



Catholic Social Services
Victoria

‘The protection and promotion of the inviolable rights of people ranks among the essential duties of government.’

Second Vatican Council
Declaration on Religious Freedom
December 1965

Submission to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament

Review of the *Charter of Human Rights and Responsibilities Act 2006*

July 2011

Contact:
Denis Fitzgerald
Executive Director

Tel (03) 9287 5569
dfitzgerald@css.org.au
www.css.org.au



CONTENTS

1. Summary and Recommendations.....	3
2. Introduction	5
3. Engaging with human rights in Victoria.....	8
4. Content of the Charter.....	11
5. Scrutiny of new legislation.....	18
6. Guiding Public Authorities	22
7. Influencing the interpretation of statutes	26
Attachment – List of CSSV members.....	28
End notes	29



1. Summary and Recommendations

1.1 Summary

As part of the Catholic Church, CSSV is a peak body for the many Catholic social service agencies that deliver a wide range of social services in Victoria. A list of our 40 member agencies is at the [Attachment](#) to this submission. Inspired by the life, death and teachings of Jesus Christ, we work with these member agencies to fulfil the gospel imperatives to stand with and serve those who are poor, disadvantaged and marginalised, and we work with them for a just, equitable and compassionate society.

Our member organisations are engaged in a wide range of services, particularly for those who are marginalised or disadvantaged, across Victoria and beyond. This work inevitably involves a focus on the human rights of those we work with and serve.

The protection and promotion of human rights and responsibilities form part of Catholic social teaching. As Pope Benedict XVI explained to the UN General Assembly in 2008:

the promotion of human rights remains the most effective strategy for eliminating inequalities between countries and social groups, and for increasing security¹.

But Catholic understanding is that these rights are recognised by the international community and by legislatures, they are not conferred by them, since they are inherent in the human person and in human dignity.² Discernment is thus needed in determining the optimal formulation and legal form for these rights.

This submission was developed in consultation with CSSV members, other parts of the Church, and others engaged in community services and reflection on the protection of human rights in Victoria.

This submission highlights that the Charter is still relatively new – awareness of it is far from universal, and more time is needed before its full impact in a number of areas can be realised.

Specific recommendations that emerge include the following.

- the promotion of greater awareness of human rights in the community, including among those who are most vulnerable
- annual reviews of the Charter to include recommendations for change, and for Parliament to more actively consider them
- as responsibilities are an essential concomitant of rights, a greater emphasis on responsibilities within the Charter, and in education on human rights
- the review of new legislation against all human rights that are protected under the law applying in Victoria, and our international obligations
- the review of new legislation against the right to self-determination, and a thorough, consultative review of further application of that right within Victoria
- the Review Committee to develop a mechanism for effectively applying the various international rights covenants to public authorities and to the annual Victorian Budget process
- freedom of religion be protected using the formulation from the international Covenant on Civil and Political Rights



- all new legislation be subject to Charter scrutiny
- Parliamentary procedures to require that human rights issues be responded to in second reading debates
- 'Public authority', and certain obligations of such bodies, be clarified
- Government bodies be subject to annual human rights reporting, but any new obligation on community sector bodies be integrated within existing requirements.

1.2 Recommendations

Awareness of the Charter

1. That community education programs on human rights and responsibilities be continued, to promote a broad understanding, and thus support for human rights.

- This should include a focus on the Charter, but also extend more broadly to the international human rights consensus and its rationale.
- It should have a focus on effective information for those who are most vulnerable, and include material such as plain-English versions of relevant documents.
- Resources should be provided to community sector bodies to advance this engagement, including with their staff and clients.

The rights currently covered by the Charter

2. Annual reviews of the Charter should include consideration of changes to the formulation of Charter rights, in light of experience with the Charter.

3. That annual reports on the Charter be considered by an appropriate Parliamentary Committee, which would make recommendations on a response to the matters raised in the reports.

Responsibilities

4. The Charter Act should acknowledge, perhaps in the Preamble, that corresponding duties and responsibilities are inseparable from rights.

5. Human rights education should focus on the duties and responsibilities that are linked with the recognition and protection of rights, because without a culture of acceptance of these duties, human rights will not be secure.

Right to self-determination

6. Pending a full review of the integration into Victorian law of the right to self-determination, new legislation should be assessed for its impact on Aboriginal people in Victoria.

Economic and social rights, and other international agreements

7. That the review Committee develop mechanisms to allow social and economic rights, and the provisions of the *Convention on the Rights of the Child*; the *Convention on the Elimination of All Forms of Discrimination against Women*, and the *Convention on the Rights of People with a Disability*, to be effectively factored in to the priorities and actions of Public Authorities, including a rights-oriented review of the annual Victorian Budget

8. That there be a rights-oriented review of the annual Victorian Budget.



Freedom of thought, conscience, religion and belief

9: That freedom of Religion be protected using the formulations of Article 18 of the *International Covenant on Civil and Political Rights* rather than the current section 14 of the Charter.

Scrutiny of new legislation

10: that the human rights against which new legislation is reviewed be widened to extend to “personal rights and liberties recognised or expressed under the Australian Constitution, in the Common Law, in statutes of the Parliament, or in treaties ratified by the Government of Australia and incorporated into law.” This would include the rights and obligations set out in the following international instruments:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Rights of the Child
- Convention on the Elimination of All Forms of Discrimination against Women,
- Convention on the Rights of People with a Disability.

11: That issues raised by SARC in relation to Charter compliance be required to be answered by the Government during the second reading debate.

12: That the Charter be amended so that all legislation is subject to its scrutiny.

Guiding public authorities

13: The definition of public authority needs to be reviewed to provide greater clarity as to whether a body is a public authority, and, if it is, what part of its activities are the activities of a public authority.

14: That further regulatory burdens not be placed on community sector bodies, particularly in relation to audit requirements, and that any such requirements be integrated with existing standards and requirements. These standards should themselves be consistent with human rights, and themselves promote human rights where appropriate

15: That an annual statement of compliance with human rights be required of Government bodies.

16: In a situation where a public authority would be exempted by s38(4) from a requirement imposed by s38(1), that same requirement should not be able to be placed on the public authority by a contractual or other requirement of Government.

2. Introduction

2.1 Catholic Social Services Victoria

Catholic Social Services Victoria welcomes this opportunity to contribute to the Review by the Scrutiny of Acts and Regulations Committee of the [Charter of Human Rights and Responsibilities Act 2006](#) (the Charter).

As part of the Catholic Church, CSSV is a peak body for the many Catholic social service agencies that deliver a wide range of social services in Victoria. A list of our 40 member agencies is at the [Attachment](#) to this submission. Inspired by the life, death and teachings of Jesus Christ, we work with these member agencies to fulfil the gospel imperatives to stand



with and serve the poor, disadvantaged and marginalised, and to work for a just, equitable and compassionate society.

Our member organisations are engaged in a wide range of services, particularly for those who are marginalised or disadvantaged, across Victoria and beyond. These services include:

Accommodation and support services	Indigenous support programs
Adoption and permanent / foster care	Loss and Grief Counselling and Peer Support
Aged care and support	Marriage and relationship education
Chaplaincy Services: Prison, HIV/AIDS,	Material assistance
Child Support, including out of home care	Mental Health Services
Disability care and support	Parenting education and support
Drought counselling and relief services	Pregnancy counselling
Drug and Alcohol counselling and support	Refugee and settlement services
Employment services	Respite care and accommodation
Employee Assistance Programs	School counselling
Family and Relationship Services (counselling, family dispute resolution)	Support for prisoners' families
Family support case management	Women's support programs
Hearing impaired services	Youth justice services
Homelessness support programs	Youth support programs

This work inevitably involves a focus on the human rights of those we work with and serve.

2.2 Human Rights form part of Catholic social teaching³

The Church has always been active in the provision of services, particularly for those who are poor or disadvantaged. As Christians, we seek to follow Jesus Christ, who by his life, death and resurrection calls us to service to others. He told us that he “came not to be served, but to serve” (Mark 10:45).

Work for justice is essential to this mission: As Pope Benedict explains in his encyclical, *Charity in Truth*:

charity demands justice: recognition and respect for the legitimate rights of individuals and peoples. It strives to build the earthly city according to law and justice.⁴

Building on this Christ-inspired work of charity and work for justice, Catholic social teaching has developed over the centuries as an analytical underpinning for works of service and work for justice in the Church.

The corpus of Catholic social teachings that has emerged, particularly over the past 120 years, has provided the Church community and general society with rich and detailed teachings on social justice, which have guided the Church's interaction in the world. By the middle of the twentieth century these teachings were extolling the benefits of guaranteeing personal rights and duties in order to secure and safeguard the common good.



The adoption in 1948 of the *Universal Declaration of Human Rights*⁵ was a milestone in this path towards universal human development – characterised by Pope John Paul II as ‘one of the highest expressions of the human conscience of our time.’⁶

In marking the 50th Anniversary of the *Declaration*, the Australian Catholic Bishops summarised:

The essential dignity of every person is the basis for human rights, as the Bible infers from the very first chapter of the Book of Genesis. This has been recognised by the Catholic Church from the beginning, even if sadly at times serious offences against those rights have been committed in the Church’s name or by individual Catholics.⁷

Thus, the importance of human rights in Catholic teaching derives from the understanding that all rights and responsibilities are founded in the dignity that belongs to every human being because we are created in the image and likeness of God - as Catholics we believe ‘the supreme commandment of love leads to the full recognition of the dignity of each individual, created in God’s image. From this dignity flows natural rights and duties.’⁸

Pope John Paul II further developed this theme, in marking the 50th anniversary of the *Declaration*:

The Universal Declaration is clear: it acknowledges the rights which it proclaims but does not confer them, since they are inherent in the human person and in human dignity.

Consequently, no one can legitimately deprive another person, whoever they may be, of these rights, since this would do violence to their nature. All human beings, without exception, are equal in dignity. For the same reason, these rights apply to every stage of life and to every political, social, economic and cultural situation. Together they form a single whole, directed unambiguously towards the promotion of every aspect of the good of both the person and society.⁹

Another fundamental dimension to rights is that they are inseparable from duties and responsibilities – this is expanded on below in section 4.2 below, in a reflection on the Charter provisions on [responsibilities](#).

Human rights discourse has developed as an effective way of engaging with these fundamental issues of human dignity, and as citizens we look to the state to play a key role in the safeguarding of this dignity. Catholic social service providers would also echo the observation of Pope Benedict XVI when he addressed the UN General Assembly that ‘the promotion of human rights remains the most effective strategy for eliminating inequalities between countries and social groups, and for increasing security.’¹⁰

The issue is not ‘whether’, but ‘how’. The challenge is one of discernment as to the best formulation of rights and responsibilities, and of the best ways to promote and protect them.

2.3 Development and focus of this submission

This submission was developed in consultation with CSSV members, other parts of the Church, and others engaged in community services and reflection on the protection of human rights in Victoria. In parts it draws from the analysis and recommendations of CSSV member organisation MacKillop Family Services and



Good Shepherd Youth and Family Services, and from the work undertaken in preparing input to this Review by several other member organisations.

The time and effort of all of these is appreciated by the Catholic social services network. Many of these consultations have also impacted on the preparation of other submissions, by member organisations, other parts of the Church, and beyond.

The interests of our members encompass all aspects of human rights, which form an indivisible web of protection for the dignity and wellbeing of all people. But this submission is unable to range so widely.

It focuses on some general themes, on some specific issues that are particularly relevant to Catholic social service providers, and on other particular issues that arise from the application of Catholic social teaching.

CSSV and its members are well aware that legal provisions for human rights are not themselves sufficient to enable us to deliver the services and support for individuals and communities at a level and a quality that we aspire to achieve, and rights do not ensure that structural inequities causing poverty and disadvantage are addressed. More than legal provisions are needed to build the just society that is needed by those that we seek to serve. Among the many additional elements that are also needed to achieve the desired human rights outcomes are organisational excellence, personal commitment, and ongoing support and formation for staff and volunteers, and a development of understanding and sentiment throughout the society.

Nevertheless, the underlying legal framework is important, and that is the main focus of this submission.

3. Engaging with human rights in Victoria

3.1 Human rights experience in Victoria

Australia generally enjoys a positive human rights environment – in general, the human rights of people in Australia are recognised and protected.

Nevertheless, there are significant gaps in this coverage, particularly for those who are disadvantaged or marginalised in our society. It is these groups that have long been a focus of the work of church agencies, and of other parts of the community sector. Work to address needs and causes of disadvantage in many of the areas of services in which our member organisations are engaged can be characterised in terms of promotion and protection of human rights.

The right to shelter, for example, and the related obligation on society to enable its members to obtain a home, provides an analytical and practical framework for the work that our members engage in with those in Victoria who are homeless, or at risk of homelessness.

Our experience in many of these areas is that additional resources and measures are needed to enable the basic human rights of all Victorians to be met. To take some examples (with references to the relevant Article in the *Universal Declaration of Human Rights*)¹¹:

- Asylum seekers in our community are subject to incarceration, beyond the reasonable needs of security and health checks (article 14)
- The low level of educational achievement of such a high proportion of



those imprisoned in Victoria – only 6.5% of males in prison on 30 June 2010 had completed secondary, trade or tertiary education prior to reception¹² - is a stark indication that the right to education (article 26) is not a reality for all.

- Significant numbers of homeless and low-income Victorians lack adequate housing and medical care (particularly dental care) (article 25)
- The right to work is clearly not a reality for Victorians who are long-term unemployed; and the National Minimum Wage, even after the May 2011 increase, is not adequate to keep a family of two adults and two children but only one wage earner above the poverty line¹³ (Article 23)
- We are still a long way from full recognition of the 'inherent dignity and of the equal and inalienable rights of all members of the human family', (Preamble), including in relation to indigenous Australians, people with disabilities, women and girls, etc
- The right to life (article 3), one of the most fundamental of rights, is overridden for unborn children by the *Abortion Law Reform Act* 2009, and section 8 of the same Act denies the right to freedom of conscience (article 18) for physicians and other health professionals who have a conscientious objection to abortion.
- The protection given to children in Victoria is clearly inadequate in a range of non-family situations (article 25).

3.2 Awareness of the Charter

The Victorian Charter received royal assent on 25 July 2006. Section 2 of the Act provided that most parts came into effect from 1 January 2007, and its role in relation to the interpretation of legislation and in guiding the work of public authorities came into effect on 1 January 2008.

Notwithstanding the publicity surrounding the introduction of the Charter, the range of information provided by various Government authorities, and the work of specialised non-government bodies, discussions with a range of individuals and organisations indicate that the level of understanding and utilisation of the Charter varies significantly across the social services sector in Victoria. We agree with the Human Rights and Equal Opportunity Commission that there are organisations and individuals who have a good understanding of the Charter¹⁴, but there is certainly some way to go before the impact of the Charter has permeated the community.

Some of our member organisations report fruitful use of the Charter in the development of policies and procedures, and in building their organisational culture.

However, in part as a consequence of gaps in awareness, the human rights deficiencies identified in the previous section have, in many organisations, tended to be addressed through the development of services, and through public policy advocacy, in terms of justice and compassion rather than of rights and responsibilities.

The rights discourse, however, can be expected to develop further over time. A recent example is the review, published by Jesuit Social Services in 2010, of young people on remand in Victoria¹⁵. That review drew indirectly on the Charter to support one of its recommendations, in that it was pointed out (at p 66) that



adequate segregation of young remandees would be more consistent with the Charter than is current practice.

Indeed, the current review of the Charter has been a catalyst for an increased focus on the Charter among some of our member organisations, and throughout the community services sector.

The patchiness in awareness of the Charter also suggests that more time is needed before the impact of the Charter can be fully assessed. This applies in particular to the impact of the Charter on the work of CSSV member organisations, on their use of the Charter in their advocacy with public authorities, in their public policy advocacy, and also to its impact on their own policies and decision making.

This relative lack of awareness also indicates that the potential for the Charter as an educative vehicle to help address disadvantage and improve the situations of disadvantaged and vulnerable individuals and groups has not been fully achieved.

Community awareness of human rights is important. One reason for this is that awareness will help to build a culture of human rights in society. Without such a culture, we cannot have confidence in the respect and protection of human rights over the long term, nor can we be confident that human rights will continue to be broadly recognised as part of 'humanity's moral patrimony'¹⁶

Another reason that this awareness is important is that, without awareness, those most adversely affected by the lack of realisation of their rights, cannot utilise the Charter to their advantage. The MacKillop Family Services submission to this review submits that the Charter is currently inaccessible to vulnerable young people, thus making it unlikely that they would explicitly assert their rights under it.

This argues for the continued presentation and explanation of human rights and responsibilities to the community, and particularly to the most vulnerable members of the community. Such educational engagement needs to include a focus on the Charter, but also to extend more broadly to the international human rights consensus and its rationale. It also needs to focus on method of engagement – we support the MacKillop Family Services proposal that presentations will need to be accessible widely, and thus be in forms that are readily understood – the [child friendly version of the International Covenant on the Rights of the Child](#)¹⁷ is an example of this approach.

Further, as the target audience for this awareness includes staff and clients of community sector organisations, the provision of resources to enable these bodies to promote an awareness of rights is likely to be more effective than any central provision of such services.

Recommendation 1: That community education programs on human rights and responsibilities be continued, to promote a broad understanding, and thus support for human rights.

- This should include a focus on the Charter, but also to extend more broadly to the international human rights consensus and its rationale.
- It should have a focus on effective information for those who are most vulnerable, and include material such as plain-English versions of relevant documents.



- Resources should be provided to community sector bodies to advance this engagement, including with their staff and clients.

4. Content of the Charter

4.1 The rights currently covered by the Charter

The rights currently protected by the Charter are largely drawn from the *International Covenant on Civil and Political Rights*¹⁸ (ICCPR). They are listed here according to the section of the Charter Act in which they are found:

8. Recognition and equality before the law
9. Right to life
10. Protection from torture and cruel, inhuman or degrading treatment
11. Freedom from forced work
12. Freedom of movement
13. Privacy and reputation
14. Freedom of thought, conscience, religion and belief
15. Freedom of expression
16. Peaceful assembly and freedom of association
17. Protection of families and children
18. Taking part in public life
19. Cultural rights
20. Property rights
21. Right to liberty and security of person
22. Humane treatment when deprived of liberty
23. Children in the criminal process
24. Fair hearing
25. Rights in criminal proceedings
26. Right not to be tried or punished more than once
27. Retrospective criminal laws

At this 'headline' level, these rights seem to be well accepted in the Victorian community. This is not surprising, given our political and legal history, and the fact that many of the formulations reflect the law as it stood in Victoria prior to the introduction of the Charter.

There are issues that arise, however, about the specific formulation of the rights. One example of this is the rights of the child. MacKillop Family Services, in its submission to this Review, has argued that there would be merit in bringing together in one legislative formulation the various references in statutes and policy of the rights of the child, and to build more solidly on the *Convention on the Rights of the Child*. This approach is supported – see [section 5.2](#) below

Another example is freedom of religion – [section 4.6](#) below supports the proposal by the Victorian Council of Churches, in its submission to this Review, that the formulation in the Charter of this right be re-worded to align with the *International Covenant on Civil and Political Rights*.

There will always be such issues – as specific rights are considered by the Courts, or are reflected on by society generally, there will be aspects of the formulation that raise policy questions that were not apparent when the Charter was drafted, or which throw new light on current formulations.

Thus, a system for review is needed. The annual reports by the Human Rights



and Equal Opportunity Commission under Section 41(a) of the Charter Act are one such line of review; this current review, and its successor in four years time – provided for under section 45 - is another. The continuation of both of these lines of review is strongly supported.

Recommendation 2: Annual reviews of the Charter should include consideration of changes to the formulation of Charter rights, in light of experience with the Charter.

What also seems needed is a mechanism for consideration of these reviews by Parliament, and the initiation of legislative action, where appropriate. Under section 30 of the Charter Act, the Scrutiny of Acts and Regulations Committee already has an important role in relation to the Charter. It would therefore seem appropriate for the Committee to consider the Commission's annual report, and to make recommendations on an appropriate response to that report.

Recommendation 3: That annual reports on the Charter be considered by an appropriate Parliamentary Committee, which would make recommendations on a response to the matters raised in the reports.

4.2 Responsibilities

The Preamble to the Charter Act notes, in part, that one of the founding principles of the Charter is that:

human rights come with responsibilities and must be exercised in a way that respects the human rights of others;

Responsibilities are also referred to in section 15, concerning freedom of expression:

- 15 (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
- (a) to respect the rights and reputation of other persons; or
 - (b) for the protection of national security, public order, public health or public morality.

These are important points.

But, overall, the concept of responsibility is not a major feature of the Charter Act. This point is symbolically underlined by the version of the Act that is available on-line from the Australasian Legal Information Institute, whose www.austlii.edu.au, the largest on-line database on Australian legislation and case law, does not provide the text of the preamble to the Charter Act¹⁹.

The Church's understanding of human rights is that they must be linked to duties – that the right of one person gives rise to a corresponding duty in others. As Pope John XXIII explained it:

28. The natural rights of which we have been speaking are inextricably bound up with as many duties, all applying to one and the same person. These rights and duties derive their origin, their sustenance, and their indestructibility from the natural law, which in conferring the one imposes the other.

29. Thus, for example, the right to live involves the duty to preserve one's life; the right to a decent standard of living, the duty to live in



a becoming fashion; the right to be free to seek out the truth, the duty to devote oneself to an ever deeper and wider search for it.

30. Once this is admitted, it follows that in human society one man's natural right gives rise to a corresponding duty in other men; the duty, that is, of recognizing and respecting that right. Every basic human right draws its authoritative force from the natural law, which confers it and attaches to it its respective duty. Hence, to claim one's rights and ignore one's duties, or only half fulfill them, is like building a house with one hand and tearing it down with the other.²⁰

Pope Benedict XVI, in noting that rights presuppose duties, outlined in his 2009 encyclical '*Charity in Truth*' that the recognition of related duties is a necessary part of advancing human rights:

Duties set a limit on rights because they point to the anthropological and ethical framework of which rights are a part, in this way ensuring that they do not become licence. Duties thereby reinforce rights and call for their defence and promotion as a task to be undertaken in the service of the common good. Otherwise, if the only basis of human rights is to be found in the deliberations of an assembly of citizens, those rights can be changed at any time, and so the duty to respect and pursue them fades from the common consciousness. Governments and international bodies can then lose sight of the objectivity and "inviolability" of rights....²¹

Pope Benedict, reflecting on the international context, further emphasise the duty associated with rights that can be a strong incentive to action in protection of rights:

Indeed, [those countries most in need of development] demand that the international community take up the duty of helping them to be "artisans of their own destiny"²², that is, to take up duties of their own. *The sharing of reciprocal duties is a more powerful incentive to action than the mere assertion of rights.*

This analysis would argue that the Charter Act should acknowledge, perhaps in the Preamble, that corresponding duties and responsibilities are inseparable from rights.

It also follows that human rights education should focus on the duties and responsibilities that are necessarily linked with the recognition and protection of rights, because without a culture of acceptance of these duties, human rights will not be secure.

Recommendation 4: the Charter Act should acknowledge, perhaps in the Preamble, corresponding duties and responsibilities are inseparable from rights.

Recommendation 5: human rights education should focus on the duties and responsibilities that are linked with the recognition and protection of rights, because without a culture of acceptance of these duties, human rights will not be secure.

4.3 Right to self determination

CSSV member organisations, as well as the Catholic Church more generally, strongly support just outcomes for Aboriginal people in Victoria.



We recognise the need to address the losses suffered by the Aboriginal people of Victoria and to ensure that they are able to direct their own future and protect their own identity and community life, and consider that the right to self-determination may usefully guide the process of providing legislation and public policy.

The Right to self-determination is the first right listed in the ICCPR, and the Preamble to the Charter Act recognises as an underlying principle that:

human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

The Charter, at section 19 (2), also recognises certain cultural rights:

Aboriginal persons hold distinct cultural rights, and must not be denied the right, with other members of their community-

- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and
- (c) to maintain their kinship ties; and
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

But the right to self-determination was not included in the Charter. The 2005 Consultation Committee commented as follows in relation to this:

The Committee is concerned that, in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences. The Committee wants to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities' understanding of the term. This is not something that can be achieved in a Charter that must be general in its terms and operate across all of the varied communities in Victoria.²³

The recent consultation by the Commission with indigenous communities in relation to this right²⁴ is noted, and the general desirability of strengthening the role of the Charter in relation to the wellbeing of Indigenous Australians is supported. This inclusion is needed in order to address the specific issues of justice and wellbeing for Indigenous Australians, but also to strengthen the Charter as a whole, for as Pope John Paul II emphasised:

The integral promotion of every category of human rights is the true guarantee of full respect for each individual right.²⁵

The issue is, how best can the Charter adequately promote the wellbeing and protect the rights of Aboriginal Victorians. In part because of the complexities identified by the Consultation Committee, further work would seem to be needed here. Full consultations with Victorian Aboriginal communities, and their agreement on how to proceed in implementing this right, are very important. Members of CSSV, including Aboriginal Catholic Ministry and Jesuit Social Services, which have engaged deeply with the importance of self-determination for Aboriginal people, would have much to offer this process.



Another point here is that self-determination is interpreted by many as extending beyond the indigenous community. This is not a problem, but it underlines the general point that there can be varying interpretations of the scope of this right. Clarification of this scope, of what obligations it entails, and what impact it will have is needed before legislative provision can effectively be made within the Charter. The Committee should set a clear course towards such clarification.

As an interim measure, the inclusion of a requirement that new legislation be assessed for its impact on Aboriginal people in Victoria could both advance the wellbeing of Indigenous Australians in Victoria, and obviate some of the difficulties of simply adopting into the Charter the right to self determination.

Recommendation 6: pending a full review of the integration into Victorian law of the right to self-determination, new legislation should be assessed for its impact on Aboriginal people in Victoria.

4.4 Economic and social rights

The *Universal Declaration on Human Rights* sets out a range of rights that are often divided into 'civil and political' rights and 'economic, social and cultural' rights. These two sets of rights are further developed in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*²⁶ (ICESCR).

The Victorian Charter focuses largely on civil and political rights, based on the ICCPR, but not exclusively so: cultural rights are also included (at section 19), and a version of the right to family life is included at section 17(1).

At issue is whether the coverage of the Charter should be extended to include the other economic and social rights included in the ICESCR. These include the rights to:

- work, under "just and favourable conditions", with the right to form and join trade unions (Articles 6, 7, and 8);
- social security, including social insurance (Article 9);
- family life, including paid parental leave and the protection of children (Article 10);
- an adequate standard of living, including adequate food, clothing and housing, and the "continuous improvement of living conditions" (Article 11);
- health, specifically "the highest attainable standard of physical and mental health" (Article 12);
- education, including free universal primary education, generally available secondary education and equally accessible higher education. (Articles 13 and 14);

Many of these rights are recognised in Australia more than in most parts of the world, but, as discussed above, there are significant gaps in their realisation, particularly for those who are disadvantaged or marginalised in our society.

Moreover, as also emphasised earlier, human rights are indivisible – one can't truly enjoy civil and political rights without, for example, an adequate standard of living.

For these reasons, recognition and protection of these rights under Victorian law is desirable.



This conclusion is aligned with the consultation conducted on behalf of the Human Rights and Equal Opportunity Commission²⁷, which found that a majority of those consulted from the general community supported the inclusion of economic and social rights in the Charter.

That consultation, however, also reflected some of the complexities that need to be addressed when it reported that, while a majority supported 'the identical treatment approach' for all rights, and considered that 'economic, social and cultural rights should be seen as having equal status with civil and political rights', they recognised that, in practice, 'this may mean that implementation would take into account the availability of resources', and there was 'a desire also for the courts, tribunals and the judiciary to continue in their current minimal roles with respect to interpretation and enforcement.'

A key issue that arises in relation to the Charter is that the two sets of rights have differing characteristics:

- The ICCPR rights can be characterised as freedoms, which each party to the Covenant 'undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant (Article 2.1)'.
- The ICESCR rights, however, call for a positive response from Governments, which, under Article 2.1, 'undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights...'

These differences would not seem to cause any particular problems when applied to the scrutiny of new legislation – the currently required statement of compatibility and report from the Scrutiny of Acts and Regulations Committee could simply report against a wider listing of human rights than is currently required. This point is developed further below.

However, further complications could be envisaged when this broader range of rights are applied to the other purposes of the Charter Act.

In relation to public authorities, while it is desirable that they take economic and social rights into account in their policies and their action, it is not at all clear that this can be done in the same way as it can for civil and political rights, where, among other things, they are required not to act in a way that is incompatible with them (section 38(1) of the Charter). Every dollar foregone by tax reductions, for example is incompatible with the rights of disadvantaged citizens to health and education – so would tax reductions be incompatible with the Charter?

Such incompatibility cannot easily be resolved by a legislative provision. It needs a broader and deeper approach, touching at the heart of Government and societal priority setting.

Perhaps a rights oriented review of the annual budget could provide a mechanism for factoring the full range of rights into Government priorities? This is an important issue, and one that this review Committee could be well placed to examine, to enable these further rights to be effectively factored in to the priorities and actions of Public Authorities.

This point is taken further in the next section.



4.5 Other international agreements

The Terms of Reference of this Review specifically refer to the [Convention on the Rights of the Child](#)²⁸; and the [Convention on the Elimination of All Forms of Discrimination against Women](#)²⁹. These conventions further develop the general rights in the ICCPR and ICESCR in relation to children and women. To these we would add the [Convention on the Rights of People with a Disability](#)³⁰.

The prescriptions of these conventions already inform various legislative and policy measures in place in Victoria, and there is significant advantage in bringing them together in the Victorian statute book, as part of the Charter. These advantages would include:

- New legislation would be reviewed in light of these international obligations
- The readily accessible repository of human rights would be expanded for educative and promotional purposes
- Related Victorian policy and enactments, eg, [The Charter for Children in out of Home Care](#), could be more readily aligned with the Conventions, thus reducing the possibility of differing approaches.
- These rights could then be advanced through the alignment with them of policies and practices of public authorities.

The rights and other provisions of these conventions share characteristics of both civil and political rights, and of the social and economic rights, which impose a resource obligation on Government and the society. Their integration with the current functions of the Charter is thus subject to some of the same comments as made in the previous section. This is reflected in the following recommendation:

Recommendation 7 That the review Committee develop mechanisms to allow social and economic rights, and the provisions of the *Convention on the Rights of the Child*; the *Convention on the Elimination of All Forms of Discrimination against Women*, and the *Convention on the Rights of People with a Disability*, to be effectively factored in to the priorities and actions of Public Authorities.

One specific step that could be taken would be to require that the Government present an analysis of the Annual Victorian Budget in terms of its impact on human rights, broadly defined. This would bring the question of resources together with rights and obligations, at a time when resource allocations are being broadly addressed.

Recommendation 8, That there be a rights-oriented review of the annual Victorian Budget.

4.6 Freedom of thought, conscience, religion and belief.

Section 14 of the Charter provides for this freedom, drawing on Article 18 of the ICCPR, but with important differences, some of them introduced by the limitation provisions of section 7(2) of the Charter Act.

In a submission to this Review, the Victorian Council of Churches (VCC) has argued that the wording of Article 18 is preferable to the current wording of the Charter provision, because it better reflects the nature of the right to religious



freedom, and its relationship to other rights.

Article 18 provides as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The VCC argues that these formulations are to be preferred on the following grounds:

- Article 18.1 more clearly indicates that the basic freedom of thought etc is inviolable – it should not, of its nature, be subject to any section 7(2) considerations of reasonable limits, as Australia recognised when it ratified the convention.
- Article 18.3 provides a superior mechanism for imposing limits on the right to manifest one's religion, than do the Charter provisions – it is clearer; it provides that limitations be introduced only where necessary; it better reflects the centrality of these rights to human wellbeing; and it is more closely aligned with international jurisprudence than is the idiosyncratic wording of section 14.
- The language of the Covenant more effectively reflects the communal nature of the freedom of religion.
- Article 18.4 is not currently reflected in the Charter, but it is an integral part of the freedom of religion, and thus should be reflected in any codification of that right.

The submission by the Victorian Council of Churches is endorsed.

Recommendation 9: that freedom of Religion be protected using the formulations of Article 18 of the *International Covenant on Civil and Political Rights* rather than the current section 14 of the Charter.

5. Scrutiny of new legislation

5.1 General observations

One of the principle functions of the Charter relates to its role in the scrutiny of new legislation:



- Members introducing Bills must provide the Parliament with a 'Statement of Compatibility' assessing the Bill against the Charter rights (Section 28)
- The Scrutiny of Acts and Regulations Committee must report to the Parliament as to whether any Bill is incompatible with human rights (Section 30).

These obligations on members and the Committee have significantly increased the attention that Parliament has given to the human rights aspects of new legislation. As the 2011 *Annual Report* from the Commission to the Parliament pointed out, this impact was significant even when the intention of Parliament was to pass legislation that was not fully compatible with the Charter – this was the case in relation to the *Summary Offences and Control of Weapons Acts Amendment Act 2009*, and in that case the Minister was led by the Charter requirements to acknowledge and explain the incompatibility.³¹

The same series of reports from the Commission indicated that, as one would expect, there has been a corresponding impact within Departments, as Charter compatibility is taken into account from an early stage as legislative proposals are developed and drafted.

5.2 Beyond civil and political rights

In an [section 4.4](#) of this submission it was noted that the fundamental differences between civil and political rights, on the one hand, and economic and social rights on the other, would not seem to cause any particular problems when applied to the scrutiny of new legislation – the currently required statement of compatibility and report from the Scrutiny of Acts and Regulations Committee could simply report against a wider listing of human rights than is currently required.

This point is corroborated by the Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth)³² that was introduced to provide for similar statements and Parliamentary Committee reports in the Commonwealth Parliament. For the purposes of those statements and report, 'human rights' are defined by the Bill, at clause 3 (1), to mean the seven major international human rights conventions of which Australia is a signatory, which include the ICCPR, the ICESCR and also the following:

- *International Convention on the Elimination of all Forms of Racial Discrimination*
- *the Convention on the Elimination of All Forms of Discrimination Against Women*
- *the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
- *the Convention on the Rights of the Child*
- *the Convention on the Rights of Persons with Disabilities*

The Senate Committee review of this Bill considered submissions that proposed that this definition of human rights be extended 'to cover personal rights and liberties recognised or expressed under the Australian Constitution, in the Common Law, in statutes of the Parliament, or in treaties ratified by the Government of Australia and incorporated into law.'³³ The majority Report of the Committee, published earlier this year, included a recommendation that the proposed Committee review within its first year of operation whether the



definition should be expanded in this way.³⁴

Such an approach would have the benefit of extending scrutiny of new legislation to cover all human rights recognised in Victoria, and is therefore supported. Nor, given the experience of the Parliament with the Charter Act, and its experience of reviewing new legislation under section 17(a)(i) of the *Parliamentary Committees Act* 2003 on whether legislation would ‘trespasses unduly on rights or freedoms’, does there seem any reason to think that such an approach would not also work in Victoria.

Recommendation 10: that the human rights against which new legislation is reviewed be widened to extend to “personal rights and liberties recognised or expressed under the Australian Constitution, in the Common Law, in statutes of the Parliament, or in treaties ratified by the Government of Australia and incorporated into law.” This would include the rights and obligations set out in the following international instruments:

- *International Covenant on Civil and Political Rights*
- *International Covenant on Economic, Social and Cultural Rights*
- *Convention on the Rights of the Child*
- *Convention on the Elimination of All Forms of Discrimination against Women,*
- *Convention on the Rights of People with a Disability.*

5.3 Fixing Section 48

Anomalies in Parliamentary practice arose in relation to the Abortion Law Reform Bill 2009, whereby the provisions of the Charter prevented an effective human rights consideration of the Bill.

Section 48 of the Charter Act provides as follows:

Savings provision

Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

No statement of compatibility was tabled at the time of the second reading of the Bill. That speech included the following:

In accordance with section 48 of the Charter of Human Rights and Responsibilities, a statement of compatibility for the Abortion Law Reform Bill 2008 is not required. The effect of section 48 is that none of the provisions of the charter affect the Bill. This includes the requirement under section 28 of the charter to prepare and table a compatibility statement, and the obligation under section 32 of the charter to interpret statutory provisions compatibly with human rights under the charter.³⁵

The Scrutiny of Acts and Regulations Committee disputed the Minister’s interpretation of the operation of section 48. It reported to the Parliament on the Bill as would be required by section 30 of the Charter Act³⁶, and in that report the Committee disputed the Minister’s interpretation of section 48, by making the following observations:

- Charter s. 48 is limited to ‘any law applicable to abortion or child destruction’. The Bill is not (yet) law.



- Charter s. 48 provides that nothing in the Charter ‘affects’ a law. Statements of compatibility have no legal effect.

The Committee also referred to parliament for its consideration the following questions relating to the Bill:

- Whether or not fetuses have human rights under the Charter; and
- If so, whether or not clauses 4 to 7 and 11, by legalising many abortions, reasonably limit the rights of fetuses to protection according to the test set out in Charter s. 7(2).
- Whether or not clause 8(1)(a), by requiring practitioners to refer patients to doctors who hold no conscientious objection to abortion, limits those practitioners’ freedom to believe that abortion is murder?
- If so, whether or not clause 8(1)(a) is a reasonable limit on freedom of belief according to the test set out in Charter s. 7(2) and, in particular, whether or not there are any less restrictive means available to ensure that women receive appropriate health care?

In the same report, the Committee also analysed the Bill under section 17(a)(i) of the *Parliamentary Committees Act* 2003 under which it is required to report to Parliament on any legislative proposal that would directly or indirectly ‘trespasses unduly on rights or freedoms’. It posed questions to Parliament regarding the rights of the unborn child and the rights of medical and other health professionals. We were unable to find reference in Hansard to any of these matters being addressed by the Minister.

Two issues arise relating to the operation of the Charter Act

The Minister asserted an interpretation of section 48 that was disputed by SARC, and there seems to have been no mechanism to resolve that – the net result was that there was no statement of compatibility, and that the legislation went through notwithstanding that there were very serious questions tabled as to its compatibility with fundamental human rights.

It is recommended that this situation be remedied – it should be a requirement of those tabling a Bill that they provide a statement of compatibility, and that they answer questions raised by SARC. Without these requirements, the Charter Act can be ignored by Parliament with immunity.

Recommendation 11: That issues raised by SARC in relation to Charter compliance be required to be answered by the Government during the second reading debate.

The second issue is that section 48 served to justify the non-tabling of a statement of compatibility, and thus to avoid human rights scrutiny of the Bill. It seems inconsistent with the general purpose of the Charter that this should be so.

Recommendation 12: That the Charter be amended so that all legislation is subject to its scrutiny.



6. Guiding Public Authorities

6.1 General observations

Section 38 (1) of the Charter Act provides that:

Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right

The Annual Reports on the operations of the Charter provide significant detail on the impact of this provision on key Government Departments:

Over the four years since the Charter was introduced, Victoria's public authorities have developed tools and put in place systems to help them meet their legal obligations under the Charter.

However, many government departments, statutory authorities and local councils have also worked hard to move beyond compliance and integrate human rights principles across all aspects of their organisational practice.

Agencies have reported to the Commission that training, human rights events, ambassador programs and other initiatives have helped build greater awareness and understanding of human rights issues among staff³⁷

These conclusions are also corroborated by numerous interactions with key authorities including Victoria Police, Corrections Victoria, and parts of the Department of Human Services.

6.2 Non-Government public authorities

The preceding section commented primarily on those public authorities that are Government Departments or Public Statutory Bodies, as defined in section 2 of the *Ombudsman Act 1973*. The operation of the Charter in relation to these bodies seems relatively clear, and largely beneficial in its impact on human rights in Victoria.

This category of public authority is important. These bodies are major parts of the interaction between government and citizens, and thus have enormous potential to impact on human rights outcomes.

But the full definition of what is a public authority is complex – section 4 of the Charter Act, which provides that definition, runs to more than three pages.

The complex definition does not fully clarify whether a particular non-Government body is a public authority. Bell J provided general guidance in this regard in 2009 in *Metro West v Sudl*³⁸, but the answers to the questions that he posed are not always clear: (a) whether the functions being exercised are of a public nature...and (b) whether the functions are being exercised on behalf of the State or a public authority.

Even less clear is the situation when an entity is a public authority for the purposes of the Act when carrying out a particular function, but not when carrying out other functions – for example, a not-for-profit body that conducts some Victorian Government-funded activities, some functions that are funded by the



Commonwealth, and some that are funded from a mix of sources. Is the Board of that entity acting as a public authority when engaged in strategic planning, budgeting, etc?

The Commission has also provided helpful advice³⁹ in this area. However, these questions are not fully answered, and that text can only be regarded as commentary and opinion - the Commission has no role to provide any prescriptive ruling or advice, nor to make any determination, binding or otherwise, concerning which organisation it holds is a public authority.

Nor is this general situation clarified by reference to earlier material. No description of the pertinent differences between a public function and a government function is made in the Report of the Consultation Committee⁴⁰. The concept of government's non-delegable duty was quoted in relation to prisons and health services as examples of when government relies on non-government organisations to perform 'essential public functions'. But it also noted that the concept of non-delegable duty was 'less clear cut in other areas of public activity.' (p55)

Despite the Committee's opinion and commitment 'to bring as much precision as possible to the area by first, defining what is or is not a public authority and secondly, making it clear that the Charter only binds public authorities' (p54) the Act settled on 'a more loosely connected arrangement in which an entity is acting as a representative of or for the purpose of the state or a public authority . . . ' when expressing the meaning "on behalf of the State or a public authority"⁴¹

Recommendation 13: The definition of public authority needs to be reviewed to provide greater clarity as to whether a body is a public authority, and, if it is, what part of its activities are the activities of a public authority.

6.3 Additional compliance requirements?

The distinction between Government Departments and Public Statutory Bodies on the one hand and community sector organisations on the other is also relevant when considering the terms of reference for this review, and in particular those matters listed in section 44 (2) (c) and (d):

44(2) A review under subsection (1) must include consideration as to whether-

....

- (c) regular auditing of public authorities to assess compliance with human rights should be made mandatory; and
- (d) further provision should be made in this Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of this Charter.

Fundamentally, Government bodies should be regulated as is needed to ensure that they meet Government requirements in relation to finances, governance, etc. There seems no good reason why this should not extend to human rights compliance.

Community sector bodies, on the other hand, are by nature different from Government. In part, that is why they are engaged by Government for a range of activities, rather than having the activities undertaken directly by Government.



Through funding contracts, legislation and in other ways they are subject to Government conditions and reporting requirements that are related to the work that they do on behalf of Government; and they are also subject to a wide array of other regulatory requirements, relating to the nature of the organisation and the type of activity they are engaged in. In many cases, they are subject to numerous sets of Government requirements, according to their various funding sources.

Community sector bodies are also, relatively, resource poor. As a strong general rule their staff are paid less than equivalent people in Government, and they do not have the financial back-up or the scope for flexibility in resource allocation that Government bodies do.

Very careful consideration therefore needs to be given to the imposition of further regulatory burdens on these bodies. It is extremely unlikely that any 'one size fits all' requirement will be effective, and it seems unlikely that legislative provision for an audit, or for exposure to proceedings or remedies can be couched in such a way that will not greatly disadvantage many community sector bodies that might currently, in relation to some of their activity, be public authorities for the purposes of the Charter Act.

As these bodies, in their capacity as public authorities, are already delivering services to externally agreed standards, any further performance requirements should be integrated with existing standards, and introduced by true negotiation. Reporting or auditing requirements should not impose additional burdens.

The Charter has already recognised a distinction in the requirements it places on Government bodies on the one hand, and other public authorities on the other. As a consequence of Section 47 of the Charter Act, section 13 of the *Ombudsman Act 1973* reads:

13 Functions and jurisdiction

- (1) The principal function of the Ombudsman shall be to enquire into or investigate any administrative action taken in any Government Department or Public Statutory Body to which this Act applies or by any member of staff of a municipal council.
- (1A) The functions of the Ombudsman under subsection (1) include the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities

As only Government Departments and Public Statutory Bodies are subject to such reviews or enquiries, the Charter thus distinguished between the treatment of Government and non-Government public authorities.

It is recommended that, if any further obligations should be placed on public authorities, a distinction be applied in requiring Government authorities to report on their compliance, but to avoid placing this burden on community bodies.

Given the wide number standards that community organisations are currently audited against, it may be a simpler solution to ensure that these standards are themselves consistent with human rights, or themselves promote human rights where appropriate.

Recommendation 14: That further regulatory burdens not be placed on community sector bodies, particularly in relation to audit requirements, and that any such requirements be integrated with existing standards and requirements.



These standards should themselves be consistent with human rights, and themselves promote human rights where appropriate.

That having been said, there would seem to be clear benefit in reporting by Government bodies on their compliance with human rights. This would be consistent with their reporting requirements under, for example, the *Freedom of Information Act* 1982, which requires, under s7(4), a statement in each Annual Report setting out requirements under that Act.

Recommendation 15: That an annual statement of compliance with human rights be required of Government bodies.

6.4 Section 38(4)

Section 38(1) of the Charter Act provides as follows:

38 Conduct of public authorities

- (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

Subsection 4 then applies an important qualification:

- (4) Subsection (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

This qualification acts to prevent the Charter requirements of a public authority from impeding a religious body from acting in conformity with its religious doctrines, etc.

An issue would arise, however, if these same requirements were to be imposed on an entity by contract from Government rather than, or in addition to, being imposed by the statute by virtue of the entity's being a public authority. So, if an organisation were a public authority, and were exempted by s 38(4) from having to comply with a particular requirement, then it could still be compelled to carry out that particular requirement under the terms of its funding contract with Government.

This is a hypothetical situation, but it highlights a problem with current arrangements. If the protection afforded by s38(4) is to be robust, then it needs to be extended to exempt organisations from relevant requirements under the Charter whether these requirements are imposed by the statute or required of the entity by Government through other means.

Recommendation 16: In a situation where a public authority would be exempted by s38(4) from a requirement imposed by s38(1), then that same requirement should not be able to be placed on the public authority by a contractual or other requirement of Government.



7. Influencing the interpretation of statutes

Human rights considerations have long been a feature of statutory interpretation by the courts, and international human rights instruments were relevant to Victorian law before the introduction of the Charter.

The advent of the Charter impacted on that situation in Victoria, with the first two sub-sections of section 32 providing as follows in relation to those rights set out in the Charter:

32 Interpretation

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

The full meaning of this section is still to be determined. In their unanimous judgement in *R v Momcilovic*⁴² the Full Bench of the Court of Appeal took issue with some earlier Victorian decisions, and with the submission to the Court on behalf of the then Attorney General, in limiting the effect of section 32(1) as follows:

35 For reasons which follow, we have reached the following conclusions:

(1) Section 32(1) does not create a 'special' rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question.

(2) Accordingly, when it is contended that a statutory provision infringes a Charter right, the correct methodology is as follows:

Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the [Interpretation of Legislation Act 1984](#) (Vic).

Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.

Step 3: If so, apply [s 7\(2\)](#) of the Charter to determine whether the limit imposed on the right is justified.

In adopting this approach, the Court of Appeal did not accept that the Charter s32 should be interpreted along the lines of its counterpart in UK legislation. The Court of Appeal pointed out, at paragraph 37, what this might entail:

Section 3(1) of the [*Human Rights Act 1998* (UK) c 42] HRA provides as follows:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.^[22]

As will appear, the House of Lords has characterised the interpretive obligation imposed by s 3(1) of the HRA as 'very strong and far reaching'. In particular, the House has said that s 3(1) may require the interpreting court to depart from the legislative intention



of the Parliament which enacted the provision(s) under scrutiny. In this sense, so it has been held, s 3(1) established a 'special' or extraordinary rule of interpretation. 'It allows the courts to amend legislation and change the choices made by Parliament about how an area of the law will be regulated.'^[23]

But this case is currently on appeal to the High Court, so, at the moment, it is not clear how this provision of the Charter will impact in the future on the interpretation of statutes.

This complicates the role of the Review Committee, as this is one of the central issues around the impact of the Charter. It is an issue, though, on which the community looks to the Review for a throughout, clear consideration of the issues at stake.



Attachment – List of CSSV members

Aboriginal Catholic Ministry
Bethlehem Community
CatholicCare
Catholic Chaplains Association for Health Care
Catholic Homes
Catholic Solo Parents
Centacare Ballarat
Centacare Gippsland
CentaCare Sandhurst
Corazon
Corpus Christi Community
Don Bosco Youth Centre and Hostel
Early Education Program for Hearing Impaired Children
Edmund Rice Camps
Frankston Pregnancy Support
Good Shepherd Aged Services
Good Shepherd Youth & Family Services
Griefline
Jesuit Social Services
John Pierce Centre for Deaf Ministry
Justice and Peace Unit, Archdiocese of Melbourne
Kewn Kreestha - Rest Home for Mothers
Keysborough Learning Centre
Larmenier
MacKillop Family Services
Marillac
McAuley Community Services for Women
Mercy Health and Aged Care
Mother Romana Home
Nazareth House
Project Dreaming Tracks
Sacred Heart Mission
Shekinah Homeless Services
Sisters of Charity Community Care
Society of St Vincent de Paul
Southern Cross Care (Vic)
St John of God ACCORD
St Mary's House of Welcome
VincentCare Victoria
Villa Maria



End notes

- ¹ Pope Benedict XVI 2008 *Address to the UN General Assembly*, at http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html
- ² *ibid*
- ³ This section is expanded on below, in [Attachment 2 - Human Rights & Catholic Social Teaching](#)
- ⁴ Pope Benedict XVI 2009 Encyclical letter *Charity in Truth (Caritas in Veritate)*, at para 6, at http://www.google.com.au/search?q=caritas+in+veritate&sourceid=ie7&rls=com.microsoft:en-au:IE-SearchBox&ie=&oe=&redir_esc=&ei=S_kBTuXUOpC0vgP-87GgDg
- ⁵ United Nations General Assembly 1948 *Universal Declaration of Human Rights*, at <http://www.un.org/en/documents/udhr/index.shtml>
- ⁶ Pope John Paul II, 1995, *Address to the UN General Assembly*, at para 2 at http://www.vatican.va/holy_father/john_paul_ii/speeches/1995/october/documents/hf_jpii_spe_0510_1995_address-to-uno_en.html
- ⁷ Catholic Bishops of Australia, 1998, *A milestone for the human family* at pp 2, 3 at www.catholic.org.au
- ⁸ Sacred Congregation for the Doctrine of the Faith 1986 *Instruction On Christian Freedom And Liberation "The truth makes us free"* para 73 at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html
- ⁹ *Pope John Paul II 2009 Message For The Celebration Of The World Day Of Peace: Respect For Human Rights: The Secret Of True Peace*, para 3 at http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_14121998_xxxii-world-day-for-peace_en.html
- ¹⁰ Pope Benedict XVI 2008 *Address to the UN General Assembly*, at http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html
- ¹¹ United Nations General Assembly 1948 *Universal Declaration of Human Rights*, at <http://www.un.org/en/documents/udhr/index.shtml>
- ¹² Corrections Victoria 2010 *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10*, at p 12, at http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/resources/a/9/a9e95380404a9d609076fbf5f2791d4a/Statistical_Profile_Victorian_Prison_System_2005-06to2009-10.pdf
- ¹³ Australian Catholic Council for Employment Relations 2011 *Submission to Fair Work Australia on the Annual Wage Review 2010-11*, at http://www.fwa.gov.au/sites/wagereview2011/submissions/ACCER_sub_awr1011.pdf
- ¹⁴ Human Rights and Equal Opportunity Commission 2011 *2010 report on the operation of the Charter of Human Rights and Responsibilities*, at http://humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=1360: talking-rights-2010-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities-mar-2011&Itemid=690
- ¹⁵ Ericson, Matthew, and Vinson, Tony (2010). *Young people on remand in Victoria. Balancing individual and community interests*. Richmond, Jesuit Social Services, at http://www.jss.org.au/files/Docs/policy-and-advocacy/publications/Young_people_in_remand_in_Victoria_-_Balancing_individual_and_community_interests.pdf
- ¹⁶ Pope John Paul II 1998 'Respect for Human Rights: The Secret of True Peace, Message for the Celebration of the World Day of Peace, 1 January 1999', para 12, at



http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_14121998_xxxii-world-day-for-peace_en.html

¹⁷ UNICEF 1991 *Summary of the UN Convention on the Rights of the Child*, at http://www.unicef.org/magic/media/documents/what_rights_flyer_english.pdf

¹⁸ United Nations 1966 *International Covenant on Civil and Political Rights*, at <http://www2.ohchr.org/english/law/ccpr.htm>

¹⁹ http://www.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/index.html#s4

²⁰ Pope John XXIII 1963 Encyclical letter '*Pacem In Terris, On Establishing Universal Peace In Truth, Justice, Charity, And Liberty*', paragraphs 28-30, at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html

²¹ Pope Benedict XVI 2009 Encyclical Letter *Caritas in Veritate (On Integral Human Development in Charity and Truth)*, para 43, at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html#_edn107

²² Pope Paul VI 1967 Encyclical Letter *Populorum Progressio (on the Development of Peoples)* paragraph 268 at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html

²³ *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* 2005, Department of Justice, Victoria, page 39, at <http://www.liv.asn.au/PDF/News/HumanRightsFinalReport2006>

²⁴ Human Rights and Equal Opportunity Commission 2011 '*Talking rights - Indigenous people to Charter their future - 31 Mar 2011*'. At http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=1356:indigenous-people-to-charter-their-future-31-mar-2011&Itemid=3

²⁵ Pope John Paul II 1998 '*Respect for Human Rights: The Secret of True Peace, Message for the Celebration of the World Day of Peace, 1 January 1999*', para 3 at http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_14121998_xxxii-world-day-for-peace_en.html

²⁶ United Nations 1966 *International Covenant on Economic, Social and Cultural Rights*, at <http://www2.ohchr.org/english/law/cescr.htm>

²⁷ Colmar Brunton Social Research 2011 *Talking rights: Consulting with Victorians about economic, social and cultural rights and the Charter* http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=1346:talkings-rights-consulting-with-victorians-about-economic-social-and-cultural-rights-and-the-charter-mar-2011&Itemid=690

²⁸ United Nations 1989 *Convention on the Rights of the Child*, at <http://www2.ohchr.org/english/law/crc.htm>

²⁹ United Nations 1979 *Convention on the Elimination of All Forms of Discrimination against Women* <http://www2.ohchr.org/english/law/cedaw.htm>

³⁰ United Nations 2006 *Convention on the Rights of People with a Disability* at <http://www2.ohchr.org/english/law/disabilities-convention.htm>

³¹ Victorian Equal Opportunity & Human Rights Commission 2011 *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, at pp 41, 42 at http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=1360:talkings-rights-2010-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities-mar-2011&Itemid=690

³² <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22legislation%2Fbillhome%2F4420%22>

³³ Rev Professor Michael Tate AO 2010, *Submission to the Legal and Constitutional Affairs Committee of the Australian Senate in its consideration of Human Rights (Parliamentary Scrutiny) Bill 2010 and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010*, at http://www.aph.gov.au/Senate/committee/legcon_ctte/human_rights_bills_43/submissions.htm

³⁴ http://www.aph.gov.au/Senate/committee/legcon_ctte/human_rights_bills_43/report/index.htm



-
- ³⁵ Hansard, Victorian Legislative Assembly, 19 August 2008, at p 2950, at <http://www.parliament.vic.gov.au/downloadhansard/pdf/Assembly/Jul-Dec%202008/Assembly%20Extract%2019%20August%202008%20from%20Book%2011.pdf>
- ³⁶ http://www.parliament.vic.gov.au/archive/sarc/Alert_Digests_08/08alt11body.htm
- ³⁷ Victorian Equal Opportunity & Human Rights Commission 2011 *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, p 30, at http://www.humanrightscormission.vic.gov.au/index.php?option=com_k2&view=item&id=1360.talking-rights-2010-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities-mar-2011&Itemid=690
- ³⁸ *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025 (9 October 2009), at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2009/2025.html?stem=0&synonyms=0&query=cohrara2006433%20s4>.
- ³⁹ Human Rights and Equal Opportunity Commission 2008 *The meaning of 'Public Authority' under the Charter*
- ⁴⁰ *Rights, Responsibilities and Respect*. The Report of the Human Rights Consultation Committee 2005, Department of Justice, Victoria, at <http://www.liv.asn.au/PDF/News/HumanRightsFinalReport2006>
- ⁴¹ Charter of Human Rights and Responsibilities Bill, Explanatory Memorandum, p6.
- ⁴² *R v Momcilovic* [2010] VSCA 50, at http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/Supreme+Court/resources/2/e/2e87530041c62e4cae8dee5c95479e66/Summary_-_R_v_Momcilovic.pdf