat Ms Castles humanely, with respect for her dignity and that access to health case is a fundamental aspect of the right to dignity.

The Court said that the health of a prisoner is as important as the health of any other person. It said that the right to medical care under the Corrections Act must be interpreted consistently with the requirement that prisoners be treated humanely with respect for their dignity. While the Court said that prisoners were entitled to care necessary for a high standard of health, that did not mean they were entitled to access to any treatment that they may want or that they would have been able to access if they were not in prison.
3. Other rights

The Charter can potentially be used in a number of other ways to protect the rights of people in prison including:

— To prompt action to protect a prisoner when there are threats to their safety, for example from other prisoners or where they are at risk of self-harm or suicide;
— To prompt access to rehabilitation services, particularly where they are a precondition to parole eligibility;
— To ensure prisoners have opportunities to practice their religion;
— To ensure a prisoner on remand can adequately prepare for and participate in their trial or sentence hearing.


The Charter has been used a number of times by Aboriginal prisoners to facilitate access to their family on the basis that their Aboriginal cultural rights under the Charter include the right to maintain their kinship ties. One example involved an Aboriginal mother in prison trying to see her children, which was extremely difficult due to her incarceration 750km away from them. The Aboriginal Family Violence Prevention and Legal Service Victoria raised arguments about the woman’s Aboriginal cultural rights and the right to protection of families under the Charter. A judge directed the Department of Health and Human Services, which had child protection orders over the children, to make all necessary arrangements for the children to visit their mother.

EXAMPLE: Promoting action to address the over-representation of Aboriginal women in prison Victorian Equal Opportunity and Human Rights Report, 2013

Aboriginal women are the fastest growing prisoner group in Victoria and are significantly over-represented compared with non-Aboriginal women. The Victorian Equal Opportunity and Human Rights Commission undertook research on how to reduce the rate at which Aboriginal women were being imprisoned. Drawing on Charter rights including the right to equality, Aboriginal cultural rights and the protection of children, the Commission recommended changes including improved access to diversion, accommodation support to improve access to bail and culturally and gender appropriate programs in prison to promote rehabilitation.

EXAMPLE: Access to prisoner newsletter

The Charter guarantees rights to freedom of expression, which includes the right to receive information, and to participate in public life including through voting (prisoners in Victoria are able to vote if they are serving a sentence of less than 5 years for Victorian elections and 3 years for Federal elections). These rights were relied on by a prisoner rights organisation to help secure an agreement from prison authorities to distribute a newsletter in Victorian prisons with information from political parties on their position on various social issues.
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.

The next pages have 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
Getting help

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

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

The Victorian Ombudsman can't provide legal advice but can receive complaints about some prison and human rights issues. Prisoners can use the freecall line to call the Ombudsman (enter prisoner ID then PIN *05) from 9am to 5pm weekdays. Calls are not monitored or recorded. Letters to and from the Victorian Ombudsman are treated confidentially. www.ombudsman.vic.gov.au

The Mental Health Legal Centre's Inside Access program may be able to provide free legal advice to people in prison who have a mental illness if their legal problem relates to their mental illness. Call 1800 555 887. www.mhlc.org.au

The Human Rights Law Centre provides advice to lawyers and advocates on helping their clients with human rights issues. Call 8636 4450. www.hrlc.org.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.

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