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# Human Rights 101:

## *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

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## 1. Overview

- Progeny and Aims
- Overview of the “Dialogue”
- The Charter in Comparative Terms

## 2. Application of the Charter

- The Charter and Parliament
  - The Charter and Public Authorities
  - The Charter and Courts
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# Outline (2)



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3. Rights Protected by the Charter
    - Substantive Rights
    - Interpreting Rights
    - Limitations on Rights
  5. Unlawfulness and Remedies under the Charter
  6. The UK Experience
  7. Looking Forward
  8. Useful resources and websites
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# Progeny and Aims



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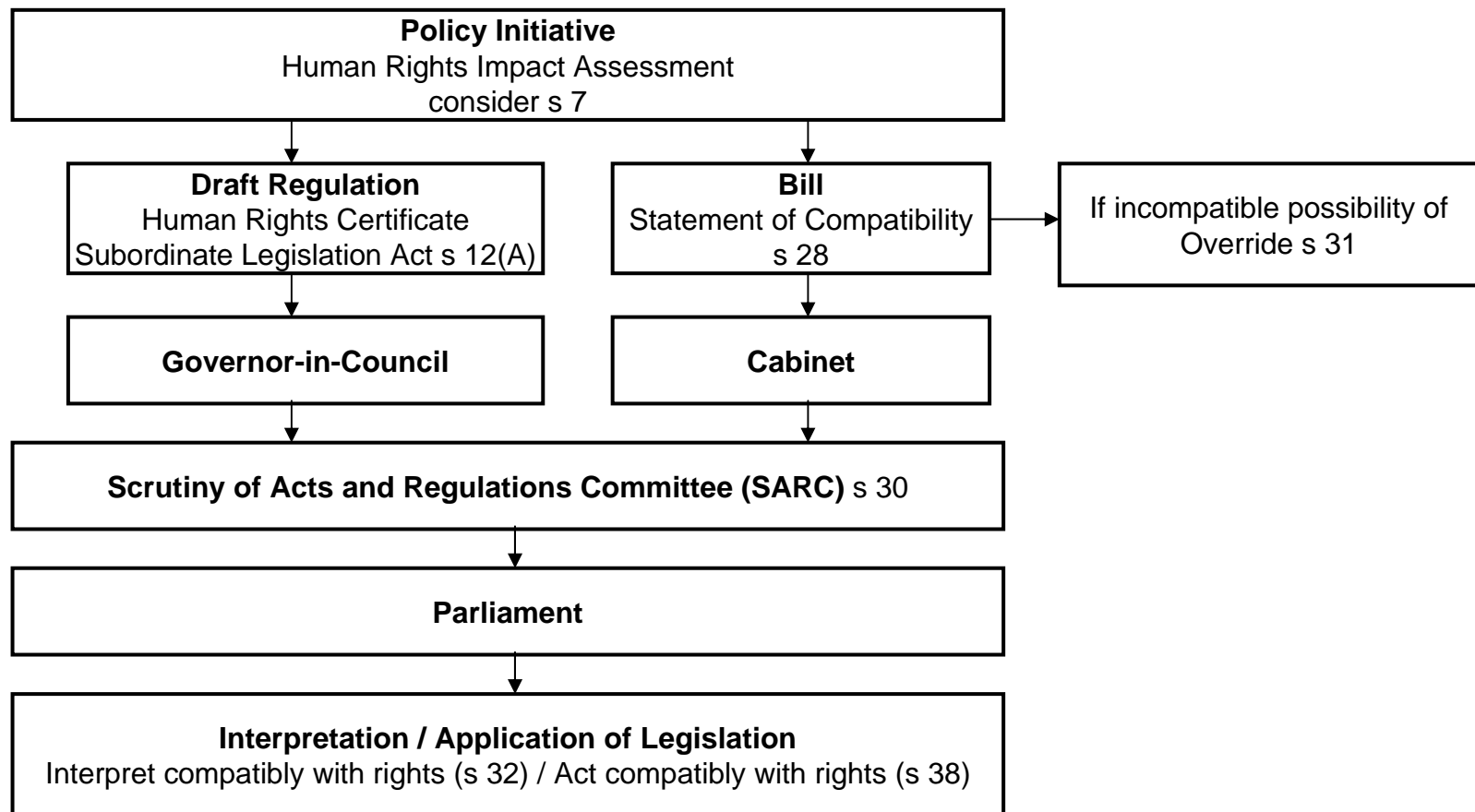
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- Preamble
  - Purposes (s 1)
    - Promote and protect human rights
    - Requires all arms of government (parliament, government, courts) to consider human rights as part of decision-making processes
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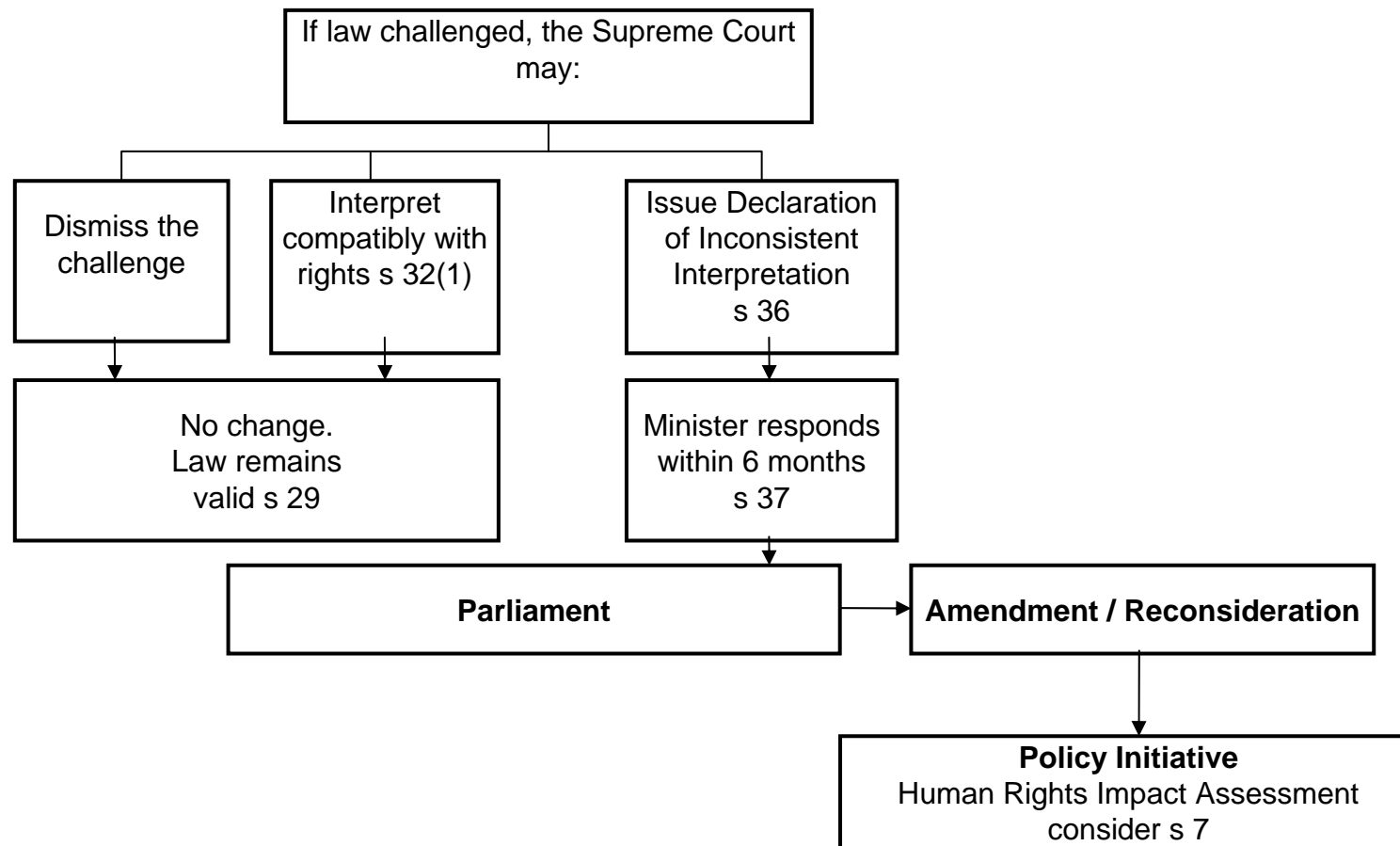


- Establishes 8 mechanisms to institutionalise human rights “dialogue”: s 1(2)
    - Statements of Compatibility
    - SARC
    - Obligations of public authorities
    - Statutory interpretation
    - Use and relevance of human rights jurisprudence
    - Declarations of Inconsistent Interpretation
    - Response to Declarations
    - VEOHRC
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# Dialogue Flowchart -1



# Dialogue Flowchart - 2



# The Charter in Comparative Terms



- Act of Parliament
  - Substantive provisions “modelled” on ICCPR
  - Comparative statutory instruments
    - *Human Rights Act 1998* (UK)
    - *Human Rights Act 2004* (ACT)
    - *Bill of Rights 1990* (NZ)
  - Comparative constitutional instruments
    - Canadian Charter of Rights and Freedoms 1982
    - South African Bill of Rights 1996
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# Application of the Charter



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- Commencement (s 2)
  - Application (s 6)
    - Natural persons (not corporations): s 6(1)
    - Parliament (but retains parliamentary sovereignty): s 6(2)(a) and s 4(1)(i)
    - Public authorities: s 6(2)(c)
    - Courts and tribunals
      - As public authorities when acting in administrative capacity: s 4(1)(j)
      - Otherwise, to the extent that they have substantive human rights functions: s 6(1)(b)
-

- Legislative development
    - Statements of Compatibility (s 28)
      - Whether and how legislation is compatible: s 28(3)
      - No affect on validity: s 29
      - Not binding on court or tribunal: s 28(4)
    - Human Rights Certificate for subordinate legislation
  - Parliamentary scrutiny
    - Scrutiny of Acts and Regs Committee (s 30)
      - Must consider any Bill and report as to compatibility
  - Override declarations (s 31)
    - Charter does not apply
    - Only in 'exceptional circumstances' and for 5 years
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# Obligations of Public Authorities - Procedural



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- *“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”*: s 38(1)
- Procedural obligation:
  - Requires “proper consideration” of human rights in decision-making processes
  - No blanket or inflexible rules; real, genuine and proportionate consideration
  - “The doctrine...may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions...It may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations”: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532
  - May be relevant to discharge of substantive obligation: *R (Begum) v Denbeigh High School* [2006] 2 WLR 719

# Obligations of Public Authorities - Substantive



- *“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”*: s 38(1)
  - Substantive obligation:
    - Must act compatibly with human rights
    - Act includes failure to act or proposal to act: s 3(1)
  - “Powerful obligation on public authorities to comply with human rights”
  - “The Charter – a law of the Parliament on a subject of fundamental importance to democratic society – specifies with absolute clarity what the consequence is: unlawfulness”:  
*Director of Housing v Sudi* [2010] VCAT 328
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# Limits on the Obligations of Public Authorities



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- Exception for acts or decisions required by law: s 38(2)
    - Obligation under s 38(1) does not apply if the public authority “could not reasonably have acted differently or made a different decision” as a result of a Victorian or Cth statutory provision
  - Exception for private acts: s 38(3)
    - Section 38(1) does not apply to acts or decisions of a private nature
  - Exception for religious bodies: s 38(4)
    - Section 38(1) does not require a public authority to act or make a decision that impedes or prevents a “religious body” from acting in conformity with its religious doctrines, beliefs or principles
  - Relationship with s 7(2)?
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# Reviewing the Conduct of Public Authorities



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- “Determining whether a public authority has behaved unlawfully by breaching human rights has some analytical similarities with judicial review.”
  - It requires determining whether:
    - the human rights in the Charter apply to the public authority;
    - the rights were breached by the authority’s actions or decisions; and
    - any breach was justified (is this by reference to s 38(2) or s 7(2)?)
  - The consequence of any breach is that the action or decision is “unlawful” (to be discussed later)
  - Source: *Director of Housing v Sudi* [2010] VCAT 328
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# What is a Public Authority – Core



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- “Core” public authorities:
    - Public officials and employees within meaning of *Public Administration Act*: s 4(1)(a)
    - Victoria Police: s 4(1)(d))
    - Local governments: s 4(1)(e)
    - Ministers: s 4(1)(f)
    - Courts and tribunals acting in an administrative capacity: s 4(1)(j)
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# What is a Public Authority – Functional



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- Entities discharging “functions of a public nature on behalf of the state or a public authority”: s 4(1)(c)
  - Relevant factors include:
    - Function conferred by or under statute (s 4(2)(a))
    - Function connected to or identified with government (s 4(2)(b))
    - Regulatory function (s 4(2)(c))
    - Public funding (s 4(2)(d))
    - Corporation owned by government (s 4(2)(e))
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# What is a Public Authority – Functional (2)



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- Focus is on “function”, not “institution”
    - “[t]he definition of ‘public authority’ in s 4 must be given a wide and generous interpretation which is consistent with the central purpose of the *Charter* to protect and promote human rights”
    - should be “approached as a matter of substance and not form or legal technicality”
  - The effect of outsourcing
    - “The state cannot shirk its human rights responsibilities by implementing its programs and policies through private entities acting on its behalf.”
    - Source: *Metro West v Sudi* [2009] VCAT 2025; cf *YL v Birmingham City Council* [2007] UKHL 27
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# Statutory Interpretation



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- “So far as it is possible to do so consistently with statutory purpose, all statutory provisions must be interpreted in a way that is compatible with human rights”: Charter s 32(1)
  - Not a “special” rule of interpretation, but rather a “statutory directive” which “forms part of the body of interpretative rules”: cf *Ghaidan*; *Kracke*
  - Should be “applied at the outset” and “not only where necessary to avoid what would otherwise be an unjustified infringement of a right”: cf *Kracke*; *Hansen*
  - Requires that we “explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes Charter rights”
  - However, emphasised importance of maintaining fidelity to parliamentary intent and purpose.
  - Source: *Momcilovic*
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# Statutory Interpretation (2)



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- Step 1: Ascertain meaning of relevant provision by applying s 32(1) of Charter in conjunction with common law principles of statutory interpretation and *Interpretation of Legislation Act*
  - Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by Charter
  - Step 3: If so, apply s 7(2) of Charter to determine whether limit on the right is justified
  - [Step 4]: If limit is not justified, issue Declaration of Inconsistent Interpretation
  - Source: *Momcilovic*
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- If a limitation is not justified under s 7(2), Court may issue Declaration of Inconsistent Interpretation: s 36(2)
  - Declarations should not be seen as a “last resort” (cf UK HRA) but rather as important remedial mechanism that “epitomises the intended relationship between the courts and the legislature” in the dialogue model.
  - Source: *Momcilovic*
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# Declarations of Incompatibility (2)

- Declarations must:
    - Only be made by Supreme Court or Court of Appeal: s 36(1)
    - Be preceded by notice to A-G and Commission (s 36(3)) and made only after A-G and Commission have reasonable opportunity to make submissions: s 36(4)
  - Declarations do not:
    - Invalidate the legislation: s 36(5)(a)
    - Create any legal rights or cause of action: s 36(5)(b)
  - Effect of Declarations:
    - Responsible Minister must table Declaration and response before each House of Parliament within 6 months
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## Other Provisions Relevant to Legal Proceedings



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- Use of international and foreign law: s 32(2)
  - Referral to Supreme Court: s 33
  - Notice to A-G and Commission: s 35
  - A-G's right to intervene: s 34
  - Commission's right to intervene: s 40
  - Legal proceedings: s 39 (we'll return to this)
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# Rights Protected by Charter



## **F**reedom

movement, assembly & association, forced work, expression, thought & religion, liberty & security, fair hearing, rights in criminal proceedings, double jeopardy, retrospective criminal laws

## **R**espect

life, protection of families and children, cultural rights, property

## **E**quality

non-discrimination, equal recognition, participation

## **D**ignity

torture & cruel treatment, privacy & reputation, humane treatment in detention

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- Interpretation and application of human rights should:
    - not be “narrow or legalistic”
    - be “generous” and ‘purposeful’
    - render them “real and effective”, not “theoretical or illusory”
    - evolve to reflect contemporary standards and values
    - re interdependent and mutually reinforcing
    - be undertaken in context of “cardinal values” which rights embody: see, eg, *XYZ v Victoria Police*; *Kracke v Mental Health Review Board*
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# Sources of Jurisprudence



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- International
    - Treaties and treaty bodies (jurisprudence and General Comments)
    - Customary international law
    - Special Procedures of the UN Human Rights Council
    - “Soft law” (eg, declarations and resolutions)
  - Regional
    - European Court of Human Rights
    - Inter-American Court of Human Rights
  - Comparative domestic
    - UK, Canada, NZ, South Africa, Hong Kong, India
  - See, eg, *XYZ v Victoria Police*; *Kracke v Mental Health Review Board*. Cf *Momcilovic*
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# Example: Freedom of Expression

- *“Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds...”*: Charter s 15(2)
  - XYZ argued that right to freedom of expression incorporates positive right to freedom of information
  - Bell J considered that:
    - Right to freedom of expression is foundational to democracy, the rule of law, and individual, social and cultural development.
    - Freedom of information is “a necessary constituent of freedom of expression, for the purposes of the right to seek, receive and impact information will be frustrated if the government, without justification, can simply refuse the information sought”.
    - “International jurisprudence is moving strongly in the direction of a positive obligation being part of freedom of expression”.
  - Bell J held that:
    - “the right to freedom of expression in s 15(2) of the *Charter* implicitly imposes a positive obligation on the government to give access to government-held documents (freedom of information)”
  - Source: *XYZ v Victoria Police*
-

# Example: Right to Privacy, Family and Home



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- “A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with”: Charter s 13(a)
  - Requirement of “legality” requires that any interference with this right be governed by “clear and publicly accessible rules of law” and by procedures that are ‘predictable and foreseeable’.
  - Prohibition against “arbitrary interference” is in addition to the requirement of lawfulness, and requires that any interference be reasonable, necessary and proportionate.
  - “Evicting people living in public housing is a severe infringement of their human rights, especially those which protect the family and the home. Unless interference is demonstrably justified, it breaches human rights and is ‘unlawful’ under the *Charter*. The onus is on the person seeking to uphold the infringement to establish this justification.”
  - Source: *Director of Housing v Sudi*
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# Limitations on Rights



- *“A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors”: s 7(2)*
- Relevant factors include:
  - nature of the right: s 7(2)(a)
  - importance of the purpose of the limitation: s 7(2)(b) [**legitimate aim**]
  - nature and extent of the limitation: s 7(2)(c) [**proportionality**]
  - Relationship between limitation and purpose: s 7(2)(d) [**rational connection**]
  - Any reasonably available less restrictive means: s 7(2)(e) [**minimal impairment**]

# Limitations on Rights – Onus and Proof



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- Onus is on the state to demonstrably justify any limitation
- Standard of proof is high and commensurate to gravity of limitation
- This will require evidence (other than in the most exceptional cases)
- Evidence should be clear, cogent and persuasive
- Limitations should be subject to ongoing monitoring and evaluation (ie, limitation must be justified on ongoing basis)
- Sources: *Momcilovic*; *DAS*; *Wesley College*; *Travel Sisters*. See also *R v Oakes* [1986] SCR 103



- Section 39:
    - No “freestanding” cause of action but if there is a pre-existing right to remedy or relief for unlawful conduct, then person may also seek that relief or remedy for unlawfulness under the Charter : s 39(1)
    - No entitlement to damages: s 39(3)
    - Existing rights, remedies and causes of action unaffected: s 39(4)
  - However, s 38:
    - Imposes “powerful obligation on public authorities to comply with human rights”
    - Human rights remedies must be accessible in order to be effective
    - “Unlawful” has a potent meaning and powerful consequences – to hold otherwise would be to “mock the rule of law, including the human rights protections in the Charter”.
  - Sources: *Director of Housing v Sudi*; *Kracke*
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# Unlawfulness and Remedies

## (2)



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- Ombudsman: *Ombudsman Act 1973* – s 1(A)
    - May enquire into or investigate whether any government action is incompatible with human rights
  - Misconduct procedures against public officials: *Public Administration Act 2004*
    - Public officials are required to make decisions compatibly with human rights
    - Must “actively implement, promote and support human rights”
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# UK Lessons: Impact Areas



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- Judicial review patterns under UK HRA (descending order by volume in post-permission cases):

Case Category	% Cases raising HRA
Immigration / asylum	45
Housing / homelessness	32
Prison	55
Education	22
Disciplinary proceedings	20
Mental health	100

- Source: Public Law Project, *The Impact of the Human Rights Act on Judicial Review* (2003)



- Use of articles in post-permission cases citing UK HRA
    - Art 8 (right to respect for privacy and family life) – 46 %
    - Art 6 (right to a fair hearing) – 44 %
    - Art 5 (right to liberty and security of person) – 23 %
    - Art 14 (prohibition on discrimination) – 14 %
    - Art 3 (freedom from torture and cruel treatment) – 13 %
    - Art 2 (right to life) – 10 %
  - Source: Public Law Project, *The Impact of the Human Rights Act on Judicial Review* (2003)
-

- Four year review of the operation of Charter must consider:
    - Additional rights, including ICESCR, CRC, CEDAW and self-determination: s 44(2)(a) and (b)
    - Mandatory and regular auditing of public authorities: s 44(2)(c)
    - Further remedies: s 44(2)(d)
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# Human Rights Resources



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- [www.hrlrc.org.au](http://www.hrlrc.org.au)
    - Searchable case law database
    - Monthly Human Rights Bulletin
    - Articles, Materials and Commentary
  - <https://humanrights.vgso.vic.gov.au>
    - Charter Guidelines
  - [www.humanrightscommission.vic.gov.au](http://www.humanrightscommission.vic.gov.au)
  - Texts
    - Evans and Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT HRA* (LexisNexis, 2008)
    - Pound and Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Thomson, 2008)
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# Human Rights 101: *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

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