

Submission to the Review of the Charter of Human Rights and Responsibilities Act 2006


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1 Executive summary

1.1 Overview

The Public Interest Law Clearing House (**PILCH**) welcomes the opportunity to make a submission to the Scrutiny of Acts and Regulations Committee (**SARC**) as part of the Inquiry into the *Charter of Human Rights and Responsibilities Act 2006* (the **Inquiry**).

We commend the Victorian Government for its good faith, evidence-based approach to reviewing the operation and impact of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**).

PILCH fully endorses the submission and recommendations made by the Human Rights Law Centre (**HRLC**), which is recognised as a leading Australian expert organisation on domestic and international human rights law. PILCH also endorses the submission made by the PILCH Homeless Persons' Legal Clinic (**HPLC**), a PILCH program that provides legal advice and assistance to Victorians who are homeless or at risk of homelessness.

This submission addresses aspects of the Charter's operation that PILCH has observed in its role as a clearing house for pro bono legal work that has a broad public interest character and/or responds to unmet legal need in the community.

This submission contains four specific case studies of clients for whom the Charter has been used to negotiate and advocate and/or litigate for a fairer outcome in the provision of services, which in PILCH's view represent examples of the broad benefits of the operation and impact of the Charter to date. All clients have been de-identified for privacy reasons. The case studies are predominantly in the area of discrimination against same sex couples, children with a disability, people subject to guardianship orders and homosexual youth. In this respect, they engage specifically with the right to recognition and equality before the law contained in s 8 of the Charter.

The case studies demonstrate the way in which the Charter has been used to bring about just, fair, efficient and commonsense outcomes, whether by negotiation, advocacy or litigation (whether or not pursued to judgment). They also illustrate the effectiveness of the Charter in establishing a dialogue about human rights in the community, amongst public authorities and in the parliamentary scrutiny process. The benefit of a human rights dialogue is that decisions about drafting and administering legislation can be informed by a single overarching framework of fairness that is the same framework that is applied by courts and tribunals and implemented on the ground by decision makers in public authorities.

1.2 Terms of Reference

Informed by our experience using the Charter in our advocacy and negotiation, in this submission we comment on the impact and operation of the Charter with respect to the following Terms of Reference (**TOR**):

- ▶ the effects of the Charter on the development and drafting of statutory provisions (TOR 5(a));
- ▶ the effects of the Charter on the provision of services, and the performance of other functions, by public authorities (TOR 5(c));
- ▶ the effects of the Charter on litigation and the roles and functioning of courts and tribunals (TOR 5(d));
- ▶ the effects of the Charter on the availability of accessible, just and timely remedies for infringements of rights (TOR 5(e));
- ▶ the overall benefits and costs of the Charter (TOR 6); and
- ▶ options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria (TOR 7).

In keeping with the evidence-base approach required by the Inquiry, we have only addressed the TORs for which our experience is directly relevant.

1.3 Summary of key points and recommendations

In this submission, PILCH uses various case studies of clients it has referred to private legal practitioners for pro bono assistance. Our clients tend to be disadvantaged individuals who receive government income support, have a disability or belong to a minority group within the community. Through its referral work, PILCH is in a unique position to recognise trends in unmet legal need and the discriminatory effects of legislation or administrative decisions.

In our experience, the Charter has provided a practical and effective tool to achieve improved access to justice for members of the community eligible for pro bono legal assistance. Our clients' use of the Charter to advocate for the non-discriminatory, fair and common sense application of laws has highlighted inequality of access to government services and has resulted, in at least two cases, in beneficial changes to the law. Much of this impact has been achieved through sustained negotiation and, in some cases, the initiation of proceedings in a court or tribunal.

While negotiated outcomes and systemic changes in policies and practices are where PILCH considers the Charter has its greatest impact, these results would not have been so efficiently and effectively delivered (and may not have occurred at all), in the absence of the three-pronged obligations under the Charter's dialogue model. Formal protection of human rights in legislation, which places obligations on Parliament and public authorities and contains a role for courts and tribunals, is imperative for the effective protection and enhancement of justice and fairness in Victoria. In the absence of any part of this model, we would not have seen the positive outcomes that have been delivered to Victorians since 2007.

However, our experience also demonstrates that, for the Charter to be more effective in protecting and upholding peoples' rights, there should be provision for an independent cause of action and the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) should be empowered to conciliate human rights complaints. This would ensure that all Victorians are able to access an effective remedy for any infringement of their human rights.

PILCH's recommendations are as follows:

1.3.1.1 Recommendation 1

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

1.3.1.2 Recommendation 2

Sections 32 and 36 of the Charter should be repealed and replaced with a provision which states that:

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

1.3.1.3 Recommendation 3

Section 39 of the Charter should be replaced with a provision that establishes a free-standing cause of action for breaches of protected human rights which is justiciable and enforceable in the appropriate court or tribunal, including VCAT.

2 About PILCH

2.1 Background

PILCH is a leading Victorian, not-for-profit organisation committed to furthering the public interest, improving access to justice and protecting human rights. PILCH does this by facilitating the provision of pro bono legal services (primarily to people located in Victoria) through five pro bono legal assistance schemes, which operate from the PILCH office:

- ▶ the Public Interest Law Scheme (**PILS**), the Victorian Bar Pro Bono Scheme (**VBPBS**) and the Law Institute of Victoria Legal Assistance Scheme (**LIVLAS**) (together, the **Referral Schemes**);
- ▶ the Homeless Persons' Legal Clinic (**HPLC**), which provides civil, administrative and some summary criminal legal services at crisis accommodation centres and welfare agencies;
- ▶ PILCH Connect - a specialist service for community organisations; and
- ▶ the Seniors Rights Legal Clinic (**SRLC**), a specialty legal clinic focusing on assisting older Victorians in relation to elder abuse and other issues associated with ageing.

(together, **The Schemes**).

Clients who are eligible for assistance through any of these schemes are referred to a solicitor at a member firm or a barrister who will act for them on a pro bono basis. PILCH's members comprise commercial law firms, the Victorian Bar, corporate legal departments, universities and community legal centres.

In the financial year ending June 2010, the Referral Scheme made 220 pro bono referrals to member law firms and LIV practitioners and 300 pro bono referrals to barristers. In the same period PILCH Connect made 121 pro bono referrals to member firms and gave telephone advice to 204 not-for-profits. Information on the HPLC's work is contained in its submission to the Inquiry, *Charting the Right Course*.

Through its pro bono referral scheme and in undertaking law reform, policy work and legal education, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice;
- ▶ foster a strong pro bono culture in Victoria; and
- ▶ increase the pro bono capacity of the legal profession.

2.2 Pro bono criteria

The Schemes receive, assess and refer requests for pro bono legal assistance to the private legal profession. The Schemes only provide assistance where applicants meet a means test, where their matter has legal merit, and where legal assistance is not available from another source (eg, Victoria Legal Aid or a community legal centre).

The PILS Scheme has an additional criterion. It only refers public interest matters to PILCH members. Public interest matters are:

- ▶ legal matters for non-profit organisations with public interest objectives; or
- ▶ individuals' matters where that matter raises an issue which:
 - affects a significant number of people, not just the individual;
 - is of broad public concern; or
 - impacts on disadvantaged or marginalised groups.

2.3 Resourcing of the Schemes

2.3.1.1 The Referral Scheme

The Public Interest Law Scheme is funded by the annual fees paid by its members and various fund raising activities. VBPBS is funded by the Victorian Bar, with the support of the Legal Practice Board. Over 700 barristers at the Victorian Bar have registered their willingness to act on a pro bono basis through VBPBS. The Law Institute of Victoria, with the support of the Legal Practice Board, funds LIVLAS. Over 150 firms and individual solicitors have registered their willingness to act on a pro bono basis through LIVLAS.

2.3.1.2 HPLC

HPLC is funded by the Commonwealth Legal Services Program, administered by Victoria Legal Aid. Legal services are provided by volunteer lawyers from PILCH member firms. HPLC has submitted a separate submission to the Inquiry, specific to the experiences of its particular client group, which PILCH endorses.

2.3.1.3 PILCH Connect

PILCH Connect provides telephone advice and delivers training to not-for-profits, as well as facilitating pro bono referrals to member firms. PILCH Connect is funded through a combination of philanthropic and government grants.

2.3.1.4 SRLC

The SRLC is a joint venture partnership between PILCH, Council on the Ageing (COTA) and Eastern and Loddon Campaspe Community Legal Centres. The SRLC is funded by Victoria Legal Aid and the Office of Senior Victorians. Legal services are provided by volunteer lawyers from PILCH member firms at legal clinics in hospitals and health centres around Melbourne.

3 The effects of the Charter on the development, drafting and consideration of statutory provisions

This section addresses Term of Reference 5(a).

3.1 The dialogue model

The dialogue model is key to the Charter's effectiveness. The three-pronged obligations under the Charter – on Parliament, public authorities and the courts – work together to ensure that human rights are appropriately considered by all arms of government in Victoria.

This model entrenches a system where: human rights are taken into consideration from the outset (i.e. in preparing laws); public authorities build human rights into their practices and decision-making processes; and, as a last resort, there is recourse to courts and tribunals. If one or more of these elements is removed, there will be a gap in the system which is likely to undermine the achievements of the other elements.

These 'front end' and 'back end' mechanisms, and the benefits they bring in terms of more efficient and effective protection of rights for Victorians, are discussed in more detail below.

3.2 Front end – the role of Parliament and SARC

The mechanisms in Part 3 of the Charter ensure that human rights are considered in the initial stages of making and amending legislation and regulations. It also establishes that Parliament has the primary role in ensuring legislation is compatible with human rights under the Charter. We refer to this function as the 'front end' consideration of human rights.

PILCH notes the VEOHRC's observation that the requirement to prepare Statements of Compatibility has been a catalyst for increased community consultation and engagement in the formulation of legislation.¹ Consultation with the community can only improve the ability of laws to be relevant and responsive to the rights and needs of Victorians.

'Front end' parliamentary scrutiny of proposed legislation for compatibility with human rights is important because it serves a preventative function in the following ways:

- ▶ the avoidance (both to the state and to individuals) of costly litigation in the pursuit of an outcome that recognises an applicant's human rights;
- ▶ the avoidance of emotional costs and stresses to applicants pursuing litigation; and
- ▶ preventing individuals from experiencing the consequences of a human rights breach.

It also improves the transparency of the statutory development process by requiring the government to weigh competing interests when drafting legislation, and for SARC to critically appraise the human rights impact of prospective laws. This provides a system in which parliament can be clear about its intent regarding the operation of legislation, including where the intention is to override a person's human rights.

Parts 3 and 4 of this submission consider some examples of the 'front end' consideration of human rights in the areas of equality before the law. These examples show the benefits of the dialogue model and the importance of Parliament's role. This process has, in Case Study 1, resulted in the redrafting of provisions to address incompatibility with human rights.

CASE STUDY 1: Woman in a same sex relationship denied the right to pass her reversionary superannuation benefits to her partner upon her death

Gina is in a same sex relationship. She had received a pension from ABC Super Fund, in accordance with the *State Superannuation Act 1988* (Vic) (**the Act**). In 2001 the Act was amended to allow for the recognition of same sex relationships for the purposes of partners accessing reversionary benefits when their same sex partner died. However, the effect of the definition of 'partner' in the amending legislation (*Statute Law Amendment (Relationships) Act 2001* (Vic) (**the Amending Act**)) was to exclude from the reversionary benefits persons in same sex relationships who retired prior to 2001. The effect of the Act was to discriminate against people in same sex relationships, and particularly older people in same sex relationships. Gina was one such person.

In November 2007 Gina sought advice from ABC Super Fund as to why her partner was not eligible for reversionary benefits in the case of her death. ABC Super Fund informed Gina that the amendments to the Act that recognised same sex relationships for the purposes of superannuation were prospective only.

Gina was unsuccessful in her application to the Victorian Equal Opportunity and Human Rights Commission alleging that ABC Super Fund and the responsible minister, Tim Holding MLA, were discriminating against her on the ground of her sexual orientation by denying her the right to pass her reversionary superannuation benefits to her partner upon her death. Her complaint was unsuccessful because s 69(1) of the *Equal Opportunity Act 1995* (Vic) permitted discrimination if that discrimination was authorised by a provision of another Act.

¹ VEOHRC, *Talking Rights: 2010 Report on the Operation of the Charter of Human Rights and Responsibilities* (2011) 35-6.

Gina approached PILCH for a referral to counsel for an advice as to whether the definition of 'partner' in the Act was incompatible the right to equality and protection from discrimination under s 8(3) of the Charter. Counsel advised that:

The relevant provisions of the Act are discriminatory because a person's eligibility for reversionary superannuation benefits will differ depending on his or her sexual orientation.

The relevant provisions of the Act cannot be read in a way that is compatible with human rights, as required by s 32 of the Charter because the intention of the Act is clear and unambiguous and there was no room for discretion.

There is no independent cause of action to seek a declaration of inconsistent interpretation under s36 of the Charter. Therefore, in the absence of a non-Charter claim, Gina cannot seek a declaration of inconsistent interpretation.

Gina advocated strongly for a change to the Act. Following Gina's complaint to VEOHRC, on 7 April 2008 VEOHRC wrote to the responsible minister and Attorney General noting that the less favourable treatment of people in same sex relationships under the Act 'is a continuing concern of the Commission'. PILCH, on behalf of Gina, wrote to the Human Rights Unit at the Department of Justice raising awareness of the issue and seeking to determine the number of people affected by the discriminatory operation of the law.

Following Gina and PILCH's advocacy on this issue, an amendment was made to the Act with the effect that all persons, irrespective of sexual orientation, could access reversionary superannuation benefits retrospectively and prospectively from the date of the Amending Act.

Had the amending act in Case Study 1 (above) been passed after the enactment of the Charter, it is possible that, in the process of preparing a statement of compatibility with the Charter, the discriminatory effect of the Act would have been identified and an explanation would have been provided for the nature and extent of the incompatibility. Further, an analysis under s 7(2) as to why a measure is 'reasonable and necessary' would have allowed for parliamentary debate on the human rights issues triggered by the proposed legislation, and transparency and accountability in respect of the effect of denying a right to a section of the community. This is the benefit of the front end approach.

Case Study 1 also illustrates that the Charter could be more effective if it allowed applicants to pursue remedies under the Charter alone, without the need to 'piggy back' the Charter argument on an independent cause of action. We discuss this further in section 8.2.

At the very least, the Charter should be amended to empower VEOHRC to receive and conciliate human rights complaints (see Recommendation 1).

4 The effect of the Charter on the provision of services and performance of functions by public authorities

This section addresses Term of Reference 5(c).

4.1 Charter-based advocacy leads to improved, sensible decision-making processes and practices within public authorities

In the course of its referral work, PILCH can report that the Charter has been used to advocate for individuals who are impacted by laws or policies in a disproportionate or discriminatory way. The case study below exemplifies how the obligations placed on public authorities under the Charter – in this case the

Department of Human Services – contributed to a fairer application of departmental policies. It also demonstrates how the Charter can be used to expose decision-making within public authorities that is out of step with community values.

CASE STUDY 2: 13 year old girl with Asperger’s Syndrome gains entitlement to disability support services

April (not her real name) has been diagnosed with Asperger’s Syndrome, which is an Autism Spectrum Disorder that is characterised by impaired social interaction, repetitive patterns of behaviour and restricted interests, in individuals of normal intelligence. When April was 13 years old, her father applied to the Department of Human Services (DHS) for disability support services on April’s behalf. April had already been assessed as being eligible to receive a federal Disability Support Pension. DHS’s policy on determining disability recognised several categories of disability: sensory, physical, Acquired Brain Injury, intellectual disability, developmental delay and neurological impairment.

DHS denied the request to access disability support services on the basis that Asperger’s Syndrome does not constitute a ‘neurological impairment’ and therefore was not a relevant ‘disability’ under s 3 of the Disability Act 2006. It became clear to April’s father that this decision not only affected Tom but all Victorians with Autism Spectrum Disorder.

With pro bono legal assistance, April’s father appealed the decision of DHS to VCAT. At the hearing, Counsel made submissions arguing that DHS should adopt an inclusive and contextual interpretation of the terms ‘disability’ and ‘neurological impairment’ in accordance with its human rights obligations under the Charter. The decision of the Tribunal was reserved.

Prior to the resolution of the case, the government announced that individuals with Autism Spectrum Disorders, including Asperger’s Syndrome, would be eligible to apply for disability support services. The government also announced funding of \$2.75 million to support those individuals affected by the change.

It is PILCH’s firm belief that, without the awareness raising served by the VCAT proceeding in Case Study 2, this change to the Department’s policy would not have occurred. In this respect, the Charter played a valuable role in persuading the Department to revisit its initial decision that Asperger’s Syndrome was not a relevant ‘disability’ under s 3 of the *Disability Act 2006*. As a result, a common sense decision was reached that also has broad and beneficial impacts for other children in April’s position.

April’s father has expressed to us his view that:

‘The Charter was an important instrument in highlighting the rights of our son for access to funding support to ensure his educational and living support needs and opportunities were met. Its place in establishing the value of each person regardless of their disability, etc, as well as highlighting to all Victorians the needs of others, was pivotal in providing access to services that would otherwise not been available to us as a family and to our son. We are indebted to the value of the Charter in motivating Government to change policy and practice that enables all Victorians to be treated with dignity and respect.’²

While this particular case study illustrates the important role that access to a legal remedy under the Charter plays in encouraging further dialogue with public authorities about their decision-making, PILCH observes from its case work that the Charter is most effective when used outside courts and tribunals. It opens the doors to negotiation and discussion and allows competing priorities to be considered and weighed. It also

² Conveyed to Charlotte Ahearne of PILCH by email from April’s father, 10 June 2011.

allows for practical solutions that are outside the more narrow options that policies or procedures might otherwise limit outcomes to.

5 The effects of the Charter on litigation and the roles of courts and tribunals

This section addresses Terms of Reference 5(a), (b) and (d).

We fully endorse the submission and recommendations of the HRLC on in respect of the effect of the charter on litigation and the roles of courts and tribunals.

5.1 Back end – the role for courts and tribunals

In the four years of its operation, PILCH observes that the Charter has been used in litigation relatively infrequently. As such, the suggestion that the Charter encourages litigation or that it is a tool for lawyers, is a misconception. Resolution of Charter-based issues before a court or tribunal is a last resort that only arises when the front end measures (discussed above in 3.2) have failed. However, it is important that this right of enforcement remain in order for the Charter to fully realise its goal to ‘protect and promote human rights’ (section 1(2)).

Even in cases where the Charter has been argued, but not ultimately considered in the reasoning of the tribunal member or judge (as was the case in Case Study 3 below), PILCH is of the view that Charter arguments inform the presentation of rights issues before the court or tribunal in a valuable way, and one that resonates with the community. Similarly, decisions by courts and tribunals (few though there are at present) are providing emerging guidance on the practical application of the Charter to the conduct of public authorities.

As the HPLC submission demonstrates, VCAT decisions (although not binding in the same way as a court decision) have created clarity and provided useful guidance to the sector about the content of Charter obligations and how to apply them in practice. These public statements have been used to encourage policy and practice-based changes within public authorities.

CASE STUDY 3: A young woman from a linguistic and ethnically diverse background with a genetic disability challenged the decision of her guardian on the basis that they did not consider her culture and religion in making decisions on her behalf

June has a daughter, May (not their real names) who was born with an extra chromosome and requires assistance with managing her affairs and with assisted accommodation arrangements. May’s family are non-English speakers and observers of a minority religion.

June approached PILCH for assistance in challenging a decision of the guardian appointed by the Office of the Public Advocate to make decisions on May’s behalf. The guardian had sought an order from VCAT to move May to a residential facility that:

- had no workers who spoke her and her mother’s native language;
- did not provide food prepared in a way required by her religion; and

in the context of neither May nor her parents supporting the move.

May informed the guardian that she wanted to live primarily at home with her family. May’s family informed the guardian that they too wanted May to live in the family home with 2 days per week spent in respite care.

PILCH arranged pro bono solicitors and counsel to challenge the guardian's use of her decision-making authority as unreasonable and excessive.

At the VCAT hearing, Counsel for May argued that the objectives of the *Guardianship and Administration Act 1986* require that the wishes of the person with a disability be given effect to wherever possible, and the means used be the least restrictive as possible. Counsel also raised arguments under the Charter, namely the right to protection of families and children, the right to culture and the right to freedom of religion.

VCAT ordered that the guardianship order be revoked.

In this case, while the Charter may not necessarily have been determinative in the tribunal's ultimate decision, it played an important role in assisting May to express her concerns about her human rights. It also allowed May's legal team to introduce the language of 'least restrictive' means into the tribunal's consideration of the relevant Act.

The following case study demonstrates how the Charter has assisted tribunals to consider the appropriate reach of anti-discrimination legislation. The Charter is now one of a number of tools available to courts and tribunals to measure exemptions contained in discrimination legislation.

CASE STUDY 4: Adventure Resort discriminated against a gay youth suicide prevention group by denying them access to its commercial camping facilities because of their sexual orientation

The WayOut project is a youth suicide prevention initiative operated by Cobaw Community Health Service that targets homosexual young people in rural Victoria. WayOut wished to have a two-day forum at the Phillip Island Adventure Resort (**PIAR**), which is operated by Christian Youth Camps Limited (**CYC**). CYC was established by the trustees of the Christian Brethren Trust for purposes connected with the Christian Brethren religion.

In June 2007, the WayOut project coordinator made a call to the PIAR resort manager to arrange a booking but was refused. WayOut instituted proceedings in VCAT claiming that CYC had contravened the Equal Opportunity Act 1995 (Vic) (**the Act**) by discriminating against them in the provision of services and accommodation on the basis of their sexual orientation. CYC denied that discrimination occurred and if it did, they relied on certain religious exemptions in the Act. The VEOHRC intervened in the proceeding, in the exercise of its right under s 40(1) of the Charter.

In the judgment of the tribunal, Justice Hampel noted that when interpreting the religious exemptions under section 75(2) of the Act, she must have regard to their purpose, namely to protect religious freedoms, in a manner consistent with the rights to equality and freedom from discrimination in section 8 of the Charter. In particular, she considered the rights to freedom of thought, conscience, religion and belief (s 14) and freedom of expression (s 15). Her Honour noted that this interpretation should not privilege one right over another, but recognise their co-existence.

Her Honour referred to s 14 of the Charter and article 18 of the ICCPR and noted that they both distinguish between the right to freedom of religion or belief, and the right to demonstrate or manifest religion or belief in worship, observance, practice and teaching. She noted that the right to hold a belief is broader than the right to act upon it. Her Honour referred to *McFarlane v Relate Avon Limited* [2010] EWCA Civ B1 where Laws LJ held that the right to freedom of religious belief does not confer a right on members of a religion to impose their beliefs on a secular society.

Justice Hampel concluded that there was no evidence to suggest that conformity with their beliefs about marriage and sexuality required CYC to avoid contact with people who were not of their faith and who did not subscribe to their beliefs about God's will in respect of sex and marriage.

Ultimately, the tribunal concluded that 'the conduct of the respondents in refusing the booking was clearly based on their objection to homosexuality. They are entitled to their personal and religious beliefs. They are not entitled to impose their beliefs on others in a manner that denies them the enjoyment of their right to equality and freedom from discrimination in respect of a fundamental aspect of their being'.

The tribunal made a declaration that CYC had committed discrimination in breach of the Act, and ordered that CYC pay compensation of \$5,000 for the hurt and distress caused.

This case study demonstrates the way in which the Charter has been used by courts to challenge arbitrary decisions based on blanket policies that have a discriminatory effect and do not properly take into account human rights considerations.

6 Access to effective remedies under the Charter for the infringement of rights

This section addresses Terms of Reference 4 and 5(e).

PILCH's experience demonstrates that the Charter would be more effective in protecting the human rights of Victorians if section 39 were amended to ensure that remedies were available in the case of acts or decisions of public authorities made unlawful by the Charter. We discuss this further in section 8.2 below.

For Gina (Case Study 1), although her legal advisors were able to establish that the *State Superannuation Act 1988* was incompatible with her right to equality under the Charter, the Charter itself did not provide her with access to an effective remedy. If the Charter contained a free-standing cause of action that enabled her to initiate legal proceedings on the basis of a breach of the rights contained in the Charter, it may have been the case that such a mechanism would have allowed her to seek a declaration of inconsistent interpretation that the *State Superannuation Act 1988* was incompatible with her human rights.

PILCH endorses the HRLC's submission calling for amendment to the Charter to empower VEOHRC to receive and conciliate human rights complaints using a similar process to that available for discrimination complaints under the *Equal Opportunity Act 2010* (Vic).

Recommendation 1

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

6.1.1.1 Guidance from courts and tribunals

The courts have an important role in developing jurisprudence about the scope of Charter obligations that provides guidance and clarification to public authorities. This is another reason why it is important that rights under the Charter are enforceable in a court or tribunal. Unenforceable rights take longer to become entrenched in policies and practices and are not as effective in bringing about systemic changes. If rights are not enforceable, there is no genuine motivation for public authorities to consider human rights and consequently negotiated outcomes become less likely. Access to remedies will always be a last resort measure but they serve as a strong incentive to public authorities to ensure that human rights breaches do not occur in the first place.

Recommendation 2

Sections 32 and 36 of the Charter should be repealed and replaced with a provision which states that

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

6.1.1.2 Additional layer of protection

As argued by the HPLC in their submission to the Inquiry, the Charter protects people from ad hoc approaches to decision-making within organisations. It provides one clear set of standards that, if needed, can be interpreted by a court or tribunal. It also provides protection against human error, which might not otherwise be detected or avoided. This additional protection only needs to be used when the obligation on public authorities is not adhered to.

7 Overall benefits and costs of the Charter

This section addresses Term of Reference 6.

In August 2005, PILCH provided a submission to the Human Rights Consultation Committee regarding the Enactment of a Victorian Charter of Human Rights. In that submission, we commented that:

‘PILCH believes that a Charter of Rights will have important educative and symbolic effects, empowering the marginalised and disempowered and creating a rights-based culture in Victoria.’

PILCH believes that the process of culture change and of embedding a consideration of human rights in both the decision-making of public authorities and legislative and policy development is an ongoing challenge towards which we are making good progress under the Charter. It is particularly helpful for community members and community groups to be able to frame their law reform advocacy around the same Charter principles that Parliament is required to consider when enacting legislation.

However, the Charter has not been a panacea for disadvantage and inequality in Victoria, nor has it always allowed for the remedy or prevention of human rights abuses since its commencement in 2007. We address avenues for improvement of the Charter below.

8 Options for improvement and strengthening of rights protection

This section addresses Terms of Reference 1, 3, 4, 5(e) and 7.

In our view, the Charter should be strengthened and improved in the following ways.

- ▶ Inclusion of protections of economic and social rights;
- ▶ Independent cause of action;
- ▶ Recognition of absolute rights; and
- ▶ Monitoring public authorities' human rights compliance.

These recommendations are discussed in more detail below.

8.1 Protections of economic and social rights

We refer to the submissions of:

- ▶ the HRLC relating to Terms of Reference 1 and 2;
- ▶ the HPLC; and
- ▶ the Federation of Community Legal Centres,

and endorse their comments with respect to the inclusion in the Charter of economic and social rights, which contribute to the conditions necessary for all people to live with dignity and participate fully and equally in our community.

8.2 Independent cause of action and damages

Currently, the limitation on a person's ability to commence legal proceedings for non-compliance with the Charter (under section 39) means that people whose rights are adversely affected by legislation but who have no other cause of action on which to 'piggy back' their Charter argument find themselves without a remedy. This is despite having legal advice as to the incompatibility of the law in question with the Charter. As currently drafted, section 39 is unnecessarily complex and unworkable.

Case Study 1 (outlined in section 3.2 above) illustrates this weakness in the current Charter model. For Gina, the lack of an independent cause of action under the Charter left her with no avenues to challenge the discriminatory effect of the *State Superannuation Act 1988*. Beyond writing letters to members of parliament, Gina had no other domestic legal remedy available to her.

Section 39 of the Charter should be replaced with a provision that establishes a free-standing cause of action for breaches of protected human rights which is justiciable and enforceable in the appropriate court or tribunal, including VCAT.

Recommendation 3

Section 39 of the Charter should be replaced with a provision that establishes a free-standing cause of action for breaches of protected human rights which is justiciable and enforceable in the appropriate court or tribunal, including VCAT.

8.3 Recognition of absolute rights

In conformity with the ICCPR, section 7 of the Charter should be amended to recognize that certain human rights are absolute, such as the right to protection from torture and cruel, inhumane or degrading treatment. Section 7 should expressly state which rights are absolute and that no limitation of absolute rights is permissible.

8.4 Mandatory monitoring of public authorities' human rights compliance.

PILCH endorses the submission of the HRLC regarding the need for mandatory regular auditing of public authorities for compliance with human rights. Auditing and reporting requirements allow for the identification of systemic and structural issues and provide a framework for monitoring and evaluating actions taken to address these failings.

It is possible that mandatory periodic auditing of public authorities to assess compliance with the Charter might have avoided the need for April in Case Study 2 and her family to pursue a litigated outcome to have Asperger's Syndrome recognized as a disability for the purpose of accessing disability support services from the government. The process of such litigation absorbs pro bono resources as well as court resources and causes stress to families.