

**Parliament of Victoria
Scrutiny of Acts and Regulations Committee**

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

Victorian Government Response

14 March 2012

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Part 1: Introduction

- 1.1 The Government welcomes the Scrutiny of Acts and Regulations Committee's (**SARC**) Report of its review of the *Charter of Human Rights and Responsibilities Act 2006* (the **Charter**).
- 1.2 In the course of the review, SARC gave detailed consideration to a wide range of issues raised in both public hearings and numerous, wide-ranging written submissions. The Government thanks SARC for conducting this valuable process and for its thorough and careful consideration of all contributions to the review. The Government also thanks all persons who made submissions and otherwise contributed to the review.

Background

- 1.3 SARC conducted its review of the Charter pursuant to the requirement in s 44 that the Attorney-General cause a review to be made of the first four years of operation of the Charter. This review is the first stage of a two part process of review of the Charter, with the second part of the review to take place after the Charter has been operative for eight years.¹
- 1.4 Section 44(2) requires consideration of 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.
- 1.5 In addition to the matters that SARC was required to consider under section 44(2), the terms of reference for the review also included the following terms:
 - (2) the effects of the Charter Act on
 - (a) the development and drafting of statutory provisions
 - (b) the consideration of statutory provisions by Parliament
 - (c) the provision of services, and the performance of other functions, by public authorities

¹ Charter, s 45.

- (d) litigation and the roles and functioning of courts and tribunals
- (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights
- (3) the overall benefits and costs of the Charter Act; and
- (4) options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria.

In carrying out its inquiry, the Committee is asked to take note of, and make use of as it sees fit, the evidence and findings of, and government responses to, previous inquiries and reports concerning rights and responsibilities in Australia.

Executive summary

- 1.6 The Government is strongly committed to the principles of human rights and considers that legislative protection for those rights provides a tangible benefit to the Victorian community. The Government considers that this review process provides an opportunity to improve protection for human rights and to make the operation of the Charter clearer, simpler and more accessible.
- 1.7 SARC's recommendations ranged from far-reaching reform of the overall structure and operation of Victoria's human rights regime to detailed consideration of individual Charter provisions.
- 1.8 This document outlines the Government's response to SARC's recommendations. The Government's specific responses to each of the 35 recommendations are summarised in the table at the end of this response at Part 3.
- 1.9 The Government's detailed response to SARC's recommendations is contained in Part 2 and is, by reference to its outcomes, in two parts.
- 1.10 ***First***, in Parts 2.1 to 2.5, the response considers SARC's recommendations on improving and clarifying the operation of the Charter. The Government supports the majority of these recommendations in whole or in part. The Government will adopt recommendations to improve parliamentary scrutiny processes under the Charter, improve internal complaints processes, clarify the legal status of certain processes and documents and repeal the parliamentary override provision.
- 1.11 ***Second***, in Part 2.6, the response considers SARC's majority Recommendation 35 that the Government consider removing the courts and tribunals from the Charter as well as repealing the obligation placed upon public authorities that they act compatibly with the Charter and consider rights when making decisions. SARC could not reach a unanimous position on this recommendation. There are a number of other contingent recommendations related to Recommendation 35 which are considered in Part 2.6.
- 1.12 The Government believes that there is an ongoing place for the courts in protecting rights in relation to the Charter but acknowledges the concerns raised by the SARC majority as to the role of the courts and the obligations

of public authorities. These are important questions for the Charter and rights instruments more broadly. The Government considers that these questions are not appropriately or adequately addressed by responding to the series of discrete recommendations provided by SARC. The Government has determined that it should seek specific legal advice regarding the questions raised by the SARC majority. The issues raised by SARC on these particular questions have generated controversies that are best considered on the basis of clear evidence.

- 1.13 The Government is further persuaded that additional analysis of these issues raised by SARC is appropriate because important decisions relating to the Charter—the High Court's decision in *Momcilovic v R* (2011) 228 ALR 221 (**Momcilovic**) and the Court of Appeal's decision in *Director of Housing v Sudi* [2011] VSCA 266 (**Sudi**)—were handed down days before SARC's review. These decisions have significant implications on the role of courts and tribunals and the obligations of public authorities that SARC was not able to consider in its review.
- 1.14 For the reasons stated above, the Government will seek specific legal advice on the evidence of the operation of the Charter in the courts and tribunals and in relation to the duties of public authorities. The specific legal advice will also consider the risks and benefits of the possible inclusion in the Charter of additional rights from the International Covenant on Civil and Political Rights (ICCPR).

Part 2: The Government response to SARC

- 2.1 The Government is committed to the continued protection of human rights in Victoria, and agrees with SARC that there are a number of specific aspects of the Charter's operation which should be clarified or improved. In particular, the Government agrees that it is appropriate to:
- simplify the practice in relation to statements of compatibility;
 - close gaps in the provisions for parliamentary scrutiny of new legislation;
 - improve complaints mechanisms;
 - repeal the override provision; and
 - develop a framework for assessing the costs and benefits of the Charter.
- 2.2 The Government's responses to SARC's specific proposals for reform and improvement are discussed in the context of key themes arising from the recommendations. These include:
- the scope of Charter rights;
 - the Charter and the three branches of government;
 - strengthening parliamentary scrutiny;
 - accessibility and accountability;
 - promoting transparency; and
 - the role of the courts, tribunals and public authorities.

2.1 The scope of Charter rights

- 2.3 The Charter primarily contains civil and political rights based on the ICCPR. However, there are a range of other international instruments that recognise a broader spectrum of human rights extending beyond the realm of civil and political rights.²
- 2.4 The Charter specifically requires that the four-year review of its operation include consideration of whether to include:
- economic, social, and cultural rights;
 - children's rights;
 - women's rights; or
 - the right to self-determination.

Additional ICCPR rights (Recommendation 1)

Relevant issues and SARC recommendations

- 2.5 SARC noted that many submissions were made supporting the inclusion in the Charter of a number of ICCPR rights and responsibilities that are not currently expressly recognised. These rights include:
- the right to compensation for wrongful conviction;³
 - the duty of the State to respect the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions;⁴
 - prohibition on war propaganda and racial and religious hatred;⁵
 - the right to found a family;⁶ and
 - the right to birth registration.⁷
- 2.6 SARC recommended that the Government should consider whether those rights in the ICCPR that are not currently recognised in the Charter should be re-examined for possible inclusion.⁸

Government position

- 2.7 The Government agrees with SARC that additional ICCPR rights that are not presently incorporated into the Charter should be considered for inclusion. The Government will seek further specific legal advice to inform its decision about whether to include any of these additional civil and political rights. The review process is discussed further in Part 2.6. This consideration will include whether certain rights may not be appropriate for inclusion on the basis that they relate to areas of Commonwealth

² See, for example, *International Covenant on Economic, Social and Cultural Rights* (ICESCR); *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD); and *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).

³ Article 14(6), ICCPR; see SARC Review at [101] – [108].

⁴ Article 18(4), ICCPR; see SARC Review at [109] – [131].

⁵ Article 20, ICCPR; see SARC Review at [132] – [137].

⁶ Article 23(2), ICCPR; see SARC Review at [138] – [145].

⁷ Article 24(2), ICCPR; see SARC Review at [146] – [152].

⁸ Recommendation 1.

Government responsibility in which State government authorities would have little or no role.

Non-ICCPR rights (Recommendation 2)

Relevant issues and SARC recommendations

- 2.8 SARC recommended against the inclusion of any specific non-ICCPR rights in the Charter. Non-ICCPR rights include economic, social and cultural rights, women's rights and children's rights. A number of submissions to the SARC review supported the inclusion of some or all of these types of rights.
- 2.9 SARC considered that the submissions supporting the inclusion of those rights in the Charter had not identified any problem in Victoria's existing laws that would be remedied by such an amendment. Many rights are already protected by other Victorian legislation. SARC also had particular concerns about economic, social and cultural rights on the basis that those rights may require the courts to comment upon the appropriateness of government resource allocation. With regard to the other rights, SARC did not consider that a broad consensus for their inclusion in the Charter had been established.

Government position

- 2.10 The Government agrees with SARC on this matter. The Government is of the view that compelling evidence has not been presented that the protection of non-ICCPR rights would be better served through inclusion in the Charter. The Government's priority is improving the operation of the Charter in relation to civil and political rights.

Right to self-determination (Recommendation 3)

Relevant issues and SARC recommendation

- 2.11 In addition to other non-ICCPR rights, SARC gave particular consideration as to whether the right to self-determination should be included in the Charter. This right is broad and flexible, and may include, for example, rights to non-discrimination, cultural integrity, lands and natural resources, social welfare and development and self-government.
- 2.12 SARC noted that as the international expressions of the right were deliberately flexible and not susceptible to precise definition, they would need to be modified for the Victorian context. SARC observed that there is a lack of clarity regarding how the right should be understood. SARC therefore recommended against its inclusion in the Charter, but recommended that the Government continue to develop specific programs to foster improved outcomes for indigenous people in consultation with Victoria's indigenous communities.

Government position

- 2.13 The Government agrees with SARC that it would be undesirable to include the right to self-determination in the Charter without greater certainty regarding its meaning and application. It therefore supports SARC's

recommendation, and will continue to work with indigenous communities to improve the lives of indigenous people in Victoria.

2.2 The Charter and the three branches of government

- 2.14 SARC recommended a number of amendments to the Charter that concern the relationship between the three branches of government. These amendments are considered below.

Remedies for breach of the Charter (Recommendation 8)

- 2.15 The Charter does not provide for an independent cause of action whereby a person can bring a claim for breach of the Charter independently of any non-Charter-based legal proceeding. Rather, the Charter provides that:

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.⁹

- 2.16 This provision also provides that a person is not entitled to be awarded monetary damages because of a breach of the Charter.¹⁰
- 2.17 A number of submissions recommended that the existing remedies provision be replaced with an independent cause of action that would allow people to bring claims under the Charter without also needing an existing non-Charter remedy.¹¹ Several submissions also argued that damages should be available for a breach of the Charter.¹²
- 2.18 SARC rejected these proposals, noting the submission of Yarra City Council that "one of the strengths of the Charter is its emphasis on engagement around issues relating to rights rather than providing remedies through legal proceedings."¹³

Government position

- 2.19 The Government agrees with SARC that the Charter should not provide an independent remedy or damages for breach of the Charter.

Repeal of the override declaration (Recommendation 21)

Relevant issues and SARC recommendation

- 2.20 The Charter provides a process for Parliament to pass laws that "override" the Charter by declaring that those laws have effect despite being incompatible with human rights.¹⁴ A member of Parliament who introduces

⁹ Charter, s 39(1).

¹⁰ Charter, s 39(3).

¹¹ See, for example, Submission 83 (PILCH Homeless Persons Legal Clinic), p 61; Submission 95 (Victorian Bar), p 15; and Submission 247 (Law Institute of Victoria), p 19.

¹² See, for example, Submission 83 (PILCH Homeless Persons Legal Clinic), p 61; Submission 97 (Office of the Victorian Privacy Commissioner), p 3; Submission 100 (Tenants Union of Victoria), pp 6-7.

¹³ Submission 52 (Yarra City Council), p 5.

¹⁴ Charter, s 31.

an override Bill must explain the “exceptional circumstances” that justify the override declaration.¹⁵ Declarations last for five years, and can be renewed.¹⁶

- 2.21 SARC considered that this process, which has never been used, is redundant, and may create a misleading impression that an override declaration is the only way that the Parliament can enact legislation that is incompatible with rights or to which the Charter does not apply.¹⁷ In fact, Parliament has the power at all times to pass legislation of this nature even without adopting the procedure outlined by the override provision.
- 2.22 SARC’s view was supported by several submissions.¹⁸ These submissions argued that while override provisions may be appropriate in constitutionally entrenched models of human rights protection where courts can invalidate rights-incompatible legislation, this type of provision is unnecessary in Victoria. Parliament already has the “final say”, so there is no need for an override power to be expressly provided for in the legislation itself.
- 2.23 SARC therefore proposed that s 31 of the Charter be repealed.¹⁹

Government position

- 2.24 The Government agrees with SARC that the override power is unnecessary and intends to repeal the provision.

Effect of failure of SARC to report on a Bill (Recommendation 14)

Relevant issues and SARC recommendation

- 2.25 The Charter provides that SARC must consider any Bill introduced into Parliament and report back on whether the Bill is incompatible with any human rights. SARC observed that the Charter does not specify what the consequences are if SARC fails to comply with this section.²⁰ SARC therefore recommended²¹ amending the Charter to bring it into line with the ACT’s *Human Rights Act 2004*, which specifies that a failure for the ACT’s equivalent parliamentary committee to report on a Bill does not affect the validity, operation or enforcement of any law.²²

Government position

- 2.26 The Government agrees that the clarification proposed by SARC would be a useful one. While there is no indication in the Charter that it would be open to treat legislation which has not been the subject of a report as invalid, it

¹⁵ Charter, s 31(3).

¹⁶ Charter, s 31(7) and 31(8).

¹⁷ SARC Review, at [431] – [432].

¹⁸ Submission 114 (Julie Debeljak), p 26; Submission 122 (Carlo Carli), p 4; Submission 263 (Human Rights Law Centre), pp 13 – 14; Submission 285 (Castan Centre for Human Rights Law), pp 12-13.

¹⁹ Recommendation 21.

²⁰ SARC Review, at [405].

²¹ Recommendation 14.

²² *Human Rights Act 2004* (ACT), s 39.

would enhance certainty to make this explicit. The Government intends to amend the Charter to provide that a failure by SARC to report on a Bill does not affect the validity, operation or enforcement of any law.

Legal status of parliamentary documents (Recommendation 26)

Relevant issues and SARC recommendation

- 2.27 SARC observed that while the Charter provides that statements of compatibility are not binding on courts or tribunals,²³ there is no similar provision in relation to the legal status of opinions regarding rights compatibility in human rights certificates, explanatory memoranda and SARC reports. SARC considered this to be problematic, as these documents do not represent the view of Parliament as a whole.²⁴ SARC therefore recommended amending the Charter to provide that human rights certificates relating to regulations, explanatory memoranda and SARC reports are not binding on courts or tribunals.²⁵
- 2.28 SARC also recommended that the drafters of these documents should be encouraged to clearly distinguish between opinions as to the intended or likely effect of new laws, and opinions about the compatibility of those laws with human rights.

Government position

- 2.29 The Government agrees that the legal status of human rights certificates and SARC reports should be clarified, and will introduce amendments to provide that these documents are not binding on courts or tribunals. This would be consistent with existing court practice.²⁶
- 2.30 As the Government has decided not to include information about the compatibility of legislation in explanatory memoranda,²⁷ it is unnecessary to clarify the status of these documents for the purposes of the Charter.
- 2.31 The Government has considered SARC's recommendation that the drafters of compatibility documents be encouraged to distinguish between opinions about the human rights compatibility of statutory provisions, and opinions about the intended or likely effect of those provisions. The Government notes that while these two types of opinion are different concepts, they are interrelated. The issue of the compatibility of a statutory provision cannot be considered without also considering its intended effect, as the rights-compatibility of a statutory provision will depend on what that provision is intended to achieve.

²³ See s 28(4).

²⁴ SARC Review, at [480].

²⁵ Recommendation 26.

²⁶ See, for example, Kirby J's comments in *Stingel v Clark* [2006] HCA 37 at [117] that 'extrinsic materials may be useful as an aid but ultimately the duty of a court is to give effect to the meaning of the words that Parliament has chosen to use'; see also Gleeson, Callinan, Heydon and Crennan JJ at [26].

²⁷ See paragraphs [2.789]-[2.83], below.

2.32 The Government considers that making these distinctions overt in compatibility documents may be cumbersome, and is of the view that the courts are well equipped to adequately distinguish between these concepts without further assistance from drafters. The Government therefore does not intend to alter the Charter in this regard.

2.3 Strengthening parliamentary scrutiny

- 2.33 Parliament has a central role in relation to human rights under the Charter. Parliament scrutinises legislation and regulations that come before it to assess whether any limitations imposed on rights are reasonable. As noted at [2.21], it also has plenary legislative power, and, accordingly, may pass laws that are incompatible with human rights.
- 2.34 The Executive assists Parliament in its scrutiny role by preparing statements of compatibility and human rights certificates for all Bills and subordinate legislation.²⁸ These documents contain analyses of the human rights impacts of the particular primary or subordinate legislation under consideration. The member of Parliament who introduces the Bill, or the Minister responsible for the subordinate legislation, ordinarily tables those documents before Parliament. SARC also assists Parliament by reporting on whether a Bill or subordinate instrument is incompatible with human rights.²⁹
- 2.35 Statements of compatibility, human rights certificates and SARC reports all play an important role in ensuring that Parliament is properly informed about the rights implications of all primary and subordinate legislation to come before it. SARC has made a number of recommendations regarding the preparation of these documents. These recommendations are discussed below.

Processes for House amendments (Recommendations 15, 16 and 17)

Relevant issues and SARC recommendations

- 2.36 The Charter requires that all Bills presented to Parliament be accompanied by a statement of compatibility.³⁰ However, SARC observed that there is no such requirement in relation to House amendments to Bills that are already before Parliament.
- 2.37 As House amendments may impact upon human rights in a way that is not contemplated in the statement of compatibility prepared for the original Bill, SARC recommended that:
- For House amendments that broaden a Bill's purpose clause, statements of compatibility should be required when the amendment is introduced.³¹
 - For all other House amendments, the member who introduced the Bill should table a revised statement of compatibility shortly after the Bill is passed.³²
 - SARC should be able to report on any provisions of an Act that were not considered by SARC when the Act was a Bill (i.e., any successful House amendments that were not considered by SARC).³³

²⁸ Charter, s 28; *Subordinate Legislation Act 1994*, ss 12A, 12D, 15 and 16B.
²⁹ Charter, s 30; *Subordinate Legislation Act 1994*, s 21(1)(ha) and 25A(1)(c).
³⁰ Charter, s 28.
³¹ Recommendation 15.
³² Recommendation 16.
³³ Recommendation 17.

Government position

- 2.38 The Government agrees with SARC that it is appropriate for House amendments to be subject to human rights scrutiny. The Government supports SARC's recommendations in principle, but notes that such amendments are sometimes made on an urgent basis. The Government will give further consideration to how best to implement this objective. For example, revised statements of compatibility for House amendments could be prepared at the request of either House of Parliament.
- 2.39 The Government further notes that where a House amendment that is passed in one House of Parliament affects the human rights analysis in a statement of compatibility, the statement of compatibility is generally revised before the Bill is introduced into the other House.

National uniform schemes (Recommendations 18 and 19)

Relevant issues and SARC recommendations

- 2.40 SARC noted that not all amendments or regulations made under national uniform schemes are subject to assessment under the Charter.³⁴ Where a national law is enacted in another jurisdiction and applies in Victoria, that jurisdiction may amend the law without the Victorian Parliament being advised of any relevant human rights implications. A similar situation may arise with regard to regulations made under a national law scheme.
- 2.41 SARC therefore recommended that consideration be given to developing a system for:
- referring amendments to national uniform legislation schemes and regulations made under those schemes to SARC,³⁵ and
 - preparing and laying before Parliament statements of compatibility and human rights certificates for such amendments and regulations.³⁶

Government position

- 2.42 The Government agrees that SARC scrutiny of amendments and regulations made under national applied law schemes would be of benefit to Parliament. The Government therefore proposes that SARC should prepare an annual review of amendments and regulations made under national applied law schemes for Charter compatibility.
- 2.43 The Government does not intend to require statements of compatibility or human rights certificates for amendments to national uniform schemes that entail the application of laws of another jurisdiction in Victoria. The initial legislation that implements a national applied law uniform scheme in Victoria is accompanied by a statement of compatibility and is subject to scrutiny by the Victorian Parliament and SARC. At that time, Parliament agrees to the

³⁴ SARC Review, at [418].
³⁵ Recommendation 19.
³⁶ Recommendation 18.

content of the initial legislation, including the process for making amendments and regulations.

Exemptions from scrutiny of new legislation (Recommendation 20)

Relevant issues and SARC recommendation

- 2.44 As noted above, in general, all Bills before Parliament must be accompanied by a statement of compatibility, and all subordinate legislation must be accompanied by a human rights certificate. SARC is empowered to examine these documents and report back to Parliament if it considers that any unreasonable limitations are being imposed on human rights.
- 2.45 Two exceptions to these requirements attracted SARC's comment:
- Under the *Subordinate Legislation Act 1994*, no human rights certificate needs to be prepared if the responsible Minister certifies that the proposed statutory rule relates only to a court or tribunal or to the procedure, practice or costs of a court or tribunal.
 - Under the Charter, a general exemption applies so that nothing in the Charter affects laws relating to abortion. As a result, laws relating to abortion are not required to be accompanied by a statement of compatibility.
- 2.46 SARC recommended that consideration be given to amending the Charter and the *Subordinate Legislation Act 1994* to provide that statements of compatibility and human rights certificates are required in both these circumstances.³⁷

Government position

- 2.47 The Government has considered these issues, as recommended by SARC, but does not intend to amend the *Subordinate Legislation Act 1994* at this time.
- 2.48 The Government considers that the exemption relating to courts and tribunals should be retained to preserve the independence of the courts. The exemption primarily relates to court or tribunal rules and practice notes that are made by courts and tribunals themselves. Providing an exemption for these documents in relation to human rights certificates is consistent with their exemption from other requirements of consultation, analysis, and certification that are usually required in the making of subordinate legislation.
- 2.49 The Government considers that questions regarding the operation of s 48 were considered at length at the time of the enactment of the Charter. Accordingly, the Government considers that it is appropriate to retain the current exemption regarding laws that relate to abortion.

³⁷

Recommendation 20(b).

2.4 Accessibility and accountability

- 2.50 Court proceedings are not the only means by which persons affected by actions or decisions of public authorities may seek to have their human rights claims resolved, or by which public authorities can be held accountable for their compliance with human rights obligations.
- 2.51 SARC considered a range of different approaches to encouraging human rights compliance by public authorities, including:
- human rights audits conducted by the Victorian Equal Opportunity and Human Rights commission (VEOHRC);
 - internal complaints processes;
 - Ombudsman investigations; and
 - alternative dispute resolution processes.
- 2.52 SARC's recommendations regarding these issues are considered below.

No mandatory audit role for VEOHRC (Recommendation 4)

Relevant issues and SARC recommendation

- 2.53 The Charter currently permits VEOHRC to review public authorities' programs and practices for compatibility with human rights at the request of the public authority.³⁸ Pursuant to SARC's terms of reference and to s 44(2)(c) of the Charter, SARC was required to consider whether regular auditing of public authorities for human rights compliance should be made mandatory. SARC noted that a range of submissions recommended that VEOHRC be able to conduct mandatory audits of public authorities by instigating own-motion reviews.³⁹
- 2.54 However, SARC noted that many other agencies⁴⁰ already have own-motion auditing powers which extend to human rights issues.⁴¹ SARC considered that existing laws provide a sufficient auditing regime, and recommended that no change be made to VEOHRC's power to conduct reviews of public authorities when requested to do so by the authority itself.⁴²

Government position

- 2.55 The Government agrees with SARC that existing laws provide a sufficient auditing regime, and notes that VEOHRC already performs an annual audit of Government compliance with the Charter. The Government therefore intends to retain VEOHRC's powers in their present form.

³⁸ Charter, s 41(c).

³⁹ SARC Review, at [316].

⁴⁰ E.g., the Victorian Auditor-General's Office, the Ombudsman, and the Health Services and Privacy Commissioners.

⁴¹ SARC Review, at [317].

⁴² See SARC Review, at [319], and Recommendation 4.

Assisting public authorities to incorporate Charter rights into internal complaints processes (Recommendation 5)

Relevant issues and SARC recommendation

- 2.56 SARC observed that a number of public authorities have added Charter obligations to their internal complaints processes.⁴³ For example, the Transport Accident Commission has a specific team that is the first point of contact for Charter-related complaints, and also maintains a register of all claims concerning the Charter.⁴⁴
- 2.57 SARC recommended that public authorities that do not have internal complaints procedures for Charter claims be supported through the development and distribution of templates for incorporating such procedures into internal complaints processes.

Government position

- 2.58 The Government agrees that it is appropriate that human rights considerations should be incorporated into internal complaints procedures. The Government supports SARC's recommendation and will work with bodies including VEOHRC and the Ombudsman to improve practices in this regard.

Role of the Ombudsman (Recommendations 6 and 33)

Relevant issues and SARC recommendation

- 2.59 When the Charter was introduced, the *Ombudsman Act 1973* was amended to provide that one of the Ombudsman's functions is to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter.⁴⁵
- 2.60 The *Ombudsman Act 1973* sets out that the Ombudsman has jurisdiction to investigate administrative actions taken by all government departments and public statutory bodies, with some specified exceptions.⁴⁶
- 2.61 SARC recommended amending the *Ombudsman Act 1973* to specify the range of bodies that can be investigated on human rights grounds.⁴⁷
- 2.62 SARC also recommended that public authorities that are subject to the Ombudsman's jurisdiction be encouraged to inform people who bring internal complaints that they may seek to have their unresolved complaints, including Charter complaints, investigated further by the Ombudsman.⁴⁸

⁴³

SARC Review, at [334].

⁴⁴

SARC Review, at [334], citing VEOHRC, *Making Progress*, April 2010, p 64.

⁴⁵

Ombudsman Act 1973, s 13(1A).

⁴⁶

Ombudsman Act 1973, s 13.

⁴⁷

SARC Review, Recommendation 33.

⁴⁸

SARC Review, Recommendation 6.

Government position

- 2.63 The Government considers that it is unnecessary to amend the *Ombudsman Act 1973* to clarify the Ombudsman's jurisdiction. That Act already sets out the extent of that jurisdiction.⁴⁹ The Ombudsman's jurisdiction with regard to human rights compliance issues is the same as his jurisdiction with regard to non-Charter issues.
- 2.64 However, the Government agrees with SARC that public authorities should be encouraged to advise people with human rights complaints that they may request investigation by the Ombudsman. Reference to the Ombudsman's role in investigating Charter complaints will be incorporated into any complaints handling templates developed in response to Recommendation 5 (see paragraphs [2.56] – [2.58]).

Dispute resolution processes (Recommendation 7)

Relevant issues and SARC recommendation

- 2.65 A number of submissions to SARC recommended that the Government should empower an independent body to conduct alternative dispute resolution for Charter disputes.⁵⁰
- 2.66 For example, in its submission to SARC, VEOHRC proposed that if the Government were to introduce an independent cause of action for breach of the Charter, VEOHRC should also be provided with powers to handle human rights complaints through conciliation.⁵¹
- 2.67 However, SARC recommended against giving VEOHRC a dispute resolution function.⁵² SARC noted that where, as in Victoria, human rights are subject to court-enforced remedies, any alternative dispute resolution system tended to be limited to narrow, highly regulated fields governed by statute, such as equal opportunity laws. While the Australian Human Rights Commission has jurisdiction to conciliate with regard to a broader range of human rights, the only consequence of failing to reach a conciliated agreement is that the matter is reported to the federal Attorney-General. This structure therefore did not reflect the Victorian system.⁵³

⁴⁹ *Ombudsman Act 1973*, s 13.

⁵⁰ Submission 278 (Victorian Equal Opportunity and Human Rights Commission), Submission 86 (2020Women), p 2; Submission 97 (Office of the Victorian Privacy Commissioner), p 3; Submission 110 (Peninsula Community Legal Centre), p 4; Submission 111 (City of Darebin), pp 8-9; Submission 127 (Top End Women's Legal Centre), p 3; Submission 173 (Women's Health Victoria), p 7; Submission 182 (Athena Nguyen), pp 4-5; Submission 185 (Inner South Supported Residential Services Network), p 14; Submission 192 (Municipal Association of Victoria), p 4; Submission 205 (Federation of Community Legal Centres), p 13; Submission 245 (International Commission of Jurists), p 16; Submission 247 (Law Institute of Victoria), pp 19-20; Submission 263 (Human Rights Law Centre), p 50; Submission 276 (Australian Centre for Human Rights Education), p 18. See also Submission 176 (Association of Employees with Disability), p 6.

⁵¹ Submission 278 (VEOHRC), pp 116-7.

⁵² SARC Review, Recommendation 7.

⁵³ SARC Review, at [338] – [340].

Government position

- 2.68 The Government agrees with SARC that introducing an alternative dispute resolution process for human rights claims is inappropriate under the existing Charter model, and does not intend to introduce such a process.

2.5 Promoting transparency

- 2.69 Various submissions to SARC considered increased transparency in policy making and legislative development as one of the key benefits of the Charter.⁵⁴ Greater transparency is achieved in the legislative process through the requirement that any limitations on rights be identified and justified in statements of compatibility and human rights certificates. The Charter requires that Parliament be clear about its intentions when it imposes a limit on human rights.
- 2.70 SARC made several recommendations to improve the processes for developing and publishing statements of compatibility and human rights certificates. In addition, SARC proposed the development of a framework to assess the costs and benefits of rights under the Charter to ensure the transparency of future reviews of the Charter. These recommendations are considered below.

Publication of draft statements of compatibility and human rights certificates (Recommendations 9 and 10)

Relevant issues and SARC recommendations

- 2.71 Where appropriate, the Government publishes a draft exposure Bill for public comment prior to finalising legislation to bring before Parliament. Currently, there is no requirement that the Government publish draft statements of compatibility to accompany such Bills. There is also no requirement that draft human rights certificates be made available for public comment in relation to subordinate instruments that are undergoing public consultation as part of the regulatory impact statement process.⁵⁵
- 2.72 SARC stated that the feasibility of releasing draft statements of compatibility is a matter for the Government.⁵⁶ However, SARC noted that releasing statements of compatibility with exposure draft Bills would ensure early consideration of human rights issues⁵⁷ and would enable the public to be informed about and contribute to the human rights assessment process.⁵⁸
- 2.73 SARC therefore recommended that consideration be given to publishing draft statements of compatibility when draft bills are exposed for public comment.⁵⁹ SARC also recommended that human rights certificates be

⁵⁴ See Submission 83 (PILCH Homeless Persons Legal Clinic), p 31- 32; Submission 97 (Office of the Victorian Privacy Commissioner), p 4; Submission 247 (Law Institute of Victoria), p 26; Submission 257 (PILCH), p 5; Submission 262 (Victorian Council of Social Services), p 13; Submission 263 (Human Rights Law Centre), p 11; Submission 278 (VEOHRC), p 136; Submission 324 (Victorian Government), p 60.

⁵⁵ This process, which involves mandatory public consultation on the economic and social impacts of subordinate legislation (unless a specific exemption applies), is provided for under the *Subordinate Legislation Act 1994*.

⁵⁶ SARC Review, at [366].

⁵⁷ Some submissions expressed a view that the Charter has its greatest impacts when human rights are considered early in the policy development and drafting process – see, for example, Submission 263 (Human Rights Law Centre), p 15; and Submission 278 (VEOHRC), citing evidence from the New Zealand experience, p 148.

⁵⁸ SARC Review, at [367].

⁵⁹ Recommendation 9.

made available for public comment when a regulatory impact statement process is being undertaken.⁶⁰

Government position

- 2.74 The Government agrees that when public consultation takes place on draft primary and subordinate legislation it will often be appropriate to publish draft analyses of any human rights impacts. The Government therefore commits to considering, on a case-by-case basis, whether a draft statement of compatibility should be provided when releasing exposure draft Bills for public comment.
- 2.75 The Government will also make amendments to the *Premier's Guidelines*⁶¹ to require the publication of draft human rights certificates as part of the regulatory impact statement process.

Content of statements of compatibility (Recommendation 11)

Relevant issues and SARC recommendation

- 2.76 SARC received some submissions criticising statements of compatibility. For example, statements were criticised for addressing minor issues⁶² or, in some circumstances, for being overly technical and lengthy.⁶³
- 2.77 SARC considered that the requirement in the Charter that a statement of compatibility must set out "how" a Bill is compatible with rights has contributed to these issues.⁶⁴ In addressing how a Bill is compatible with rights, statements of compatibility often consider the manner in which Bills "engage" human rights, even in circumstances where no limit is ultimately imposed.
- 2.78 SARC recommended that statements of compatibility should only be required for Bills that impose a limit on human rights, and proposed that consideration be given to providing information on why particular provisions do not limit rights in the explanatory memorandum to a Bill.⁶⁵

Government position

- 2.79 The Government does not intend to amend the existing legislative requirements for statements of compatibility.
- 2.80 The Government agrees with SARC that some statements of compatibility have been too long or overly technical, or have focused on minor

⁶⁰ Recommendation 10.

⁶¹ Made under s 26 of the *Subordinate Legislation Act 1994*.

⁶² See, for example, Submission 19 (Family Voice), pp 11-12; Submission 133 (Institute of Public Affairs), pp 7-8.

⁶³ Submission 263 (Human Rights Law Centre), pp 11-12 and see Submission 160 (Victorian Alcohol and Drug Association), p 4; Submission 324 (Victorian Government), p 16.

⁶⁴ SARC Review, at [391].

⁶⁵ Recommendation 11.

engagements with human rights that need not have been addressed.⁶⁶ The Victorian Government submission to SARC noted that the median length of statement tabled in the 2009/10 financial year was 1.5 pages⁶⁷ and for statements categorised as having a high level of complexity, the median number was 5.25 pages.⁶⁸

- 2.81 Other submissions to SARC consider that statements have played an important role in promoting transparency and accountability of the Parliament and the Executive.⁶⁹
- 2.82 Currently, information about why particular rights are not limited by a Bill is often included in the statement of compatibility. For example, a statement may set out why an apparent interference with a right in fact falls within the particular right's "internal limitations."⁷⁰ Including this information in statements of compatibility (rather than in explanatory memoranda) ensures that the human rights analysis is a transparent process and that all relevant information is available in a single document that is readily accessible to both Parliament and the general public.
- 2.83 The Government considers that statements can be improved by adopting SARC's recommendation to improve drafting practices for statements of compatibility (see paragraph [2.86], below).

Content of rights and guidelines for preparing statements of compatibility (Recommendation 12)

Relevant issues and SARC recommendation

- 2.84 SARC indicated a concern that statements of compatibility sometimes contain too much technical analysis of provisions of Bills that limit human rights where the limit is clearly justified.⁷¹
- 2.85 To deal with this issue, SARC recommended⁷² that the Government consider:
- altering guidelines and practices for drafting statements of compatibility to avoid this outcome;⁷³ and

⁶⁶ See Submission 324 (Victorian Government), at p 16, which noted that while most statements were written in plain language, "some [statements] are becoming increasingly technical, with specific references to international jurisprudence."

⁶⁷ Submission 324 (Victorian Government), p 15.

⁶⁸ Submission 324 (Victorian Government), p 16.

⁶⁹ Submission 83 (PILCH Homeless Persons Legal Clinic), pp 32-3; Submission 97 (Office of the Victorian Privacy Commissioner), p 4; Submission 138 (Fitzroy Legal Service), p 4; Submission 247 (Law Institute of Victoria), p 26; Submission 257 (PILCH), p 5; Submission 265 (Human Rights Law Centre), p 11; Submission 278 (VEOHRC), p 135; Submission 295 (Mallesons Human Rights Law Group), pp 15 and 18-20.

⁷⁰ "Internal limitations" are limitations that are built into the scope of a right itself. For example, the right to privacy only extends to a right against 'unlawful or arbitrary' interferences with privacy (see Charter, s 13). Statements of compatibility will often include information on why an interference with privacy is neither unlawful nor arbitrary, and so does not impose a limitation on the right.

⁷¹ SARC Review, at [397].

⁷² Recommendation 12.

- amending the drafting of particular human rights to include internal limitations⁷⁴ on rights such as freedom of movement that are frequently limited in a manner that is clearly reasonable.⁷⁵

Government position

- 2.86 The Government agrees with SARC that drafting practices for statements of compatibility should avoid overly long or technical analysis of routine and clearly reasonable limitations on rights. The Government will review existing practices with this in mind.
- 2.87 The Government does not believe a case has been made for an amendment to introduce new internal limitations to the rights listed in Part 2 of the Charter.
- 2.88 The Government considers that SARC's concerns regarding the content of statements can be addressed through adopting SARC's recommendation with regard to the drafting process, rather than through amendments to the rights themselves.

Developing a framework to assess the costs and benefits of the Charter (Recommendation 34)

Relevant issues and SARC recommendation

- 2.89 SARC observed that there is no established methodology for assessing the benefits and costs of the Charter.⁷⁶ To assist future assessments of the Charter, SARC recommended the development of a framework to analyse the costs and benefits of the Charter.⁷⁷ SARC considered that this would help resolve methodological issues encountered by the Committee in the conduct of the review, and would also improve the transparency of future reviews.

Government position

- 2.90 The Government supports SARC's recommendation and will develop a cost/benefit framework to assist informed public debate and any future reviews of the Charter.

⁷³ For example, by producing general statements of compatibility for particular types of provisions that avoid the need for such analysis to be restated in each statement.

⁷⁴ See footnote 70, above.

⁷⁵ SARC Review, Recommendation 12, and at [398].

⁷⁶ SARC Review, at [521].

⁷⁷ Recommendation 34.

2.6 Role of the courts, tribunals and public authorities

- 2.91 Under the existing structure of the Charter, the courts, tribunals and public authorities have roles and obligations in relation to protecting human rights. Public authorities are obliged to act compatibly with rights and take relevant rights into account when making decisions. The courts may provide remedies where public authorities act in breach of the Charter. In addition, the courts are required to interpret legislation consistently with Charter rights. The Supreme Court may issue a declaration of inconsistent interpretation if a law cannot be interpreted consistently with human rights.
- 2.92 SARC made recommendations in relation to the roles of the courts, tribunals and public authorities under the Charter. These are considered below.

Structural reform to the Charter (Recommendation 35) and other contingent recommendations relating to the courts, tribunals and public authorities (Recommendations 13, 22, 23, 24, 25, 27, 28, 29, 30, 31 and 32)

Relevant issues and SARC recommendation

- 2.93 In Recommendation 35, SARC identified three possible options for the future structure of the Charter in Victoria:
- (1) That all of Part 3 of the Charter (application of human rights in Victoria) be retained, subject to the modifications recommended in the Report.
 - (2) That only Division 1 of Part 3 of the Charter (scrutiny of new laws) be retained, with the modifications recommended in the Report, and that Divisions 3 (interpretation of laws) and Divisions 4 (obligations of public authorities) be repealed.
 - (3) That the Charter be repealed altogether.
- 2.94 SARC rejected the third option, but recommended that consideration should be given to both options (1) and (2). SARC could not reach a unanimous agreement about which of these options should be adopted. The SARC majority preferred option (2), while the minority preferred option (1).
- 2.95 There are a number of other recommendations that are contingent upon the question of which approach should be taken to Recommendation 35. These recommendations concern the role of public authorities under the Charter and the operation of the Charter in the courts and tribunals, and cannot be properly considered separately from the issue of the best course to take with regard to the structure of the Charter. They are Recommendations 13, 22, 23, 24, 25, 27, 28, 29, 30, 31 and 32.

Government position

- 2.96 The Government believes that there is an ongoing place for the courts in protecting rights in relation to the Charter but acknowledges the concerns raised by the SARC majority as to the role of the courts and the obligations of public authorities. The SARC majority was concerned, in effect, that the Charter may create legal uncertainties and inappropriately politicise the

judiciary.⁷⁸ SARC could not come to a unanimous position on this recommendation.

- 2.97 When considered in the aggregate, Recommendation 35 and SARC's other recommendations concerning the roles of courts, tribunals and public authorities, raise important questions about the operation of the Charter.
- 2.98 In addition, the Government notes that in the eight days before the SARC report was published, the Court of Appeal handed down its decision in *Sudi* and the High Court handed down its decision in *Momcilovic*. These decisions significantly touch upon the role of the courts and tribunals, and the Victorian Civil and Administrative Tribunal's review of the decisions of public authorities on Charter grounds. While the Chair's foreword referred briefly to those two decisions, the timeframes for the completion of SARC's report meant those decisions were not able to be addressed by SARC itself.
- 2.99 The Government has also had limited opportunity to observe the practical effect of those decisions on issues relating to the various roles of the courts and VCAT in relation to the Charter.
- 2.100 For these reasons and after consideration of SARC's recommendations, and of the many submissions made to SARC, the Government considers that it is appropriate to seek further specific legal advice in relation to the issues arising from Recommendation 35 and of SARC's other related recommendations. This will provide the opportunity for a thorough and detailed analysis of the evidence regarding the role of the courts and tribunals under the Charter and its impact upon public authorities, and of the consequences of the decisions in *Momcilovic*, *Sudi* and any subsequent cases applying those authorities.
- 2.101 The Government considers that obtaining further specific legal advice will assist in resolving the public debate regarding these aspects of the Charter's wording and operation.

⁷⁸

SARC review, at [684].

Part 3: Table of Recommendations

	Recommendation	Government Response	Relevant paragraph(s)
1	If the Charter is retained in its current form, SARC recommends that consideration be given to whether the rights contained in the ICCPR omitted by the Human Rights Consultation Committee should be re-examined for inclusion in the Charter.	Support	2.7
2	Additional rights If the Charter is retained in its current form, SARC recommends that, except pursuant to the terms of Recommendation 1, no further rights be added to the Charter.	Support	2.10
3	Right to self-determination If the Charter is retained in its current form, SARC acknowledges that there was no agreement on the definition of the right to self-determination and subsequently does not recommend that the right to self-determination be added to the human rights in the Charter, but recommends that the Victorian government, in consultation with Victorian Indigenous communities, continue to develop specific programs that foster improved outcomes for Victoria's Indigenous peoples.	Support	2.13
4	Mandatory auditing SARC recommends that no change be made to Charter s. 41(c)'s current provision that VEOHRC have a function of reviewing the programs and policies of public authorities to determine their compatibility with human rights "when requested by a public authority".	Support	2.55
5	Internal complaints If the Charter is retained, then SARC recommends that public authorities that do not have internal complaints procedures relating to human rights be supported through the development and distribution of templates for incorporating such procedures into existing complaints processes.	Support	2.58
6	Complaints to the Ombudsman If the Charter is retained, then SARC recommends that public authorities who are subject to the Ombudsman's jurisdiction be encouraged to inform people who bring internal complaints that the Ombudsman may be able to investigate any unresolved complaints, including complaints concerning Charter rights.	Support	2.63 - 2.64
7	Dispute resolution	Support	2.68

	SARC recommends that, if Division 4 of Part 3 of the Charter is retained, then VEOHRC should not be given a dispute resolution function in relation to human rights.		
8	<p>Legal proceedings</p> <p>SARC recommends that Charter s. 39 not be amended to provide for an independent legal remedy or damages for breaches of Charter s. 38.</p>	Support	2.19
9	<p>Publication of draft statements of compatibility</p> <p>If Charter s. 28(1) is retained, then SARC recommends that consideration be given to publishing a draft statement of compatibility, as appropriate, when drafts of Bills are exposed for public comment.</p>	Support	2.74 - 2.75
10	<p>Publication of draft human rights certificates</p> <p>If ss. 12A and 12D of the <i>Subordinate Legislation Act 1994</i> are retained, then SARC recommends that ss. 11 and 12I of that Act be amended to require that copies of the proposed human rights certificate be made available for public comment in respect of subordinate legislation for which a regulatory impact statement has been prepared.</p>	Support	2.74 - 2.75
11	<p>When statements of compatibility are required</p> <p>If Charter s. 28 is retained, then SARC recommends that it be amended to provide that statements of compatibility must be prepared and tabled only for provisions of Bills that limit a human right. For provisions of Bills that do not limit a human right, consideration should be given to providing, where appropriate, a brief account of why particular provisions do not limit a human right in the relevant section of the explanatory memorandum for the relevant Bill. Statements of compatibility may continue to provide information about provisions that promote particular Charter rights, at the discretion of the member of Parliament introducing the Bill.</p>	Not support	2.78 - 2.83
12	<p>Whether rights are limited</p> <p>If Part 2 is retained, then SARC recommends that consideration be given to altering the guidelines and practices for drafting of statements of compatibility and, where necessary, particular human rights in Part 2 to avoid occasions when routine, minor provisions are regarded as limiting a human right.</p>	Support in part	2.86 - 2.88
13	<p>Whether rights are reasonably limited</p> <p>If Charter s. 7(2) is retained, then SARC recommends that the provision be redrafted to state the test for limiting rights in plain language that is accessible to Victorians without reference to comparative jurisprudence, and to remove or reduce the list of factors that must be considered when applying this test.</p>	Under review	2.96 - 2.101

14	<p>Scrutiny of Acts and Regulations Committee</p> <p>If Charter s. 30 is retained, then SARC recommends that Charter s. 29 be amended to clarify that a failure to comply with Charter s. 30 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or any other statutory provision.</p>	Support		2.26
15	<p>Statements of compatibility for proposed amendments</p> <p>If Charter s. 28 is retained, then SARC recommends that it be amended to extend its requirements for Bills so that they also apply to proposed House amendments to a Bill that broaden the Bill's purpose clause.</p>	Support principle	in	2.38 - 2.40
16	<p>Revised statements of compatibility</p> <p>If Charter s. 28 is retained, then SARC recommends that it be amended to require that, if amendments are accepted by both Houses, the member who introduced the Bill shall cause the preparation of a revised statement of compatibility and cause that statement to be laid before both Houses of Parliament in advance of the time specified in s. 17(1)(c) of the <i>Parliamentary Committees Act 2003</i>.</p>	Support principle	in	2.38 - 2.39
17	<p>SARC reports on amended Bills</p> <p>If s. 17(1)(c) of the <i>Parliamentary Committees Act 2003</i> is retained, then SARC recommends that it be amended to clarify that the Scrutiny of Act and Regulations Committee may consider any provisions of an Act that were not considered by SARC when the Act was a Bill.</p>	Support		2.38 - 2.39
18	<p>Compatibility information about national uniform legislation schemes</p> <p>If Charter s. 28 is retained, then SARC recommends that consideration be given to providing for a system for causing the preparation and laying before the Parliament of statements of compatibility for amendments to national uniform legislation schemes, and human rights certificates for regulations made under those schemes.</p>	Not support		2.42 - 2.43
19	<p>Scrutiny of national uniform legislation schemes</p> <p>If Charter s. 30 is retained, then SARC recommends that consideration be given to providing for a system for referring amendments to non-Victorian laws that a Victorian law gives force and effect to in Victoria, and regulations under those laws, to SARC for scrutiny.</p>	Support principle	in	2.42 - 2.43
20	<p>Exemptions from scrutiny of new legislation</p> <p>If Charter s. 28 and s. 12A of the <i>Subordinate Legislation Act 1994</i> are retained, then SARC recommends that consideration be given:</p> <p>(a) to amending Charter s. 48 to provide that it does not affect the provisions for scrutiny of new legislation in Division 1 of Part 3 of the Charter</p>	Not support		2.47 - 2.49

	(b) to examining, in consultation with Victoria's courts and tribunals, whether the exemption from the requirement for human rights certificates in s.12A(3)(a) of the <i>Subordinate Legislation Act 1994</i> is necessary.		
21	Override declarations If the Charter is retained, then SARC recommends that Charter s. 31 be repealed. To avoid doubt, the amending statute or explanatory memorandum should expressly state that Charter s. 31 has been repealed in order to confirm the Parliament's continuing authority to enact any statute, including statutes that are incompatible with human rights.	Support	2.24
22	What is a public authority? If Charter s. 4 is retained, then SARC recommends that Charter s. 4(1)(a)-(g) and (2)-(5) be replaced by a schedule to the Charter containing an exhaustive list of: (a) specific entities that must comply with Charter s. 38, and (b) specific functions that must be carried out in compliance with Charter s. 38.	Under review	2.96 - 2.101
23	Conduct of public authorities If Charter s. 38 is retained, then SARC recommends that it be redrafted to state the obligations of public authorities in plain language that is accessible to both lay employees of public authorities and lay users of public services without recourse to overseas precedents. For example, Charter s. 38(1)-(2) could be replaced with a single requirement that a public authority must, in making a decision, give proper consideration to any relevant human right.	Under review	2.96 - 2.101
24	Interpretation of legislation If the Charter is retained, then SARC recommends that consideration be given to whether Charter s. 32 is necessary, in light of common law principles of statutory interpretation. If Charter s. 32 is retained, then sub-s. (1) should be redrafted in a manner that both clarifies that it is limited to traditional approaches to interpretation and makes its meaning accessible to local users, without undue recourse to overseas judgments. For example, sub-s. (1) could be drafted (similarly to s. 35(a) of the <i>Interpretation of Legislation Act 1984</i>) to provide that, in the interpretation of the provision of an Act or a subordinate instrument, a construction that would not limit a human right shall be preferred to a construction that would limit a human right.	Under review	2.96 - 2.101
25	Relationship between the Interpretation of Legislation Act 1984 and the Charter If Charter s. 32 is retained, then SARC recommends that the operation of sub-s. (1) be expressly made subject to s. 35(a) of the <i>Interpretation of Legislation Act 1984</i> .	Under review	2.96 - 2.101

26	<p>Relevance of opinions about compatibility</p> <p>If Division 1 of Part 3 is retained, then SARC recommends that Charter s. 28(4) be amended so that it also applies to human rights certificates, explanatory memoranda and SARC reports. In addition, drafters of these documents should be encouraged to clearly distinguish between opinions as to the intended or likely effect of new laws and opinions about the compatibility of those laws with human rights.</p>	Support in part	2.29 - 2.32
27	<p>Use of international law and the judgments of domestic, foreign and international courts</p> <p>If Charter s. 32 is retained, then SARC recommends that sub-s. (2) be repealed. To avoid doubt, the amending statute or explanatory memorandum should expressly state that the repeal of Charter s. 32(2) is not intended to affect existing common or statutory law on the relevance of non-Victorian judgments or laws to the interpretation of Victorian statutory provisions.</p>	Under review	2.96 - 2.101
28	<p>Are courts public authorities?</p> <p>If Charter s. 38 is retained, then SARC recommends Charter s. 4(1)(j) be amended by removing the words "except when it is acting in an administrative capacity".</p>	Under review	2.96 - 2.101
29	<p>Are tribunals public authorities?</p> <p>If Charter s. 38 is retained, then SARC recommends that:</p> <p>(a) Charter s. 4(1)(j) be amended by removing the words "or tribunal", and</p> <p>(b) Charter s. 4 be amended, consistently with Recommendation 22, to provide for a schedule containing an exhaustive list of specific tribunals or specific functions of tribunals that are subject to Charter s. 38.</p>	Under review	2.96 - 2.101
30	<p>Application of the Charter to courts and tribunals</p> <p>If Charter s. 6(2)(b) is retained, then SARC recommends that the words "Part 2 and" be deleted.</p>	Under review	2.96 - 2.101
31	<p>Inconsistent interpretation</p> <p>If Charter s. 36 is retained, then SARC recommends that consideration should be given to amending it to give an independent non-judicial body (such as VEOHRC) the functions of identifying statutory provisions that the Supreme Court has interpreted in a way that limits a human right and forwarding those provisions to a parliamentary committee (such as SARC) for reporting to the Parliament, as well as to the Minister responsible for the statutory provision.</p>	Under review	2.96 - 2.101
32	<p>Reliefs and remedies</p>	Under review	2.96 - 2.101

	<p>If Charter s. 38 is retained, then SARC recommends that:</p> <p>(a) Charter s. 39 be repealed and replaced by a provision that states that, except where a statute expressly provides otherwise, nothing in Charter s. 38 creates in any person any legal right, gives rise to any civil cause of action or affects the rights or liabilities of a public authority, and</p> <p>(b) if any existing relief or remedy in Victorian law is to be made available for a breach of Charter s. 38, it should be provided for by an express amendment to the statute that provides for that relief or remedy.</p>		
33	<p>Jurisdiction of the Ombudsman</p> <p>If s. 13(1A) of the <i>Ombudsman Act 1973</i> is retained, then SARC recommends that it be amended so as to specify the range of bodies that can be subject to an enquiry or investigation with respect to human rights.</p>	Not support	2.63 - 2.64
34	<p>Development of a framework for assessing benefits and costs</p> <p>SARC recommends that the government develop a framework for assessing the benefits and costs of the regime for protecting and upholding human rights in Victoria.</p>	Support	2.90
35	<p>Options for reform or improvement of the regime for protecting and upholding the human rights and responsibilities of Victorians</p> <p>SARC recommends that consideration be given to the following two options:</p> <ol style="list-style-type: none"> 1. That all of Part 3 of the Charter (application of human rights in Victoria) be retained, subject to the modifications recommended in this Report. 2. That only Division 1 of Part 3 of the Charter (scrutiny of new laws) be retained, with the modifications recommended in this Report, and that Divisions 3 (interpretation of laws) and Divisions 4 (obligations of public authorities) be repealed. <p>A minority of SARC prefers the first option to the second, while a majority of SARC prefers the second option to the first.</p>	Under review	2.96 - 2.101