

# Charter of Human Rights and Responsibilities Act 2006

Act No. 43/2006

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Victoria

No. 43 of 2006

## Charter of Human Rights and Responsibilities Act 2006<sup>†</sup>

[Assented to 25 July 2006]

### Preamble

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This 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.

**The Parliament of Victoria therefore enacts as follows:**

**PART 1—PRELIMINARY**

**1. Purpose and citation**

- (1) This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act.
- (2) The main purpose of this Charter is to protect and promote human rights by—
  - (a) setting out the human rights that Parliament specifically seeks to protect and promote; and
  - (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
  - (c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
  - (d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and

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- (e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.
- (3) In addition, this Charter—
- (a) enables Parliament, in exceptional circumstances, to override the application of the Charter to a statutory provision; and
  - (b) renames the Equal Opportunity Commission as the Victorian Equal Opportunity and Human Rights Commission and confers additional functions on it; and
  - (c) makes consequential amendments to certain Acts.

## **2. Commencement**

- (1) This Charter (except Divisions 3 and 4 of Part 3) comes into operation on 1 January 2007.
- (2) Divisions 3 and 4 of Part 3 come into operation on 1 January 2008.

## **3. Definitions**

- (1) In this Charter—

**"Aboriginal"** means a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples;

**"act"** includes a failure to act and a proposal to act;

**"Charter"** means the Charter of Human Rights and Responsibilities;

**"child"** means a person under 18 years of age;

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**"Commission"** means the Victorian Equal Opportunity and Human Rights Commission under the **Equal Opportunity Act 1995**;

**"court"** means the Supreme Court, the County Court, the Magistrates' Court or the Children's Court;

**"declaration of inconsistent interpretation"** means a declaration made by the Supreme Court under section 36(2);

**"discrimination"**, in relation to a person, means discrimination (within the meaning of the **Equal Opportunity Act 1995**) on the basis of an attribute set out in section 6 of that Act;

Note: Section 6 of the **Equal Opportunity Act 1995** lists a number of attributes in respect of which discrimination is prohibited, including age; impairment; political belief or activity; race; religious belief or activity; sex; and sexual orientation.

**"human rights"** means the civil and political rights set out in Part 2;

**"interpreter"** means—

- (a) an interpreter accredited by a prescribed body; or
- (b) if an accredited interpreter is not readily available, a competent interpreter—

and relates only to the oral rendering of the meaning of the spoken word or other form of communication from one language or form of communication into another language or form of communication;

**"override declaration"** means a declaration made by Parliament under section 31;

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**"Parliamentary Committee"** has the same meaning as "Joint House Committee" has in the **Parliamentary Committees Act 2003**;

**"person"** means a human being;

**"public authority"** has the meaning given in section 4;

**"statutory provision"** means an Act (including this Charter) or a subordinate instrument or a provision of an Act (including this Charter) or of a subordinate instrument;

**"Victoria Police"** has the same meaning as "the force" has in the **Police Regulation Act 1958**.

Note: In the **Police Regulation Act 1958** "the force" means officers and other members of the police force.

(2) In this Charter—

- (a) a reference to a function includes a reference to a power, authority and duty; and
- (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

#### **4. What is a public authority?**

(1) For the purposes of this Charter a public authority is—

- (a) a public official within the meaning of the **Public Administration Act 2004**; or

Note: A public official under the **Public Administration Act 2004** includes employees of the public service, including the Head of a government department or an Administrative Office (such as the Secretary to the Department of Justice or the Chairman of the Environment Protection Authority) and the Chief Executive Officer of the State Services Authority. It also includes the directors and

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staff of certain public entities, court staff,  
parliamentary officers and holders of certain  
statutory or prerogative offices.

- (b) an entity established by a statutory provision  
that has functions of a public nature; or

Note 1: In section 38 of the **Interpretation of  
Legislation Act 1984** "entity" is defined to  
include a person (both a human being and a  
legal person) and an unincorporated body.

Note 2: See sub-section (2) in relation to "functions of  
a public nature".

- (c) an entity 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 (whether under  
contract or otherwise); or

**Example**

A non-government school in educating students may  
be exercising functions of a public nature but as it is  
not doing so on behalf of the State it is not a public  
authority for the purposes of this Charter.

Note: See sub-sections (4) and (5) in relation to  
"on behalf of the State or a public authority".

- (d) Victoria Police; or
- (e) a Council within the meaning of the **Local  
Government Act 1989** and Councillors and  
members of Council staff within the meaning  
of that Act; or
- (f) a Minister; or
- (g) members of a Parliamentary Committee  
when the Committee is acting in an  
administrative capacity; or
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(h) an entity declared by the regulations to be a public authority for the purposes of this Charter—

but does not include—

(i) Parliament or a person exercising functions in connection with proceedings in Parliament; or

(j) a court or tribunal except when it is acting in an administrative capacity; or

Note: Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

(k) an entity declared by the regulations not to be a public authority for the purposes of this Charter.

(2) In determining if a function is of a public nature the factors that may be taken into account include—

(a) that the function is conferred on the entity by or under a statutory provision;

**Example**

The **Transport Act 1983** confers powers of arrest on an authorised officer under that Act.

(b) that the function is connected to or generally identified with functions of government;

**Example**

Under the **Corrections Act 1986** a private company may have the function of providing correctional services (such as managing a prison), which is a function generally identified as being a function of government.

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- (c) that the function is of a regulatory nature;
  - (d) that the entity is publicly funded to perform the function;
  - (e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.

**Example**

All the shares in the companies responsible for the retail supply of water within Melbourne are held by or on behalf of the State.

- (3) To avoid doubt—
    - (a) the factors listed in sub-section (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and
    - (b) the fact that one or more of the factors set out in sub-section (2) are present in relation to a function does not necessarily result in the function being of a public nature.
  - (4) For the purposes of sub-section (1)(c), an entity may be acting on behalf of the State or a public authority even if there is no agency relationship between the entity and the State or public authority.
  - (5) For the purposes of sub-section (1)(c), the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the State or a public authority.
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**5. Human rights in this Charter in addition to other rights and freedoms**

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

**6. Application**

- (1) Only persons have human rights. All persons have the human rights set out in Part 2.

Note: Corporations do not have human rights.

- (2) This Charter applies to—
- (a) the Parliament, to the extent that the Parliament has functions under Divisions 1 and 2 of Part 3; and
  - (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; and
  - (c) public authorities, to the extent that they have functions under Division 4 of Part 3.
- (3) Sub-section (2) does not take away from or limit—
- (a) any other function conferred by this Charter on an entity specified in sub-section (2); or
  - (b) any function conferred on any other entity by this Charter.
- (4) This Charter binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.
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**PART 2—HUMAN RIGHTS**

**7. Human rights—what they are and when they may be limited**

- (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.
- (2) 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.
- (3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

**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.
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- (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 sub-section (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.

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**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.

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**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



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- (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.

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- (6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear—
- (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.
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**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 sub-section (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: For example, section 19 of the **Supreme Court Act 1986** sets out the circumstances in which the Supreme Court may close all or part of a proceeding to the public. See also section 80AA of the **County Court Act 1958** and section 126 of the **Magistrates' Court Act 1989**.

- (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.

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**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
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- (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.
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- (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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**PART 3—APPLICATION OF HUMAN RIGHTS IN VICTORIA**

**Division 1—Scrutiny of New Legislation**

**28. Statements of compatibility**

- (1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.
- (2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under sub-section (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.

Note: The obligation in sub-sections (1) and (2) applies to Ministers introducing government Bills and members of Parliament introducing non-government Bills.

- (3) A statement of compatibility must state—
  - (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
  - (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.
- (4) A statement of compatibility made under this section is not binding on any court or tribunal.

**29. No effect on Victorian law**

A failure to comply with section 28 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

### **30. Scrutiny of Acts and Regulations Committee**

The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

Note: The Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights: see section 21 of the **Subordinate Legislation Act 1994**.

### **Division 2—Override Declaration**

#### **31. Override by Parliament**

- (1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.
  - (2) If an override declaration is made in respect of an Act or a provision of an Act that declaration must be taken to extend to any subordinate instrument made under or for the purpose of that Act or provision.
  - (3) A member of Parliament who introduces a Bill containing an override declaration, or another member acting on his or her behalf, must make a statement to the Legislative Council or the Legislative Assembly, as the case requires, explaining the exceptional circumstances that justify the inclusion of the override declaration.
  - (4) It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.
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- (5) A statement under sub-section (3) must be made—
- (a) during the second reading speech for the Bill that contains the override declaration; or
  - (b) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or
  - (c) with the leave of the Legislative Council or the Legislative Assembly, as the case requires, at any time before the third reading of the Bill.
- (6) If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.
- Note: As the Charter has no application to a statutory provision for which an override declaration has been made, the Supreme Court cannot make a declaration of inconsistent interpretation in respect of that statutory provision. Also, the requirement under section 32 to interpret that provision in a way that is compatible with human rights does not apply.
- (7) A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.
- (8) Parliament may, at any time, re-enact an override declaration, and the provisions of this section apply to any re-enacted declaration.
- (9) A failure to comply with sub-section (3) or (5) in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

### **Division 3—Interpretation of Laws**

#### **32. Interpretation**

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
- (3) This section does not affect the validity of—
  - (a) an Act or provision of an Act that is incompatible with a human right; or
  - (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

#### **33. Referral to Supreme Court**

- (1) If, in a proceeding before a court or tribunal, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter, that question may be referred to the Supreme Court if—
    - (a) a party has made an application for referral; and
    - (b) the court or tribunal considers that the question is appropriate for determination by the Supreme Court.
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- (2) If a question has been referred to the Supreme Court under sub-section (1), the court or tribunal referring the question must not—
    - (a) make a determination to which the question is relevant while the referral is pending; or
    - (b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.
  - (3) If a question is referred under sub-section (1) by the Trial Division of the Supreme Court, the referral is to be made to the Court of Appeal.
  - (4) Despite anything contained in any other Act, if a question arises of a kind referred to in sub-section (1), that question may only be referred to the Supreme Court in accordance with this section.

**34. Attorney-General's right to intervene**

- (1) The Attorney-General may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter.
- (2) If the Attorney-General intervenes in a proceeding under this section, then, for the purpose of the institution and prosecution of an appeal from an order made in that proceeding, the Attorney-General may be taken to be a party to the proceeding.

**35. Notice to Attorney-General and Commission**

- (1) A party to a proceeding must give notice in the prescribed form to the Attorney-General and the Commission if—
  - (a) in the case of a Supreme Court or County Court proceeding, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or
  - (b) in any case, a question is referred to the Supreme Court under section 33.
- (2) For the purpose of sub-section (1), a notice is not required to be given to—
  - (a) the Attorney-General if the State is a party to the relevant proceeding; or
  - (b) the Commission if the Commission is a party to the relevant proceeding.

**36. Declaration of inconsistent interpretation**

- (1) This section applies if—
    - (a) in a Supreme Court proceeding a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or
    - (b) the Supreme Court has had a question referred to it under section 33; or
    - (c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a).
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- (2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.
  - (3) If the Supreme Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission.
  - (4) The Supreme Court must not make a declaration of inconsistent interpretation unless the Court is satisfied that—
    - (a) notice in the prescribed form has been given to the Attorney-General and the Commission under sub-section (3); and
    - (b) a reasonable opportunity has been given to the Attorney-General and the Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.
  - (5) A declaration of inconsistent interpretation does not—
    - (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
    - (b) create in any person any legal right or give rise to any civil cause of action.
  - (6) The Supreme Court must cause a copy of a declaration of inconsistent interpretation to be given to the Attorney-General—
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- (a) if the period provided for the lodging of an appeal in respect of the proceeding in which the declaration was made has ended without such an appeal having been lodged, within 7 days after the end of that period; or
- (b) if on appeal the declaration is upheld, within 7 days after any appeal has been finalised.

**Example**

If the Trial Division of the Supreme Court makes a declaration of inconsistent interpretation (based on a referral of a question from VCAT) and on appeal the Court of Appeal upholds the declaration, a copy of the declaration must be sent to the Attorney-General within 7 days after the Court of Appeal's decision.

- (7) The Attorney-General must, as soon as reasonably practicable, give a copy of a declaration of inconsistent interpretation received under subsection (6) to the Minister administering the statutory provision in respect of which the declaration was made, unless the relevant Minister is the Attorney-General.

**37. Action on declaration of inconsistent interpretation**

Within 6 months after receiving a declaration of inconsistent interpretation, the Minister administering the statutory provision in respect of which the declaration was made must—

- (a) prepare a written response to the declaration; and
- (b) cause a copy of the declaration and of his or her response to it to be—
  - (i) laid before each House of Parliament; and
  - (ii) published in the Government Gazette.

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**Division 4—Obligations on Public Authorities**

**38. Conduct of public authorities**

- (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
- (2) Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

**Example**

Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

- (3) This section does not apply to an act or decision of a private nature.
- (4) Sub-section (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.
- (5) In this section "**religious body**" means—
  - (a) a body established for a religious purpose; or
  - (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

### **39. Legal proceedings**

- (1) 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.
  - (2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right—
    - (a) to seek judicial review under the **Administrative Law Act 1978** or under Order 56 of Chapter I of the Rules of the Supreme Court; and
    - (b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.
  - (3) A person is not entitled to be awarded any damages because of a breach of this Charter.
  - (4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.
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**PART 4—VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION**

**40. Intervention by Commission**

- (1) The Commission may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter.
- (2) If the Commission intervenes in a proceeding under this section, then, for the purpose of the institution and prosecution of an appeal from an order made in that proceeding, the Commission may be taken to be a party to the proceeding.

**41. Functions of the Commission**

The Commission has the following functions in relation to this Charter—

- (a) to present to the Attorney-General an annual report that examines—
  - (i) the operation of this Charter, including its interaction with other statutory provisions and the common law; and
  - (ii) all declarations of inconsistent interpretation made during the relevant year; and
  - (iii) all override declarations made during the relevant year; and

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- (b) when requested by the Attorney-General, to review the effect of statutory provisions and the common law on human rights and report in writing to the Attorney-General on the results of the review; and
- (c) when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights; and
- (d) to provide education about human rights and this Charter; and
- (e) to assist the Attorney-General in the review of this Charter under sections 44 and 45; and
- (f) to advise the Attorney-General on anything relevant to the operation of this Charter; and
- (g) any other function conferred on the Commission under this Charter or any other Act.

**42. Powers**

The Commission has power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions under this Charter.

**43. Reports to be laid before Parliament**

- (1) The Attorney-General must cause a copy of any report prepared by the Commission in accordance with section 41(a) or (b) (as amended under subsection (2), if applicable) to be laid before each House of Parliament on or before the 6th sitting day of that House after the Attorney-General has received the report.

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- (2) The Attorney-General may amend a report received under section 41(a) or (b) if the Attorney-General considers it necessary to do so to prevent disclosure of—
- (a) the identity of any person whose human rights have, or may have been, contravened;  
or
  - (b) the identity of any person who may have contravened another person's human rights;  
or
  - (c) information that could, in the Attorney-General's opinion, harm the public interest.
- (3) If the Attorney-General amends the report in accordance with sub-section (2), he or she must present a statement that the report has been amended when laying the report before Parliament in accordance with sub-section (1).
-

**PART 5—GENERAL**

**44. Review of Charter after 4 years of operation**

- (1) The Attorney-General must cause a review to be made of the first 4 years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2011.
- (2) A review under sub-section (1) must include consideration as to whether—
  - (a) additional human rights should be included as human rights under this Charter, including but not limited to, rights under—
    - (i) the International Covenant on Economic, Social and Cultural Rights; and
    - (ii) the Convention on the Rights of the Child; and
    - (iii) the Convention on the Elimination of All Forms of Discrimination against Women; and
  - (b) the right to self-determination should be included in this Charter; and
  - (c) regular auditing of public authorities to assess compliance with human rights should be made mandatory; and
  - (d) further provision should be made in this Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of this Charter.

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**45. Review of Charter after 8 years of operation**

- (1) The Attorney-General must cause a review to be made of the 5th to 8th years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2015.
- (2) A report under sub-section (1) must include a recommendation as to whether any further review of this Charter is necessary.

**46. Regulations**

- (1) The Governor in Council may make regulations for or with respect to any matter or thing required or permitted by this Charter to be prescribed or necessary to be prescribed to give effect to this Charter.
- (2) Without limiting sub-section (1), the Governor in Council may make regulations for or with respect to—
  - (a) prescribing entities to be public authorities for the purposes of this Charter; and
  - (b) prescribing entities not to be public authorities for the purposes of this Charter; and
  - (c) prescribing entities not to be public authorities for the purposes of this Charter when exercising certain functions; and
  - (d) prescribing bodies that are authorised to accredit interpreters; and
  - (e) prescribing forms for the purposes of this Charter.

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- (3) A power conferred by this Charter to make regulations may be exercised—
- (a) either in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified case or class of case; and
  - (b) so as to make, as respects the cases in relation to which the power is exercised—
    - (i) the same provision for all cases in relation to which the power is exercised, or different provisions for different cases or classes of case, or different provisions for the same case or class of case for different purposes; or
    - (ii) any such provision either unconditionally or subject to any specified condition.
- (4) Regulations under this Charter may be made—
- (a) so as to apply at all times or at a specified time; and
  - (b) so as to require matters affected by the regulations to be—
    - (i) in accordance with specified standards or specified requirements; or
    - (ii) approved by or to the satisfaction of specified persons or bodies or specified classes of persons or bodies; or
    - (iii) as specified in both sub-paragraphs (i) and (ii); and
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- (c) so as to apply, adopt or incorporate any matter contained in any document whatsoever whether—
    - (i) wholly or partially or as amended by the regulations; or
    - (ii) as in force at a particular time or as in force from time to time; and
  - (d) so as to confer a discretionary authority or impose a duty on specified persons or bodies or specified classes of persons or bodies; and
  - (e) so as to provide in specified cases or classes of case for the exemption of persons or things or classes of persons or things from any of the provisions of the regulations, whether unconditionally or on specified conditions and either wholly or to such an extent as is specified.

**47. Consequential amendments**

On the coming into operation of an item in the Schedule, the Act referred to in the heading to that item is amended as set out in that item.

**48. Savings provision**

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

**49. Transitional provisions**

- (1) This Charter extends and applies to all Acts, whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or after that commencement.
- (2) This Charter does not affect any proceedings commenced or concluded before the commencement of Part 2.

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- (3) Division 4 of Part 3 does not apply to any act or decision made by a public authority before the commencement of that Division.
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**SCHEDULE**

Section 47

**CONSEQUENTIAL AMENDMENTS**

**1. Equal Opportunity Act 1995**

- 1.1 In section 4(1) in the definition of "Commission", for "Equal Opportunity" **substitute** "Victorian Equal Opportunity and Human Rights".
- 1.2 In section 160(1), after "Commission" **insert** "under the name of the Victorian Equal Opportunity and Human Rights Commission".
- 1.3 After section 160(5) **insert**—
  - "(6) Despite the change in the name of the Commission made by item 1 of the Schedule to the Charter of Human Rights and Responsibilities, the Commission continues to be the same body after as before that change and that change does not affect any act, matter or thing."
- 1.4 In section 161(1)(d), after "other Act" **insert** ", including the Charter of Human Rights and Responsibilities".
- 1.5 In section 172, after "Act" **insert** ", or the Charter of Human Rights and Responsibilities,".
- 1.6 In section 172A, after "this Act" **insert** "or the Charter of Human Rights and Responsibilities".
- 1.7 In section 225, for "Equal Opportunity Commission" **substitute** "Commission".

**2. Ombudsman Act 1973**

After section 13(1) **insert**—

- "(1A) The functions of the Ombudsman under subsection (1) include the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities."

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**3. Parliamentary Committees Act 2003**

3.1 After section 17(a)(vii) **insert**—

"(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;"

3.2 After section 17(f) **insert**—

"(fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;"

**4. Police Regulation Act 1958**

4.1 In section 102BA(b), for "prevented." **substitute** "prevented; and".

4.2 After section 102BA(b) **insert**—

"(c) to ensure that members of the force have regard to the human rights set out in the Charter of Human Rights and Responsibilities."

**5. Public Administration Act 2004**

5.1 In section 7(1)(f), for "values." **substitute** "values;"

5.2 After section 7(1)(f) **insert**—

"(g) **human rights**—public officials should respect and promote the human rights set out in the Charter of Human Rights and Responsibilities by—

(i) making decisions and providing advice consistent with human rights; and

(ii) actively implementing, promoting and supporting human rights."

5.3 After section 8(c) **insert**—

"(ca) human rights as set out in the Charter of Human Rights and Responsibilities are upheld; and".

**6. Racial and Religious Tolerance Act 2001**

6.1 In section 3, in the definition of "Commission" for "Equal Opportunity" **substitute** "Victorian Equal Opportunity and Human Rights".

6.2 In section 32(1) and (2), for "Equal Opportunity Commission" **substitute** "Commission".

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**7. Subordinate Legislation Act 1994**

7.1 After section 12 **insert—**

**"12A. Human rights certificate**

- (1) The responsible Minister must ensure that a human rights certificate is prepared in respect of a proposed statutory rule, unless the proposed statutory rule is exempted under sub-section (3).
- (2) A human rights certificate must—
  - (a) certify whether, in the opinion of the responsible Minister, the proposed statutory rule does or does not limit any human right set out in the Charter of Human Rights and Responsibilities; and
  - (b) if it certifies that, in the opinion of the responsible Minister, the proposed statutory rule does limit a human right set out in the Charter of Human Rights and Responsibilities, set out—
    - (i) the nature of the human right limited; and
    - (ii) the importance of the purpose of the limitation; and
    - (iii) the nature and extent of the limitation; and
    - (iv) the relationship between the limitation and its purpose; and
    - (v) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
- (3) Sub-section (1) does not apply if the responsible Minister certifies in writing that in his or her opinion—
  - (a) the proposed statutory rule is a rule which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal; or
  - (b) the proposed statutory rule only—
    - (i) prescribes under section 4(1)(a) an instrument or class of instrument to be a statutory rule; or

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- (ii) exempts under section 4(1)(b) an instrument or class of instrument from the operation of this Act; or
- (iii) extends under section 5(4) the operation of a statutory rule that would otherwise be revoked by virtue of section 5."

7.2 In section 14(e) for "section 6A." **substitute** "section 6A;".

7.3 After section 14(e) **insert**—

- "(f) if a human rights certificate was required, a copy of the human rights certificate;
- (g) if a human rights certificate was not required, a copy of the responsible Minister's certificate under section 12A(3)."

7.4 After section 21(1)(h) **insert**—

- "(ha) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;".

**8. Victorian Civil and Administrative Tribunal Act 1998**

- 8.1 In section 3 in the definition of "proceeding" for "Equal Opportunity Commission" **substitute** "Victorian Equal Opportunity and Human Rights Commission".
- 8.2 In clause 15 of Schedule 1, for "Equal Opportunity Commission" **substitute** "Victorian Equal Opportunity and Human Rights Commission".
- 8.3 In clause 16(1) of Schedule 1, for "Equal Opportunity Commission" **substitute** "Victorian Equal Opportunity and Human Rights Commission".
- 8.4 In clause 20(1) and (2) of Schedule 1, for "Equal Opportunity Commission" **substitute** "Victorian Equal Opportunity and Human Rights Commission".
- 8.5 In clause 22 of Schedule 1, for "Equal Opportunity Commission" **substitute** "Victorian Equal Opportunity and Human Rights Commission".
- 8.6 In clause 23 of Schedule 1, for "Equal Opportunity Commission" **substitute** "Victorian Equal Opportunity and Human Rights Commission".

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Endnotes

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**ENDNOTES**

† *Minister's second reading speech—*

*Legislative Assembly: 4 May 2006*

*Legislative Council: 19 July 2006*

The long title for the Bill for this Act was "to protect and promote human rights, to make consequential amendments to certain Acts and for other purposes."

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