



The Charter of Human Rights and Responsibilities

A guide for Victorian public sector workers

Third edition (January 2024)

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**The Charter of Human Rights and Responsibilities:
A guide for Victorian public sector workers (third edition)**

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Illustrations by Marc Martin.

The Commission acknowledges Aboriginal and Torres Strait Islander peoples as first Australians and recognise their culture, history, diversity and deep connection to the land.

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The Commission's role under the Charter

The Victorian Equal Opportunity and Human Rights Commission (the Commission) is a statutory body with responsibilities under four key laws:

- the *Charter of Human Rights and Responsibilities Act 2006* (the Charter)
- the *Equal Opportunity Act 2010*
- the *Racial and Religious Tolerance Act 2001*
- the *Change or Suppression (Conversion) Practices Prohibition Act 2021*.

The Commission's functions under the Charter

The Commission has specific functions under the Charter to protect and promote human rights in Victoria. These include:

- to provide education about human rights and the Charter
- to intervene in court and tribunal proceedings that relate to the Charter
- on request by a public authority, to review a public authority's programs and practices for compatibility with the Charter
- to present an annual report on the operation of the Charter to the Attorney-General
- on request by the Attorney-General, to review and report on the effect of statutory provisions and the common law on human rights
- to assist the Attorney-General in the four- and eight-year reviews of the Charter
- to advise the Attorney-General on anything relevant to the operation of the Charter.

About this guide

This guide will support you to:

- ✓ **Learn about the Charter and how it works** (Part 1, Part 2)
- ✓ **Contribute to a culture of human rights** (Part 3)
- ✓ **Get to know the rights in the Charter** (Part 4, Appendix B, Appendix C)
- ✓ **Understand your legal obligations and work out when it's lawful to limit rights** (Part 5, Appendix A)
- ✓ **Learn about complaints and remedies** (Part 6)
- ✓ **Find out where to go for more information** (Part 7)

Foreword

I am pleased to present the third edition of *The Charter of Human Rights and Responsibilities: A guide for Victorian public sector workers* (the Charter Guide). Since the first Charter Guide was published in 2014, the human rights landscape in Victoria has continued to grow, with an increasing focus on building a culture of human rights in the public sector based on human rights leadership, capability and accountability.

Prioritising human rights education within the public sector remains a focus of the Commission's work to build a stronger human rights culture, facilitating better government decisionmaking. The third edition of the Charter Guide supports the Victorian Government's continuing commitment to put human rights at the heart of the public service.

The Charter Guide is designed as a practical tool to help public sector employees build their human rights knowledge and capability to contribute to a strong human rights culture. We know that proactive human rights leadership has benefits for the public sector and the diverse communities it serves – this includes inspired workforces that bring life to the public sector values, improved service design and delivery, and strong outcomes on the ground where human rights matter the most.

The Charter Guide also helps simplify the obligations of public authorities – including government departments, local councils, and public sector employees. It equips users of this guide to properly consider human rights and apply human rights principles in their work and decision making.

I hope that you enjoy using the Charter Guide to learn more about your human rights obligations as a public sector employee and take practical steps to becoming a human rights champion for the communities that you serve.

We all have a role to play in creating a human rights culture here in Victoria.



Ro Allen
Victorian Equal Opportunity and Human Rights Commissioner



'We know that proactive human rights leadership has benefits for the public sector and the diverse communities it serves.'

PART 1:

About the Charter

The Charter is, at its heart, a set of shared principles based on the values of the Victorian community. When government organisations embody human rights in their everyday practices we are promoting standards of behaviour, decision-making and actions that uphold principles essential to a democratic society. The impact of such behaviour should not be underestimated. A government that lives and breathes human rights reminds us all that we live in a community that values the rule of law, human dignity, equality and freedom.

– Ro Allen, Victorian Equal Opportunity and Human Rights Commissioner

The Charter is a Victorian law that sets out the basic rights and responsibilities of all people in Victoria. The Charter is about the relationship between the government and the people it serves. Twenty fundamental human rights are protected in the Charter (see Part 4).

Founding principles (Charter preamble)

The Charter is founded on the following principles:

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others
- 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.

Victoria, the Australian Capital Territory and Queensland have dedicated human rights legislation. There is no national human rights legislation.

Victoria's Charter forms part of a broader human rights framework including international human rights law and domestic laws that also protect people's rights in Victoria, such as the Equal Opportunity Act and the Racial and Religious Tolerance Act.

Where do Charter rights come from?

Charter rights are adapted from international human rights instruments including the:

- *Universal Declaration of Human Rights 1948* (UDHR)
- *International Covenant on Civil and Political Rights 1966* (ICCPR) that Australia ratified in 1980.

Many Charter rights also reflect traditional rights protected by the common law in Australia, including freedom of speech, the presumption of innocence and property rights.

Charter rights are largely based on civil and political rights, rather than economic and social rights. Although Australia is party to international human rights treaties covering social and economic rights, these rights were not incorporated into the Charter.

The modern concept of human rights dates back to the end of the Second World War when the international community was determined to safeguard civilians against atrocities committed in war. After the war, the United Nations (UN) was founded to maintain international peace and security and promote social progress and rights.

Did you know? Australia was one of 51 founding members of the United Nations and one of eight nations involved in the drafting of the Universal Declaration of Human Rights (UDHR). Australia's Dr Herbert Vere Evatt, Colonel William Roy Hodgson and Jessie Street each made significant contributions to the final text.

Jessie Street campaigned for the inclusion of women's rights in the UDHR which led to a change in the introductory words from "All men and brothers" – to "All human beings are born free and equal in dignity and rights". These exact words also appear in the preamble to the Victorian Charter.

One of the first tasks of the UN was to lay down a set of rights for all people and all nations. It was called the *Universal Declaration of Human Rights* and was adopted by the UN in 1948. It sets out the rights and freedoms to which all human beings are entitled. A number of treaties followed, most of which Australia has ratified.

International human rights treaties

Australia is party to seven key human rights treaties:

- *International Convention on the Elimination of All Forms of Racial Discrimination 1965*
- *International Covenant on Civil and Political Rights 1966*
- *International Covenant on Economic, Social and Cultural Rights 1966*
- *International Convention on the Elimination of All Forms of Discrimination against Women 1979*
- *International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984*
- *International Convention on the Rights of the Child 1989*
- *International Convention on the Rights of Persons with Disabilities 2006.*

Australia is also a party to a number of other international human rights instruments and it supports the United Nations Declaration on the Rights of Indigenous Persons.

Countries that ratify or join a treaty voluntarily accept legal obligations under international law to uphold the treaty rights. This means that Australia has obligations under international law to respect, promote and protect human rights.

Australia's obligations under international law treaties can only be carried out with the support of Australia's states and territories, including the Victorian Government.

Further information on international human rights treaties is available at ag.gov.au/humanrights and humanrights.gov.au.

PART 2:

How the Charter works

Charter obligations

The Charter requires each arm of government to play a role in protecting and promoting human rights for the benefit of the Victorian community. This includes:

- the Victorian Parliament
- Victorian courts and tribunals
- Victorian public authorities.

The Charter places obligations on Parliament

Section 28: When introducing new laws into Victoria's Parliament, a Statement of Compatibility must be tabled in Parliament, indicating how the proposed law is compatible or incompatible with the rights set out in the Charter.

Section 30: The Scrutiny of Acts and Regulations Committee reviews Bills and statutory rules and reports to Parliament as to whether they are compatible with human rights.

Section 31: In exceptional circumstances, Parliament may declare a law as being incompatible with one or more of the rights in the Charter but still pass the law.

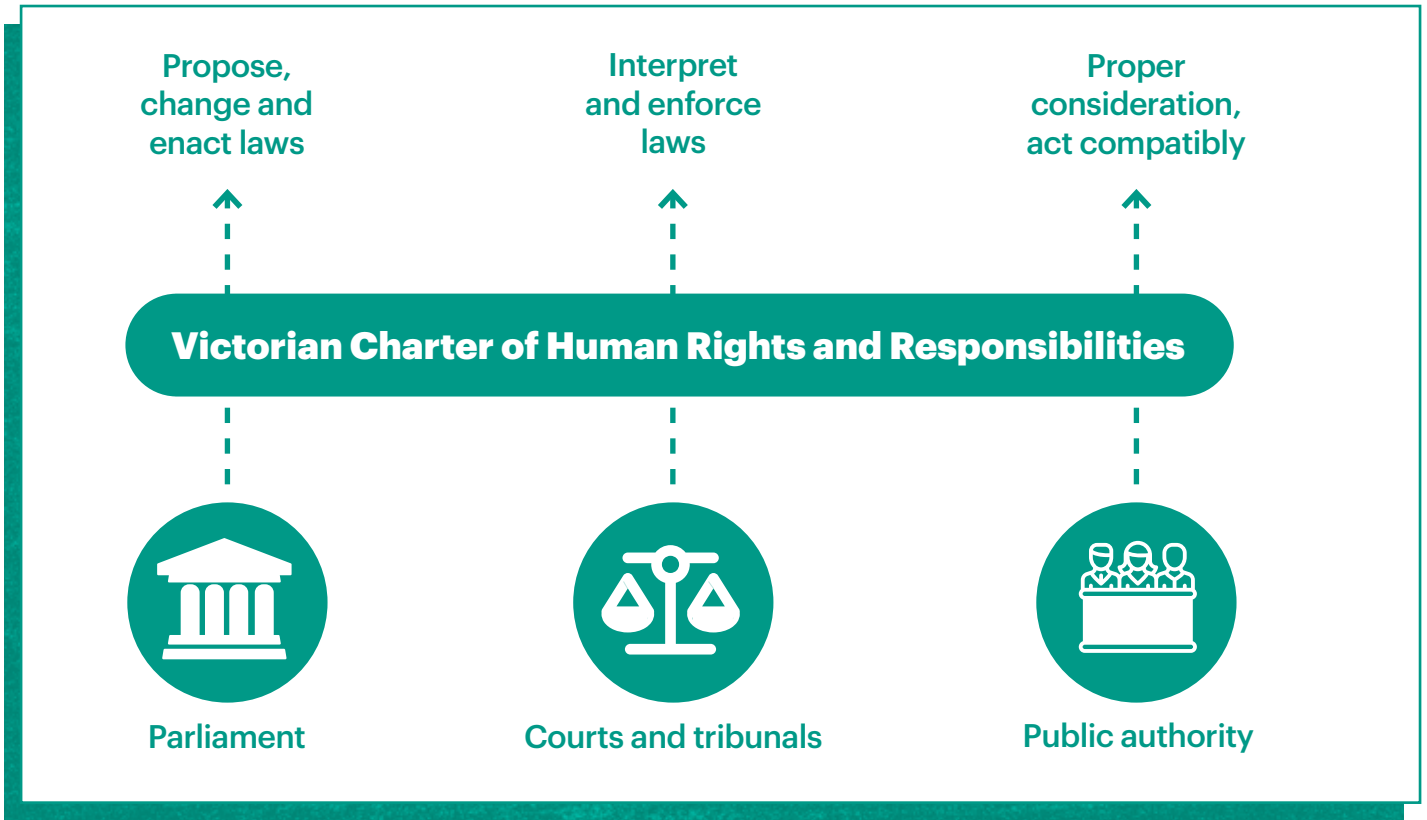
The Charter places obligations on courts and tribunals

Section 32: Courts and tribunals must interpret all Victorian laws in a way that upholds the human rights outlined in the Charter, as far as this is possible.

Section 36: The Supreme Court has the power to declare that a law or provision is inconsistent with human rights but does not have the power to strike it down.

The Charter places obligations on public authorities

Section 38: Public authorities must act compatibly with human rights and give proper consideration to human rights when making decisions.



Public authority obligations

Public authorities – including all staff who work in state government departments, agencies and local government – have to turn their minds to human rights when they carry out their work. This includes when they deliver services, develop policies and projects, manage risks, make decisions, manage complaints and create new laws.

By setting out human rights in a law, the Charter requires public authorities to put people and their rights at the centre of its work.

What is a 'public authority' under the Charter?

- Public officials within the meaning of the *Public Administration Act 2004* (this includes all staff who work in state government departments and certain statutory entities)
- Victoria Police
- Local councils, councillors and council staff
- Ministers
- Courts and tribunals when acting in an administrative capacity (for example, issuing warrants)
- Parliamentary committee members, when acting in an administrative capacity

Did you know? The obligation for public authorities to act compatibly with human rights under the Charter is closely aligned with the 'positive duty' under the Equal Opportunity Act. As employers and service providers, public authorities are required to take reasonable steps to eliminate discrimination, sexual harassment and victimisation. Taking relevant Charter rights into account – such as the right to equality – can help you identify potential discrimination before it happens.

- A body established by a statutory provision that has functions of a public nature (such as VicHealth, VicRoads and WorkSafe)
- A body whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the state or a public authority (such as private prisons)
- Any entity declared by government regulations to be a public authority

PART 3:

Building a human rights culture

The protection and promotion of human rights in Victoria requires more than just compliance with the law. It requires a human rights culture – a pattern of shared attitudes, values and behaviours that influence the policy-making, decisions and practices of government to uphold human rights of all people.

Developing a strong culture of human rights can enhance the effectiveness of the Charter, sustain progress and work to change attitudes and behaviours. The aim is to make human rights part of the everyday business of government.

There are six influences on a positive human rights culture:

- engaged leadership
- attitudes and values of employees
- transparency and accountability
- community engagement and participation
- operational capability – knowledge and resourcing
- systems and processes.

Best practice tips

To build a culture of human rights:

- regard human rights as an opportunity to improve public sector decision-making
- make human rights part of our everyday work
- treat everyone as contributing to a human rights culture.

Indicators of a positive human rights culture

Influences on a positive human rights culture	Indicators of a positive human rights culture
Engaged leadership	<ul style="list-style-type: none"> • Formal and informal leaders demonstrate their commitment to human rights and the Charter • Leadership forums (including business/branch planning forums) include discussion on human rights • Metrics on human rights embedded in executive performance reviews
Attitudes and values of employees	<ul style="list-style-type: none"> • People feel safe to raise issues and call-out problems • The organisation is genuinely diverse and inclusive – staff reflect the communities they serve
Transparency and accountability	<ul style="list-style-type: none"> • Organisations understand what is required for ‘good human rights practice’ • Organisations know what they have achieved and what still needs to be done to embed a positive human rights culture • Organisations understand and comply with human rights reporting mechanisms, including by reporting annually to the Commission by electing to complete the Commission’s survey
Community engagement and participation	<ul style="list-style-type: none"> • Community participation has informed key ‘work’ (end users contribute to the design of service) and feedback is regularly sought from the community • Improvements and interventions are made based on community feedback • Tools and information are available for community about their human rights • Diverse cross section of community accessing services • Structured/formal reflection on accessibility • Complaint mechanisms are available and accessible to the community
Operational capability – knowledge and resourcing	<ul style="list-style-type: none"> • Victorian public service (VPS) staff understand the Charter and how to apply it in their work • Relevant human rights days and achievements are articulated and celebrated • Organisation has dedicated resources (both time and funding) to embed human rights • Champions or Influencers of human rights are empowered and resourced
Systems and processes	<ul style="list-style-type: none"> • The Charter is included in legal compliance frameworks • Organisation embeds human rights in complaints, policies, branch / business planning documents, code of conduct and employment standards, risk management plans; internal grievance systems, processes; including inter agency agreements, research applications, procurement process, contracts, recruitment, position descriptions and performance reviews • Organisation delivers available, accessible, adaptable, acceptable, inclusive and quality services

Benefits of a human rights culture

For government

- Builds relationship with the community
- Identifies problem areas
- Improves democratic legitimacy by demonstrating to the Victorian community a genuine commitment to human rights
- Connects Victoria with international efforts to translate human rights goals and standards into results for the people of Victoria
- Reinforces other work, for example safety, equality, multiculturalism

For community members and advocates

- Assists government to make decisions that consider rights
- Establishes clear non-negotiable standards
- Strengthens cases where change is needed
- Empowers individuals
- Contributes to a fairer and more inclusive society
- Encourages community participation in decision-making

For public authorities

- Improves quality of service design, in particular for the most marginalised, excluded and disadvantaged in our community
- Improves decision-making by providing a framework to identify, assess and balance human rights against other rights and interests
- Helps manage organisational risks, such as litigation
- Builds reputation and credibility
- Creates a framework for solving problems
- Provides a protective mechanism to engage compliance and adherence to human rights laws

For staff

- Inspires staff
- Reconnects staff with core public service values
- Gives staff a framework to act with a moral compass when dealing with people



PART 4:

Human rights in the Charter

The Charter sets out 20 fundamental human rights that belong to all people in Victoria. These guide the decisions and actions of all public authorities in Victoria.

Human rights are basic entitlements that belong to everyone regardless of your background, where you live in Victoria, what you look like, what you think or what you believe.

As explained in Part 1, Charter rights are derived from international treaties which Australia has ratified. The language of human rights is similar all over the world and is reflected in the Charter rights. The common language of human rights gives the Charter legitimacy and ensures human rights speak to a global audience. See Appendix C for the full text of the human rights set out in the Charter.

Best practice tip

To understand and apply Charter rights:

- remember that human rights apply to all people in Victoria including people in detention and custody
- get to know the human rights in the Charter and how they apply to your work
- give a broad interpretation to human rights in your work
- create your own list of triggers that may engage human rights in your work, for example:

Function or duty	Reoccurring and relevant rights
<i>Survey data collection</i>	<i>Right to privacy (s13)</i>
<i>Drafting policies for families</i>	<i>Protection of families and children (s17)</i>
<i>Determining use of public land</i>	<i>Aboriginal cultural rights (s19); freedom of movement (s15)</i>

Human rights protected by the Charter

The Charter protects 20 basic rights and freedoms in Victoria:

Section 8:	The right to recognition and equality before the law	Section 17:	The right to protection of families and children
Section 9:	The right to life	Section 18:	The right to take part in public life
Section 10:	The right to protection from torture and cruel, inhuman or degrading treatment	Section 19:	Cultural rights, including Aboriginal cultural rights
Section 11:	The right to freedom from forced work	Section 20:	Property rights
Section 12:	The right to freedom of movement	Section 21:	The right to liberty and security of person
Section 13:	The right to privacy and reputation	Section 22:	The right to humane treatment when deprived of liberty
Section 14:	The right to freedom of thought, conscience, religion and belief	Section 23:	Rights of children in the criminal process
Section 15:	The right to freedom of expression	Section 24:	The right to a fair hearing
Section 16:	The right to peaceful assembly and freedom of association	Section 25:	Rights in criminal proceedings
		Section 26:	The right to not be tried or punished more than once
		Section 27:	The right to protection from retrospective criminal laws

Case study: Identifying and applying rights to your work

A public housing officer is required to make a decision about whether to evict a tenant and her two teenage children from public housing. Other tenants have complained about the teenagers playing loud music late at night and smoking drugs.

In deciding whether or not to evict the mother and her children, the public housing officer identifies

that the mother's right to protection of her family and the right to best interests of her children are relevant to the decision. By considering the significant impact on the family's human rights the decision to evict them would have, the public housing officer decides to seek further information before making her decision and to consider less restrictive ways of responding to the complaints.

A first step in putting the Charter into practice in your day-to-day work is to identify relevant Charter rights.

Appendix B is a practical guide on Charter rights which sets out:

- a summary of each right
- practical examples of each right in practice
- human rights 'triggers'.

It is also helpful to read the full text of the Charter rights, which is set out in Appendix C. You will notice the language of rights is accessible and clear.

To get to know the Charter rights in greater depth, see the list of resources in Part 7.

PART 5:

Human rights obligations

Obligations on public authorities

Section 38 of the Charter requires public authorities to:

- give proper consideration to human rights when making decisions
- act compatibly with human rights.

Public sector employees also have a responsibility to demonstrate seven core public sector values set out in the Code of Conduct for Victorian Public Sector Employees, including 'human rights'. These values are the standards of behaviour that the Victorian community expects of public sector employees. A breach of these values – including failing to respect and promote human rights – may constitute misconduct.

A decision or action that does not comply with the obligations under section 38 may also be unlawful and form the basis of an internal or external complaint, or be raised in a court or tribunal (see Part 6).

Section 38 of the Charter

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.

This part explains the obligations to give proper consideration to, and act compatibly with, human rights. See the summary overview of these obligations in Appendix A: 'How to apply the Charter to your work'.

The obligations to comply with human rights are at the heart of the Charter and requires public authorities to apply human rights in a practical way including considering whether any decision or action lawfully limits human rights (see pages 15–16).

Exceptions

The obligation to give proper consideration to, and act compatibly with, human rights does not apply where:

- under another law you could not reasonably have acted differently or made a different decision. For example, where you are giving effect to another statutory provision that is incompatible with a human right
- the act or decision is of a private nature
- the act or decision would impede or prevent a religious body from acting in conformity with religious doctrines, beliefs or principles.

Did you know? Although the Charter includes a legal obligation for public authorities to comply with human rights, there are many ways you can proactively promote human rights in the Victorian community. For example, a local council could promote Aboriginal cultural rights (section 19) by celebrating significant Aboriginal and Torres Strait Islander events such as NAIDOC week and Reconciliation Week.

Giving proper consideration to human rights

As a public sector worker, you may or may not deal directly with the public as part of your role. However, working in the public sector means that you are likely to make or recommend many decisions that directly affect the everyday lives and rights of people in Victoria.

Public authorities must give proper consideration to human rights when making decisions. This is known as the 'procedural' obligation for a public authority. Proper consideration to human rights must be undertaken before a decision is made and may impact on people's rights.

The obligation to give proper consideration to human rights requires a decision maker to:

- understand, in general terms, which human rights are relevant
- identify any interference or limitation
- turn their mind to the possible impact of the decision on a person's rights
- justify the decision having balanced any competing interests or obligations.

Competing interests or obligations might include, for example, respecting and protecting the rights of others, public interest considerations, and other obligations and considerations under law.

Proper consideration of human rights should not be a tick-the-box exercise but should be done in a practical and common-sense way.

Case study: Considering how decisions will operate in practice

The obligation to give proper consideration to human rights includes considering how a decision will operate in practice. In the case of *Certain Children (No 2)* [2017] VSC 251, the court considered a decision about when pepper spray could be used on young people in detention.

Dixon J explained that 'proper consideration' required the decision maker to consider the circumstances in which the spray would be used, including the potential for it to be used contrary to guidelines (for example, as an instinctive response to escalating violence). Proper consideration required balancing the benefits of using the spray to avoid confrontational violence with the effects on bystanders who are not directly involved.

It is important to remember that the obligation to give proper consideration to human rights is equally as important when decisions are made in emergencies and other extreme circumstances. That's why public authorities should proactively familiarise themselves with the human rights set out in the Charter and how to apply them before the need arises to make urgent decisions that can seriously impact on rights.

The following guide includes simple steps to support you to properly consider rights in a practical way. Also see Appendix A: 'How to apply the Charter to your work' at for a summary of this obligation.

Practical guide to properly considering human rights before making a decision

To give proper consideration to human rights before making a decision you must:

Step 1: Identify relevant rights

Understand (identify) in general terms which human rights may be relevant to the decision you are making.

Step 2: Identify any interference or limitation

Understand whether and how the decision will limit or interfere with those rights.

Step 3: Impact of decision

Consider what impact the decision will have on the rights of all people affected by the decision.

Step 4: Can the decision be justified?

Identify other interests or obligations and check if the decision is justified, having balanced all competing interests. This includes taking into account whether any limitation on human rights is reasonable, justifiable and proportionate.

Best practice tip

Make a record to show how you gave proper consideration to human rights so that you can demonstrate your decision-making process.

The following case study demonstrates how proactively considering human rights can lead to better human rights outcomes for people who are impacted by a decision.

Case study: Proper consideration of rights for no smoking policy

Mr De Bruyn was detained at the Thomas Embling Hospital. He challenged the Victorian Institute of Forensic Mental Health's decision to implement a smoke-free policy on the basis that the policy would cause deterioration to his mental state and therefore engage his right to humane treatment when deprived of liberty (section 22).

The Supreme Court found that the smoke-free policy did not engage the right to humane treatment because the smoking ban was properly considered and only adopted after comprehensive research, extensive consultation with patients, and the implementation of strategies to manage the transition to a smoke-free facility (including nicotine replacement therapy and cessation counselling).

The hospital considered the impact that the policy might have on the patients' human rights. Although it was likely to cause some distress to Mr De Bruyn, it was for the purpose of protecting patients, staff and visitors from the known harmful effects of smoking. The court did not consider it to be inhumane to hospital patients.

De Bruyn v Victorian Institute of Forensic Mental Health [2016] VSC 111

Acting compatibly with human rights

Public authorities must act compatibly with the human rights in the Charter. This is known as the ‘substantive’ obligation for a public authority and applies to actions that you undertake day-to-day in your work.

The obligation to act compatibly with human rights requires you to identify which human rights are relevant in the circumstances, consider whether your action limits any rights, and determine whether any limitation is reasonably justified and proportionate.

The obligation to act compatibly with human rights is closely linked to the obligation to give proper consideration to human rights when making decisions.

Did you know? An ‘act’ includes a failure to act and a proposal to act. For example, a failure to act could be a decision not to issue a permit, not to provide information or to withhold a service.

This is because a decision often leads to action, and action is generally based on a decision. In short: best-practice decision-making can lead to human rights compatible actions.

The following guide includes simple steps to support you to act compatibly with human rights. Also see Appendix A: ‘How to apply the Charter to your work’ for a summary of this obligation.

Practical guide to acting compatibly with and limiting human rights

The Charter requires all public authorities in Victoria to act compatibly with human rights and give proper consideration to human rights before making a decision. To carry out these responsibilities, public authorities should:

Step 1: Identity relevant rights

Read Appendix A of this guide to see what rights are relevant to your situation.

Step 2: Consider whether rights are being limited by your action or inaction

Will your decision limit or interfere with the relevant rights you’ve identified?

No – If rights are not being limited, you are acting compatibly with human rights

Yes – If human rights are being limited, you should move to step 3.

Step 3: To lawfully limit a right you must:

Be authorised

What law or regulation allows you to limit a person’s rights? If you can’t identify a law or regulation then you may not be able to limit rights.

Be justified and proportionate

Determine whether your limitation of a person’s rights is justified and proportionate in the circumstances, taking into account all relevant factors, including:

- **the nature of the right/s:** What does the human right/s protect? What are the values that underpin the right?
- **the importance of the purpose for the limitation:** What is your purpose for limiting a human right? What are you trying to achieve by your action or inaction?
- **the nature and extent of the limitation:** How are you limiting a human right? What are the consequences for the person whose right/s you are limiting?
- **is there a relationship between the limitation and your purpose?** Is your action or inaction tailored to achieve your purpose? Is it proportionate? If so, you may be lawfully limiting a human right. If not, you may be breaching the Charter.
- **are there less restrictive means reasonably available to achieve your purpose?** Is there another way to achieve your purpose that won’t limit a person’s human rights as much? If so, you should take the less restrictive option.

See the case study on page 21–22 for how a local council could have acted compatibly with the Charter to lead to better outcomes for a resident with a disability.

Many decisions and actions of public authorities have the potential to engage human rights. Some protect human rights, while others limit them.

A public authority's obligations to give proper consideration to human rights when making a decision and to act compatibly with human rights requires consideration of whether any limitation on rights is justified under the Charter.

Section 7(2) of the Charter – The 'proportionality test'

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 including:

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The 'proportionality test' in the Charter helps public authorities to ensure that any limitation on rights is lawful, reasonable and proportionate in the circumstances.

Did you know? The rights in the Charter are not absolute. This means that, at times, the decisions and actions of public authorities may lawfully limit or balance other rights.

Public authorities should always consider ways to protect human rights and ways to achieve their purpose that has the least impact on people's human rights. Any limitation on rights must only go as far as necessary to achieve a legitimate aim – in other words, if limiting a right is necessary, the action taken should be proportionate, justified and reasonable.

Below is a guide that provides for factors that should be taken into account when considering the proportionality test. The test should be taken into account in a cumulative manner with reference to all the factors outlined below.

Best practice tip

Make a record to show how you justified any limitation of a human right so that you can demonstrate how you took the factors into account.

The following case study demonstrates that public authorities can enable people to exercise their human rights by practically considering competing interests.

Case study: Acting compatibly and limiting human rights

Following riots at a youth justice facility, the government designated a unit of an adult male maximum security prison as a youth justice facility and transferred a number of children on remand into the unit. The transferred children challenged whether the decision to place them on remand in the male maximum security prison was compatible with their rights.

In the unit within the male prison, a number of concerns were raised including whether the physical environment was in keeping with the rehabilitative aims of youth detention, use of disciplinary measure of lockdowns and handcuffing, constrained visits with family owing to the location of the regional location of the male prison, and inadequate education and medical care.

The matter was heard in the Supreme Court in April 2017. As part of its decision, the Supreme Court applied the test set out in the Charter for limiting human rights.

Step 1: The court identified the right to humane treatment when deprived of their liberty and the right of children to such protection as is in their best interest as being engaged.

Step 2: The court determined the rights were being limited.

Step 3: The court considered whether the limitations were reasonably justified and took into consideration:

- a. *the nature of the rights:* The court found the rights protected important values of bodily integrity, mental health, dignity and self-worth, and noted the Charter makes clear that children are not to be treated like adults. The Court noted there was no evidence the Government sought any advice or expertise to inform itself of the likely key limitations on these rights, such as the impact of the built environment on mental health.
- b. *the purpose of the limitation:* The government argued the purpose of limiting the rights of the children was to address a crisis of accommodation in the youth justice system following the riot. The court was satisfied that the primary purpose of the limitation was to complete renovations, but noted such a 'crisis' was necessarily an indication of long-term policy failure and mis-allocation resources.
- c. *the nature and extent of the limitation:* The court looked to the particular significance of the limitation for the children as rights

holders, and found evidence of long periods of lockdowns and isolation in their cells because proper facilities were still being put in place. These limitations were caused by the inappropriate features of the built environment of the male adult prison.

- d. *the relationship between the limitation and purpose:* The built environment of the male prison was unsuitable for the purpose of providing crisis accommodation for children in the youth justice system, though the court noted significant improvements had been made to this by actively instituting a therapeutic approach.
- e. *whether a less restrictive means is available:* The Court noted that the Government's responsibility to show there was not a less restrictive option was high threshold given the vulnerability of the children and the significance of the limitation of their rights. Ultimately, the court found that there were less restrictive options reasonably available including alternative accommodation for the children, cutting delays in children's criminal justice processes, and additional financial support for crisis accommodation solutions.

The Supreme Court held the limits on the Charter rights of the children were not justified and the limits were unreasonable.

Certain Children v Minister for Families and Children & Ors (No. 2) [2017] VSC 251

Participation – 'nothing about us, without us'

People should be able to meaningfully contribute to decision-making and the design of government policies, programs and projects that affect them. A simple rule of thumb is 'nothing about us, without us'.

Genuine participation in decision-making and the development of government action – as opposed to a 'top down' approach – helps ensure that decisions and actions can be successfully implemented on the ground and deliver meaningful outcomes.

As best human rights practice, where possible and appropriate, people who may be affected by the decisions and actions of public authorities should have the opportunity to participate in the process. This should include the people who may directly benefit or be affected by a decision or action, and the people who will be responsible for implementing it.

Did you know? A human-rights-based approach encourages participation in decision-making by the people who may be affected by a decision. This helps ensure that decisions are based on evidence rather than assumptions.

Best practice tips

To make sure your decisions and actions have the best outcomes, where possible and appropriate provide meaningful opportunities for the people who may be affected by your decisions or actions to participate in the process.

PART 6:

Complaints and remedies

People have the right to complain about acts and decisions of public authorities under the Charter and seek remedies. As explained in Part 5, a public authority's decision or action that is not compatible with the Charter may be unlawful.

It is important to remember public sector employees must also respect and promote human rights as a condition of employment. Failure to meet Charter obligations may breach the Victorian Public Sector Code of Conduct and amount to misconduct.

Human rights complaints

The aim of the Charter is to protect and promote human rights through prevention rather than litigation. However, by creating legal obligations for public authorities to give proper consideration to, and act compatibly with, human rights, the Charter provides an avenue for people to challenge decisions and actions that impact on their rights.

There are a number of different ways that people can complain and seek a remedy in relation to their human rights under the Charter. This includes:

- internal complaints
- independent complaints
- raising the Charter in courts and tribunals.

1. Internal complaints

Individuals can raise a complaint about human rights directly with any public authority through their internal complaint handling procedures.

Public authorities can demonstrate best practice by managing human rights complaints consistently with the Charter and the public sector values. The *Good Practice Guide: Managing Complaints Involving Human Rights* (see Part 7: Further resources) provides practical guidance to help public authorities effectively deal with complaints about human rights.

Did you know? The Charter has led to many public authorities developing their own complaint-handling procedures to receive and respond to human rights complaints.

2. Independent complaints

Individuals can also raise a complaint about human rights to an independent body (see table on page 20).

3. Raising the Charter in courts and tribunals

Section 39(1) of the Charter

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

There is no direct cause of action under the Charter. This means that people cannot make complaints directly to courts and tribunals for breaches of the Charter alone. The Charter only allows a person to raise human rights if they already have an existing ground under another law based on the same act or decision (such as an administrative law or common law ground).

For example, if a person makes a claim of discrimination under the Equal Opportunity Act to the Victorian Civil and Administrative Tribunal (VCAT), the person can also raise their rights under the Charter (such as the right to equality) with VCAT.

Courts and tribunals will consider questions of whether the public authority:

- gave proper consideration to human rights when making decisions; or
- acted compatibly with human rights (see Part 5).

Best practice tips

- If someone raises their human rights, respond promptly and effectively.
- Develop complaint-handling procedures for managing human rights complaints.
- Refer to the *Good Practice Guide: Managing complaints involving human rights*.



Complaints-handling bodies

Body	Overview
Victoria	
Victorian Ombudsman	<p>The Victorian Ombudsman is an independent officer who investigates complaints about state government departments, most statutory authorities and local government.</p> <p>In certain instances, people can make a complaint to the Victorian Ombudsman that their human rights have been breached.</p> <p>The Ombudsman can initiate investigations into breaches of the Charter and can review the lawfulness of a public authority's actions or decisions.</p>
Independent Broad-based Anti-corruption Commission (IBAC)	<p>IBAC is an anti-corruption agency responsible for identifying and preventing corruption and police misconduct across the public sector.</p> <p>Anyone can complain to IBAC about public sector corruption and police misconduct. One of IBAC's roles is to ensure that police officers and protective services officers have regard to the human rights set out in the Charter.</p>
Victorian Auditor-General's Office (VAGO)	<p>VAGO conduct audits to ensure that public sector entities are transparent and accountable to the Victorian Parliament and the community.</p> <p>In certain instances, VAGO can undertake reviews to explore whether the practice of a public authority complies with the Charter.</p>
Victorian Equal Opportunity and Human Rights Commission	<p>The Victorian Equal Opportunity and Human Rights Commission is an independent statutory body with responsibilities under the following laws:</p> <ul style="list-style-type: none"> • the Charter of Human Rights and Responsibilities • the Equal Opportunity Act • the Racial and Religious Tolerance Act • the Change or Suppression (Conversion) Practices Prohibition Act. <p>The Commission does not handle complaints directly under the Charter, but does manage complaints about discrimination, sexual harassment, victimisation and racial and religious vilification.</p> <p>See the introduction to this guide for information on the Commission's other functions under the Charter, including education.</p>
Other oversight bodies	<p>The Charter can be raised with other complaints handling bodies such as the Health Services Commission, the Public Transport Ombudsman Victoria, the Office of the Public Advocate, the Mental Health Complaints Commission, the Commission for Children and Young People, the Commissioner for Aboriginal Children and Young People, the Disability Services Commissioner, the Office of the Victorian Information Commissioner, and the Dispute Settlement Centre Victoria.</p>
Australian Human Rights Commission (AHRC)	<p>The AHRC handles human rights complaints about the actions of federal government departments and agencies.</p>
International	
United Nations treaty bodies	<p>People can make complaints about breaches of international human rights treaties when they have exhausted all of their legal options in Australia. For example, the UN Human Rights Committee can consider complaints about a breach of the International Covenant on Civil and Political Rights (ICCPR).</p>

Human rights remedies and outcomes

Where there is a breach of the Charter, a person cannot claim compensation under the Charter. However, compensation may still be available for the non-Charter ground (such as an administrative law or common law ground).

Where there is a finding of a breach of the Charter, a court or tribunal may make a number of orders to remedy the breach, provided that the remedy is available for the non-Charter ground.

Depending on the circumstances, remedies can include:

- **declaration:** a declaration that the conduct of a public authority was unlawful
- **injunction:** an injunction to prohibit or restrain an action of a public authority
- **order to set aside:** an order to set aside a previous decision or order
- **remitting:** sending a matter back (remitting) to the decision maker for a fresh decision.

Case study: The Charter in action

The following case study is based on a discrimination case in which VCAT found there had also been a breach of the Charter.

The case study is a useful example of how the Charter works in practice, including:

- the obligation for public authorities to properly consider, and act compatibly with, human rights (Part 5)

- whether human rights have been lawfully limited (Part 5)
- raising human rights under the Charter (Part 6)
- remedies for a breach of the Charter (Part 6).

Applying the Charter to a local council's ban on a resident with a disability

A local council banned a resident with a disability from accessing any building owned, occupied or managed by the council. This meant that he could not attend any council meetings, attend the local pool and library or use council toilets.

The council claimed the ban was necessary to protect the health and safety of employees because the resident had made numerous complaints to the council, used comments and language that were considered offensive and inappropriate, and council staff had reported having 'highly charged' interactions with the resident.

Proper consideration of rights

To properly consider the resident's human rights, the council should have:

- understood the rights of the resident affected by the decision (including the rights to equality, freedom of expression and participation in public life)
- understood whether and how the decision would interfere with the resident's rights (for example: consulted with the resident to identify how the decision would impact him and discuss possible adjustments to help him participate in council meetings without creating risk to staff)
- considered the impact the decision would have on the rights of all people affected (for example: conducted appropriate consultations with staff and properly documented any occupational health and safety concerns)
- considered if the decision was justified, having balanced competing interests (for example: developed a proportionate and tailored strategy).

(Case study continues on the next page)

Acting compatibly with rights

To act compatibly with the resident's rights, the council should have:

- identified which rights were engaged
- asked whether those rights were limited by the ban from accessing any building owned, occupied or managed by the council
- asked whether the limitation was lawful under the Charter

Limiting and balancing rights

To consider whether the ban lawfully limited the resident's rights, the council should have asked:

- whether it had **lawful authority** to impose the ban under a law or regulation (for example, whether the *Occupational Health and Safety Act 2004* authorised the ban)
- was the limitation **reasonably justified**:
 - a. what the nature of the relevant rights were (the resident had the right to participate in public life which is a fundamental principle of our democratic system and the right to equality which protects people from isolation and exclusion and promotes human dignity)
 - b. what the purpose of the limitation was and why it was important (the purpose of the limitation was to prevent the risk that the resident's behaviour would impact on the health and safety of council staff – an important consideration for the council as an employer)
 - c. what the nature of the limitation was and how long it would last (the limitation was a ban on the resident's participation in public life and his access to council property)
 - d. what the relationship was between the limitation and the purpose (the ban should have been reasonably proportionate and tailored to its purpose of protecting the health and safety of council staff)
 - e. whether there was a less restrictive way to achieve its purpose (the safety of staff could have been achieved in other ways such as case-managing the resident, providing training for staff, imposing a shorter ban with fewer restrictions such as allowing the resident to access toilets and libraries).

Complaints

The resident took the case to VCAT to challenge the ban. Although there is no direct cause of action under the Charter, VCAT was able to consider whether the resident's rights were breached because he had an existing claim of discrimination under the Equal Opportunity Act for the same conduct.

In relation to the Charter claim, VCAT found that the council had discriminated against the resident on the basis of disability and that the council had breached his human rights.

Remedies

VCAT ordered that:

- the council revoke the ban on the resident attending council buildings
- the council pay the resident \$14,000 in compensation
- the CEO, directors and councillors at the council undergo training on the Charter.

VCAT also made a declaration that the council breached the resident's human rights under the Charter by maintaining the ban.

This case study is based on the following VCAT decisions:

- *Slattery v Manningham CC* [2013] VCAT 1869
- *Slattery v Manningham CC* [2014] VCAT 1442 (remedies)



PART 7:

Further resources

Victoria

Charter of Human Rights and Responsibilities Act 2006

The full and most up-to-date text of the Charter can be viewed online or downloaded in PDF and RTF formats.

austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/cohrara2006433/

The Charter Bench Book

The Charter Bench Book is an online resource prepared by the Judicial College of Victoria. It contains a discussion on the scope of each right and limitations. It also contains chapters on the Charter's operative provisions which deal with the way in which Charter rights are to be taken into account by courts and tribunals, public authorities and Parliament.

judicialcollege.vic.edu.au/bench-books/charter-human-rights-and-responsibilities-bench-book

Your rights under the Charter

The Commission has prepared plain language overviews of the 20 rights protected by the Charter, including information on when rights can be limited and how people can make a complaint.

humanrights.vic.gov.au/for-individuals/human-rights

Victorian Human Rights Charter Case Collection

The Judicial College of Victoria produced a Charter Case Collection which includes summaries of all significant Charter cases from the Supreme Court of Victoria with a description of the factual issues, area of law, and an account of the Charter arguments and the outcome. The Charter Case Collection can be viewed online or downloaded in PDF.

judicialcollege.vic.edu.au/bench-books/charter-human-rights-and-responsibilities-bench-book

Annual reports on the operation of the Charter

Each year the Victorian Equal Opportunity and Human Rights Commission prepares a report examining the operation of the Charter, including its interaction with other laws, any declarations of inconsistent interpretation and any override declarations. The Charter reports can be viewed online or downloaded in PDF or Word formats.

humanrights.vic.gov.au/resources

Good Practice Guide: Managing Complaints Involving Human Rights

The Department of Justice and Regulation produced a guide to help public authorities effectively deal with complaints about human rights. The guide can be viewed online or downloaded in PDF format.

humanrights.vic.gov.au/resources/good-practice-guide-managing-complaints-involving-human-rights-may-2017

Federal and other

Attorney-General's Department

Information on human rights and anti-discrimination matters related to the federal government.

ag.gov.au/RightsAndProtections/HumanRights

Australian Human Rights Commission

The federal body for human rights in Australia.

humanrights.gov.au

International

United Nations Office of the High Commissioner for Human Rights

Representing the world's commitment to universal ideals of human dignity, with a unique mandate from the international community to promote and protect all human rights.

ohchr.org

International human rights instruments

Information on the nine core international human rights instruments.

ohchr.org/en/instruments-and-mechanisms

Public Participation in Government Decision-Making: A Better Practice Guide

Victorian Auditor-General's Office published this guide to assist government to more efficiently and effectively engage the public to inform government decision-making and implementation. The guide can be viewed online or downloaded in PDF format.

audit.vic.gov.au/report/public-participation-government-decision-making-better-practice-guide

Human Rights Law Centre

An independent, not-for-profit organisation that protects and promotes human rights in Australia and in Australian activities overseas.

hrlc.org.au

United Nations Declaration on the Rights of Indigenous Peoples

Establishes a universal framework of minimum standards for the survival, dignity and wellbeing of the indigenous peoples of the world.

un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

Appendices

Appendix A: Practical guide on Charter rights

The practical guide on Charter rights includes:

- a brief summary of each of the rights set out in the Charter
- examples that demonstrate each Charter right in practice
- triggers that may engage each Charter right in a positive or restrictive way. The triggers are not an exhaustive list but are intended to provide helpful context for Charter rights and support you to put the Charter into practice in your own work.

Section 8: The right to recognition and equality before the law

Summary of rights

Everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination – see opposite page for information on the attributes protected from discrimination.

Triggers

Charter rights may become engaged if what you propose to do:

- provides for the delivery of an entitlement or service to some groups but not others
- assists or recognises the interests of Aboriginal persons or members of other ethnic groups
- is stated in neutral terms but has a disproportionate impact on a sector of the community whose members have one or more protected attributes under the Equal Opportunity Act (for example, sex, race, age or disability)
- deals with any of the human rights set out in the Charter in a discriminatory way. For example, if legislation curtails freedom of expression when a person has engaged in industrial activity
- establishes eligibility requirements for access to services or assistance (such as legal aid)
- affects information and communications services including electronic services
- contains measures that aim to assist people who have been socially, culturally or economically disadvantaged
- sets age bands that are expressed as protective measures, graduated entitlements (for example, driver licensing), or statements of legal capacity (for example, voting)
- takes steps to diminish or eliminate conditions that have resulted in specific groups within society being disadvantaged (positive discrimination)
- regulates access to infrastructure and public facilities including buildings, roads, transport, schools, housing and hospitals
- regulates access to public services including education, healthcare, the justice system, courts, voting and advocacy
- provides for mobility aids, assistive devices and technologies designed for people with disabilities
- sets standards or guidelines for access to facilities and services to ensure businesses that provide public services take into account access for people with disabilities.

Section 9: The right to life

Summary of rights

Every person has the right to life and to not have their life taken. The right to life includes a duty on government to take appropriate steps to protect the right to life.

Practical examples

If a public authority takes on the care of a person in prison, a mental health facility, other closed environment or foster care, then they must take positive steps to ensure that the person is in a safe environment. This includes allowing access to medical or mental health care as well as protecting a person from risks of suicide or self-harm, or violence and sexual assault perpetrated by others.

Triggers

Charter rights may become engaged if what you propose to do:

- impacts on the way that essential services are provided, or on how and whether these services can be accessed in a way that impacts on the welfare or safety of persons (such as medical or welfare services)
- impacts on the delivery of medical resources for patients
- creates or amends law, policy or practices permitting law enforcement officers to use force, including the use of weapons (such as aerosols, batons, taser guns) in the course of their duties
- creates or amends a law withholding or requiring medical treatment, or relates to coronial inquests
- relates to investigation into the conduct of public authorities, especially when people die while in the care of public authorities, for example, deaths in custody or of children in the child protection system
- impacts on the right to maternal decision-making
- impacts on procedures for the management of those held in your care.

How is discrimination defined under Victorian law?

The meaning of discrimination is found in the *Equal Opportunity Act 2010 (Vic)* (EOA). The EOA also outlines attributes protected in Victoria under this law. These are:

- age
- disability
- employment activity
- expunged homosexual conviction
- gender identity
- industrial activity
- lawful sexual activity
- marital status
- parent and carer status
- physical features
- political belief or activity
- pregnancy and breastfeeding
- profession, trade or occupation
- race
- religious belief or activity
- sex
- sex characteristics
- sexual orientation
- spent conviction
- personal association with someone who has, or is assumed to have, one of these personal characteristics.

Under the EOA, organisations have a 'positive duty' to eliminate discrimination, as far as possible. This means that positive action should be taken to prevent discrimination from occurring – regardless of whether someone has made a complaint.

Section 10: Protection from torture and cruel, inhuman or degrading treatment

Summary of rights

People must not be tortured or treated or punished in a cruel, inhuman or degrading way. This includes protection from treatment that humiliates a person. People must not be subjected to medical treatment or experiments without their full and informed consent.

Triggers

Charter rights may become engaged if what you propose to do:

- affects the wellbeing of a person in a manner that may cause serious physical or mental pain or suffering
 - affects the wellbeing of a person in a manner that may humiliate or debase them
 - creates new powers, or modifies or increases existing powers of police, inspectors or authorised officers or other persons
 - removes or restricts the right to complain about service delivery
 - removes or restricts the right to complain of mistreatment by a public authority, or limits those with a role of conducting independent scrutiny to places of detention
 - affects the operation of detention facilities and conditions attached to all forms of state care and detention (including access to goods and services, such as medical treatment, while in detention)
 - creates new types of penalties (including mandatory minimum sentences, and limits to or denial of a service)
 - authorises changes to rules of evidence or procedure that would allow for evidence obtained as a result of torture, inhuman or degrading treatment, to be used in courts or tribunals
- introduces or permits corporal punishment by a public authority
 - authorises a person to be searched or puts in place procedures for conducting searches
 - regulates the treatment of persons located at any site for which a public authority is responsible, including: a public hospital, an approved mental health service, a prison, a government school, a disability or aged care service, and supported residential service
 - allows for prolonged periods of segregation or other particularly harsh prison regimes
 - involves crisis intervention strategies or behavioural management plans that include the use of seclusion, chemical restraint or physical restraint
 - defines and regulates procedures for obtaining consent to medical treatment and experiments
 - regulates medical treatment of persons without their consent
 - regulates the conduct of medical or scientific research.

Practical examples

Workers in residential care facilities for people with disabilities cannot treat residents in a degrading way by humiliating them in front of others.

Section 11: Freedom from forced work

Summary of rights

A person must not be forced to work or be made a slave.

Practical examples

An agency cannot force a person to work by threatening punishment if they don't perform the work. This does not include work done in detention, work done in the community because of a community order or a civic obligation such as jury service.

Triggers

Charter rights may become engaged if what you propose to do:

- compels the provision of any labour or the performance of any service under threat of a penalty
- relates to people trafficking
- gives a minister or public authority the power to employ or direct people to perform work in a vital industry or during a state of emergency.

Section 12: Freedom of movement

Summary of rights

People can stay in or leave Victoria whenever they want to as long as they are here lawfully. They can move around freely within Victoria and choose where they live.

Practical examples

A patient with a mental illness is treated under a community treatment order. She resides at a community care unit but wishes to return to her mother. The conditions of the order do not require her to live at a particular place. The unit's psychiatrist tells her that although she can go out during the day, she must remain at the unit each night. However, the conditions of the order do not require her to live at a particular place and there is no medical urgency making this necessary. Therefore she ought to be able to return to her mother.

Triggers

Charter rights may become engaged if what you propose to do:

- limits the ability of a person to choose where to live in Victoria
- restricts the movement of people as part of the criminal process, for example the imposition of bail conditions
- allows for an intervention order against a person, or enables their detention
- proposes surveillance of an individual
- empowers public authorities to restrict people's movement based on national security considerations
- compels someone to provide information (for example, a subpoena)
- regulates access to land based on quarantine considerations, or eligibility requirements permitting exclusion from public land or premises
- affects the conduct of public protests.

Section 13: Privacy and reputation

Summary of rights

Everyone has the right to keep their lives private. Your family, home or personal information cannot be interfered with, unless the law allows it and it is based on reasonable grounds. The right to privacy also includes personal autonomy.

Practical examples

Police cannot ask a random person on the street for their name and address without reasonable suspicion of a crime.

Triggers

Charter rights may become engaged if what you propose to do:

- involves surveillance of persons for any purpose (such as closed-circuit television)
- involves collection, storage, use or publication of personal information and how that information is accessed, used or disclosed
- regulates information held on a public register
- restricts access by people to their own personal information
- provides for sharing of personal information across or within agencies
- involves powers of entry, search, seizure, confiscation or forfeiture (including entry into a controlled environment)
- allows publication of personal information (for example, results of surveillance, medical tests or the electoral roll)
- provides for a compulsory physical intervention on a person such as a DNA, blood, breath or urine test; forced medical examination; or corporal punishment
- provides for treatment or testing of a patient without their consent
- involves a professional duty of confidentiality
- changes or creates any confidentiality provisions or secrecy provisions relating to personal information
- provides for mandatory disclosure or reporting of information (including disclosure of convictions, injury or illness), or by professionals reporting abuse, for example, doctors regarding patients or teachers regarding students
- regulates a person's name, private sexual behaviour, sexual orientation or gender identification
- involves the interception, censorship, monitoring or other regulation of postal articles and all other communications
- relates to handling personal information for research or statistics
- recognises or fails to give legal recognition to close or enduring personal relationships
- provides for the removal of children from a family unit or a family intervention order
- regulates tenancy or eviction
- regulates a state-run care facility or mental health service
- regulates standards, consultation and procedures operating in respect of public housing
- authorises compulsory acquisition of a home or regulates planning or environmental matters that may affect a person's home.

Section 14: Freedom of thought, conscience, religion and belief

Summary of rights

People have the freedom to think and believe what they want. They can do this in public or private, as part of a group or alone.

Practical examples

A local council extended the hours when a community hall could be used for religious activities to accommodate the practices of different religious groups in their community.

Triggers

Charter rights may become engaged if what you propose to do:

- promotes, restricts or interferes with a particular religion or set of beliefs
- requires a person to disclose their religion or belief
- affects an individual's ability to adhere to their religion or belief
- impinges upon or disadvantages a person because of the person's opinions, thoughts or beliefs
- attempts to regulate conduct that will affect some aspect of a person's worship, observance, practice or teaching of their religion or belief
- subjects conduct that is required or encouraged by an individual's religion or beliefs to criminal penalties or fines
- compels certain acts that may be inconsistent with a religion or set of beliefs
- restricts the capacity for those under state control (for example, prisoners) to comply with the requirements of their religion
- restricts the capacity for those in your care or control to comply with the requirements of their religion
- sets dress codes (possibly for safety or hygiene reasons) that do not accommodate religious dress
- imposes requirements as a condition of receiving a benefit that prevents a person from adhering to their religion or belief
- requires students to learn about particular religions or beliefs or to be taught materials that might have the effect of undermining their religious beliefs
- regulates planning or land use that may make it difficult to use or establish places of religious worship.

Section 15: Freedom of expression

Summary of rights

People are free to say what they think and want to say. They have the right to find, receive and share information and ideas. In general, this right might be limited to respect the rights and reputation of other people, or for the protection of public safety and order.

Triggers

Charter rights may become engaged if what you propose to do:

- regulates the manner, content and format of any public expression (for example, the contents of a speech, publication, broadcast, display or promotion) – examples could include requiring prior approval for public protest or restricting where protest activity can take place
- imposes a dress code
- censors materials or requires that they be reviewed or approved before being published
- compels someone to provide information (for example, a subpoena)
- regulates or restricts an individual's access to information (including access to material on the internet)
- attaches criminal or civil liability to publication of opinions or information.

Practical examples

People can generally hand out information about their local political campaign in a public space.

Section 16: Peaceful assembly and freedom of association

Summary of rights

People have the right to join groups or unions and to meet peacefully.

Triggers

Charter rights may become engaged if what you propose to do:

- limits the ability of a person or group of people to exercise their right to peacefully protest or to come together for a common purpose
- treats people differently on the basis of their membership of a group or association, for example, trade unions
- regulates membership of groups or associations
- creates disincentives or confers preferences for membership in a group or association (including a disclosure requirement)
- prohibits membership in a group or association, for example a motorcycle gang.

Practical examples

People have the right to march and rally in public to promote their cause. In general, it is the responsibility of the police to respect this right and allow people to rally peacefully. Limitations or conditions can be placed on this to ensure other people's rights are also respected.

Section 17: Protection of families and children

Summary of rights

Families are entitled to protection. Children have the same rights as adults (except voting and other elements of the right to take part in public life that require a person to be aged over 18). Children have added protection according to their best interests.

Triggers

Charter rights may become engaged if what you propose to do:

- affects the law regarding close or enduring personal relationships or fails to give legal recognition to these relationships
- affects any aspect of care of children, including children cared for by parents, guardians, informal carers, children in out-of-home care, children with a disability, or parents or carers with a disability
- relates to treatment of children in the criminal process
- relates to family violence
- affects adoption or surrogacy
- regulates the obligations of family members towards each other, including parents and guardians towards children
- provides for the separation and removal of children from parents or guardians or other adults responsible for their care
- regulates family contact for those in your care or enables intervention orders to be granted between family members
- affects the welfare of children within the family or state care
- regulates family contact of prisoners or others in involuntary state care
- creates a regime for giving children access to information about biological parents when the child has been adopted or born using assisted reproductive technology.

Practical examples

A government agency considers the protection of the family and the best interests of the child in deciding to provide extra support services to parents with disabilities to help them look after their children.

Section 18: Taking part in public life

Summary of rights

Every person has the right to take part in public life, such as the right to vote or run for public office. This includes access to employment in the public service on equal terms.

Triggers

Charter rights may become engaged if what you propose to do:

- limits the ability to take part in municipal and parliamentary elections
- requires individuals to meet certain conditions in order to be eligible to participate in municipal and parliamentary elections
- regulates how individuals vote in elections (for example, the method of voting)
- regulates eligibility and access to employment in the public service or appointment to public office
- establishes requirements for membership of public bodies
- regulates the conduct of elections and the electoral process
- regulates the suspension and conduct of local government
- regulates the suspension and removal of statutory office holders
- regulates electoral processes including funding of and expenditure by political parties and the drawing of electoral boundaries
- affects communication of information and ideas about public and political issues
- affects the ability of someone to participate in local council meetings.

Practical examples

People with a vision impairment have the right to vote in state elections. The government provides specialised computer software for people with a vision impairment to assist them to do so.

Section 19: Cultural rights

Summary of rights

People with particular cultural, religious racial or linguistic background must not be denied the right, in community with other people of that background, to enjoy his or her culture, to declare and practise their religion and use their languages. Aboriginal people hold distinct cultural rights.

Triggers

Charter rights may become engaged if what you propose to do:

- limits the observance of any religious practices
- addresses discrimination based on attributes including race or religion
- restricts the capacity for persons to declare or make public their affiliation to a particular racial, religious or cultural group
- limits or prohibits communication in languages other than English, including through the provision of information
- prevents people using their language in community with others
- limits the ability of Aboriginal persons or members of an ethnic group to take part in a cultural practice, or otherwise interferes with their distinct cultural practices
- regulates the conduct of commercial activities on the traditional lands of Aboriginal persons
- restricts the provision of services or trade on religious holidays
- regulates access to public spaces including libraries, museums and sports facilities
- regulates cultural or religious practices around the provision of secular public education
- may interfere with the relationship between Aboriginal people and land, water and resources
- imposes or coerces individuals to do something that interferes with their distinct cultural practices, for example, wear clothes that differ from their traditional cultural attire
- regulates traditional medical practices
- licenses or provides a restriction on the preparation and serving of food.

Practical examples

Parks Victoria has permission from VCAT to employ local Aboriginal people in their field office to care for and protect Wurundjeri country. VCAT's decision recognises the right of Aboriginal people to maintain their distinctive spiritual, material and economic relationship with the land.

Section 20: Property rights

Summary of rights

People are protected from having their property taken, unless the law says it can be taken.

Triggers

Charter rights may become engaged if what you propose to do:

- provides for acquisition, seizure or forfeiture of a person's property under civil or criminal law
- confers on a public authority a right of access to private property
- limits or terminates property rights (for example, by legislation which establishes a limitation period)
- restricts the use of private property
- restricts or regulates established patterns of access (especially for commercial or business purposes) to public property
- implements government control over its own property (for example, resumption of land)
- impounds or suspends registration of a motor vehicle.

Practical examples

Authorities cannot confiscate or seize a person's property unless it is illegal (such as drugs), was purchased with the proceeds of a crime, stolen or otherwise as provided by law.

Section 21: Right to liberty and security of person

Summary of rights

Everyone has the right to freedom and safety. The right to liberty includes the right to not be arrested or detained except in accordance with the law. The right to security means that reasonable steps must be taken to ensure the physical safety of people who are in danger of physical harm.

Triggers

Charter rights may become engaged if what you propose to do:

- authorises a person to be detained for treatment in a mental health facility and facilitates review of their detention
- provides for the interim detention of a person whether or not he or she is suspected of committing an offence (for example, to prevent the spread of a contagious disease, or enable a person to 'sober up')
- provides for special powers of detention of people for purposes including national security
- relates to the management of security of anyone in your care, particularly those in involuntary care
- makes provision for granting of bail
- makes it an offence for a person to fail to remain at a place (for example, for further questioning or to conduct a search or test by a police officer or other official)
- allows a public authority to cordon an area and control movement within that area
- grants a power of arrest
- relates to the safety of a person and their wellbeing. Note: this is not limited to a custodial setting and includes the risk of violence or other harm.

Practical examples

Government policy says that any disability service wishing to impose a plan that enables physical or chemical restraint in exceptional circumstances on a patient must first apply to the senior practitioner to determine whether less restrictive measures can be imposed and to ensure there are proper protections in place when someone is deprived of their liberty.

Section 22: Humane treatment when deprived of liberty

Summary of rights

People have the right to be treated with humanity if they are accused / convicted of breaking the law and are detained.

Triggers

Charter rights may become engaged if what you propose to do:

- enables you to detain individuals or relates to the conditions under which a person may be detained for example, in prisons, mental health services or prison transportation facilities
- authorises a person to be held in a place with limited facilities or services for the care and safety of detainees
- concerns standards and procedures for treatment of those who are detained (for example, use of force, dietary choice and access to private shower and toilet facilities)
- enables enforcement officers to undertake personal searches of those individuals detained in custody or detainee visitors.

Practical examples

Authorised officers at train stations must treat people arrested humanely while they are holding them on suspicion of fare evasion.

Section 23: Children in the criminal process

Summary of rights

A child charged with committing a crime or who has been detained without charge must not be held with adults. They must also be brought to trial as quickly as possible and treated in a way that is appropriate for their age. Children are entitled to opportunities for education and rehabilitation in detention.

Triggers

Charter rights may become engaged if what you propose to do:

- enables you to detain children for any length of time
- authorises you to hold children in amenities that have limited facilities or services for the care and safety of children
- enables you to undertake personal searches of a detained child
- impacts on the environmental design of detention centres or conditions under which children are detained
- establishes or alters programs in prisons, youth training centres or residential centres
- affects the speed at which a child may be brought to trial
- creates or amends procedures and the law of evidence applicable to children charged with criminal offences, including the investigation and prosecution of offences
- amends the law relating to children in criminal proceedings, including bail, adjournments, and sentencing.

Practical examples

A court's procedures and bail application processes take special consideration of children's rights to ensure these processes do not expose a child on trial to avoidable intimidation, humiliation and distress, are age appropriate and focused on rehabilitation.

Section 24: Fair hearing

Summary of rights

A person has the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Practical examples

You have the right to take your matter to court; you have the right to advice and representation, such as Victoria Legal Aid if you are eligible; your hearing should go ahead without too much delay; and all relevant evidence should be disclosed. Sometimes the right can extend to an obligation on a decision-maker to give you reasons for their decisions.

Triggers

Charter rights may become engaged if what you propose to do:

- creates or restricts review of administrative decision-making and appeals processes
- reverses the onus of proof
- regulates the rules of evidence in courts and tribunals or amends the way in which evidence is collected and presented
- regulates the procedures for challenging the impartiality and independence of courts and tribunals
- affects the way witnesses give evidence
- regulates the way the media may report on proceedings.

Section 25: Rights in criminal proceedings

Summary of rights

There are a number of minimum guarantees that you have when you have been charged with a criminal offence. These include:

- the right to be told the charges against you in a language you understand
- the right to an interpreter if you need one
- the right to have time and the facilities (such as a computer) to prepare your own case or to talk to your lawyer
- the right to have your trial heard without too much delay
- the right to be told about Legal Aid if you don't already have a lawyer
- presumption of innocence until proven guilty
- that you don't have to testify against yourself or confess your guilt unless you choose to do so.

Triggers

Charter rights may become engaged if what you propose to do:

- impacts on the right to be presumed innocent (including amendments to the law relating to self-incrimination)
- impacts on the bringing of disciplinary actions
- impacts on the treatment of children in complaint and disciplinary proceedings
- regulates aspects of criminal trial procedure for investigation and prosecution of offences, for example, establishing time limits on the lodging of complaints or appeals, or affects access of an accused to witnesses, information and evidence, filing and service charges
- establishes guidelines or procedures for the provision of assistants, translators and interpreters, including Auslan and languages other than English
- amends any guidelines or procedures enabling the accused to represent themselves personally or restricts the right of an accused to choose a support person or advisor of their choice
- regulates how an accused person may appear in court, for example, security measures associated with their appearance
- limits requirements on courts or tribunals to accord fair hearing rights for example, in relation to disclosure of evidence to an accused
- deals with the admissibility of evidence
- restricts access to information and material to be used as evidence
- affects the law of evidence governing examination of witnesses
- allows special procedures for examination of witnesses, for example, the manner in which they give evidence
- creates or amends an offence that contains a presumption of fact or law and puts the legal or evidential burden on the accused to rebut the presumption
- alters the criteria or conditions under which a person may apply for or be released on bail
- amends or alters procedures under which a person is able to appeal against or review a decision
- amends the eligibility criteria for legal aid
- governs remedies available to people whose criminal convictions have been overturned or who have been pardoned in situations involving a miscarriage of justice
- affects the capacity of investigators and prosecutors to prepare for trial and of courts to conduct trials through allocation of resources.

Section 26: Right not to be tried or punished more than once

Summary of rights

A person will only go to court and be tried once for a crime. This means if the person is found guilty they will only be punished once.

Practical examples

A person charged with an offence can only be tried and punished for that offence once. If they are found guilty, they will pay the penalty or serve the prison sentence. They cannot be convicted of the same offence again.

Triggers

Charter rights may become engaged if what you propose to do:

- allows a person to be punished a second time for the same offence
- amends any criminal procedure rules relating to previous convictions and acquittals
- creates an overlap between an offence in regulations and an offence in the parent Act
- allows continued incarceration of people, for example convicted sex offenders, following completion of sentence.

Section 27: Retrospective criminal laws

Summary of rights

A person has the right not to be prosecuted or punished for things that were not criminal offences at the time they were committed.

Practical examples

If the parliament introduced new laws creating offences in 2011 these laws only apply from that time forward. They do not apply to actions people took prior to 2011.

Triggers

If what you propose to do:

- seeks to sanction a person for conduct that was not contrary to law at the time the conduct was undertaken
- applies more severe penalties for conduct by a person than those that existed at the time the conduct was undertaken
- fails to apply less severe penalties for conduct by a person if penalties have decreased since the conduct was undertaken
- expands the range of activities that are covered by an existing criminal offence
- amends criminal law procedure that applies to trials for acts done before the legislation commences or introduces new sentencing options to apply to acts done before the legislation was operative
- changes parole conditions that apply to sentences of imprisonment imposed before the legislation commences.

Appendix B: Human rights in the Charter

The following is an extract from the *Charter of Human and Responsibilities Act 2006* (Vic) setting out the human rights that Parliament specifically seeks to protect and promote.

8. Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

9. Right to life

Every person has the right to life and has the right not to be arbitrarily deprived of life.

10. Protection from torture and cruel, inhuman or degrading treatment

A person must not be—

- (a) subjected to torture; or
- (b) treated or punished in a cruel, inhuman or degrading way; or
- (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

11. Freedom from forced work

- (1) A person must not be held in slavery or servitude.
- (2) A person must not be made to perform *forced or compulsory* labour.
- (3) For the purposes of subsection (2) forced or compulsory labour does not include—

- (a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or
 - (b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or
 - (c) work or service that forms part of normal civil obligations.
- (4) In this section *court order* includes an order made by a court of another jurisdiction.

12. Freedom of movement

Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

13. Privacy and reputation

A person has the right—

- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have his or her reputation unlawfully attacked.

14. Freedom of thought, conscience, religion and belief

- (1) Every person has the right to freedom of thought, conscience, religion and belief, including—
 - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
- (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

15. Freedom of expression

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by him or her.
- (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.

16. Peaceful assembly and freedom of association

- (1) Every person has the right of peaceful assembly.
- (2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

17. Protection of families and children

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

18. Taking part in public life

- (1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.
- (2) Every eligible person has the right, and is to have the opportunity, without discrimination—
 - (a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and
 - (b) to have access, on general terms of equality, to the Victorian public service and public office.

19. Cultural rights

- (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.
- (2) 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.

20. Property rights

A person must not be deprived of his or her property other than in accordance with law.

21. Right to liberty and security of person

- (1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.
- (5) A person who is arrested or detained on a criminal charge—
 - (a) must be promptly brought before a court; and
 - (b) has the right to be brought to trial without unreasonable delay; and
 - (c) must be released if paragraph (a) or (b) is not complied with.
- (6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to attend—
 - (a) for trial; and
 - (b) at any other stage of the judicial proceeding; and
 - (c) if appropriate, for execution of judgment.
- (7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must—
 - (a) make a decision without delay; and
 - (b) order the release of the person if it finds that the detention is unlawful.
- (8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

22. Humane treatment when deprived of liberty

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.
- (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

23. Children in the criminal process

- (1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.
- (2) An accused child must be brought to trial as quickly as possible.
- (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

24. Fair hearing

- (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

Note: See Part 5 of the *Open Courts Act 2013*.

- (3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

25. Rights in criminal proceedings

- (1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—
 - (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
 - (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and
 - (c) to be tried without unreasonable delay; and
 - (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the *Legal Aid Act 1978*; and
 - (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the *Legal Aid Act 1978*; and
 - (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*; and
 - (g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and
 - (h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and
 - (i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and
 - (j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
 - (k) not to be compelled to testify against himself or herself or to confess guilt.

(3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

(4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

26. Right not to be tried or punished more than once

A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.

27. Retrospective criminal laws

(1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

(2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

(4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.



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