

A Charter of Human Rights for Australia

Submission to the Australian Human Rights Commission's Free and Equal Inquiry Discussion Paper: A model for positive human rights reform in Australia

29 November 2019

© 2019 Victoria Legal Aid. Reproduction without express written permission is prohibited.

Written requests should be directed to Victoria Legal Aid, Research and Communications, Level 9, 570 Bourke Street, Melbourne Vic 3000.

Contents

1. Executive summary	1
2. About Victoria Legal Aid	3
3. The role for an Australian Charter of Human Rights	4
4. Benefits of the Victorian Charter in practice	5
4.1 Impact of the Victorian Charter: Embedding rights to secure fairer outcomes	5
4.2 Vital human rights protections for VLA clients	6
5. Stronger human rights protections across Australia	12
5.1 Need for better consideration of human rights at a Federal level.....	12
5.2 A positive model to safeguard human rights protections for all.....	15
6. Additional human rights protections to promote cultural change	17

1. Executive summary

Victoria Legal Aid (VLA) welcomes the opportunity to provide our submission to the Australian Human Rights Commission's (AHRC) Free and Equal Inquiry in response to its *A model for positive human rights reform in Australia* Discussion Paper (Discussion Paper).¹

VLA's vision is for a fair and just society where rights and responsibilities are upheld. Ensuring human rights are properly protected, respected and fulfilled is central to VLA's purpose of resolving and preventing legal problems and encouraging a fair and transparent justice system.

Achieving better outcomes for our clients through embedding human rights into government processes and decision-making have a very real impact for our clients. As one client shared after VLA assisted her to use the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Charter) as part of securing essential modifications for her disability in her own home:

I feel like I'll finally be able to do things by myself and I will feel safe, independent and dignified. Everybody should have this right. Nobody should have to go through what I've been through.

The Victorian Charter has played a crucial role in making sure that the impact of decisions on people's everyday lives is at the centre of government decision-making. The Victorian Charter has substantially contributed to a more rights-respecting culture within the Victorian Government, including the public service, through embedding consideration of human rights during the development of new laws, policies and guidelines, and as part of government decision-making. The Victorian Charter has also provided a helpful framework for decision-makers without placing unreasonable constraints on decision-making.

By ensuring that human rights are central to government decision-making and actions, the Victorian Charter plays an essential preventative role, including through promoting rights to a fair hearing, equality and freedom from discrimination, and freedom of expression. In our casework, we see firsthand the risks to our clients when laws are passed, or policies or decisions are made, which do not adequately take human rights into account. In these limited situations where human rights are not respected, the Victorian Charter also provides an important corrective function to ensure that people can assert their human rights through courts or tribunals.

This submission draws on 10 client stories² to illustrate the benefits of the Victorian Charter in upholding our clients' human rights as well as the impact of gaps in human rights protections at a Federal level. Our Victorian Charter focussed client stories demonstrate the tangible benefits of a positive human rights framework to ensure that people can be heard, have their cultural rights considered, stay housed and participate in public life free from discrimination. Our clients' stories of their treatment under Federal laws and policies demonstrate the harm and hardship people are currently experiencing as a result of laws and policies which have not adequately considered their human rights.

VLA supports a Charter of Human Rights and Responsibilities for Australia (Australian Charter) as the preferred model for positive human rights protections under Federal laws. An Australian Charter would play a crucial role in instilling a rights-respecting culture within government, improving the quality of government decision-making, incorporating human rights considerations into new laws and policies and ensuring Federal laws are interpreted and applied consistently with human rights.

¹ Australian Human Rights Commission, 'Discussion Paper: A model for positive human rights reform in Australia' (November 2019) <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-model-positive-human-rights-reform-2019>.

² The majority of the client stories in this submission use pseudonyms to protect our clients' privacy and anonymity. We note that the cases of *Slattery* and *Taha* detail public judgments which use our clients' real names.

An Australian Charter will ensure that human rights are comprehensively protected under Federal laws and provide a safety net where existing protections are inconsistent or inadequate. People whose human rights have been breached as a result of government decision-making or the actions of public authorities would be able to access remedies to recover from their experiences. An Australian Charter would also improve our laws and policies to ensure they comply with Australia's human rights obligations.

Our submission focuses on:

1. **The benefits of the Victorian Charter** in embedding greater human rights awareness and understanding in government decision-making and the public service, drawing on our experiences with the Victorian Charter.³
2. **The need for an Australian Charter** to ensure human rights are taken into account when drafting new laws and policies, making decisions which impact on people's lives and interpreting laws consistently with human rights.
3. **The potential benefits of additional human rights protections to complement an Australian Charter**, including enhancing the AHRC's functions, parliamentary review and oversight mechanisms, public education and improved consideration of human rights in statutory interpretation.

Recommendations

We make the following recommendations to ensure people are treated with fairness, equality, dignity and respect in all aspects of their lives:

1. **Australian Charter of Human Rights and Responsibilities:** The Australian Government should introduce an Australian Charter which protects the human rights of all people impacted by Federal laws, policies, decisions and actions.
2. **Additional human rights protections:** The Australian Government should introduce additional human rights protections to ensure the effective implementation of an Australian Charter and to better protect, promote and respect human rights in the community, including improvements to education and training, parliamentary policies and procedures, government protocols and service delivery and guidance for interpretation by courts.

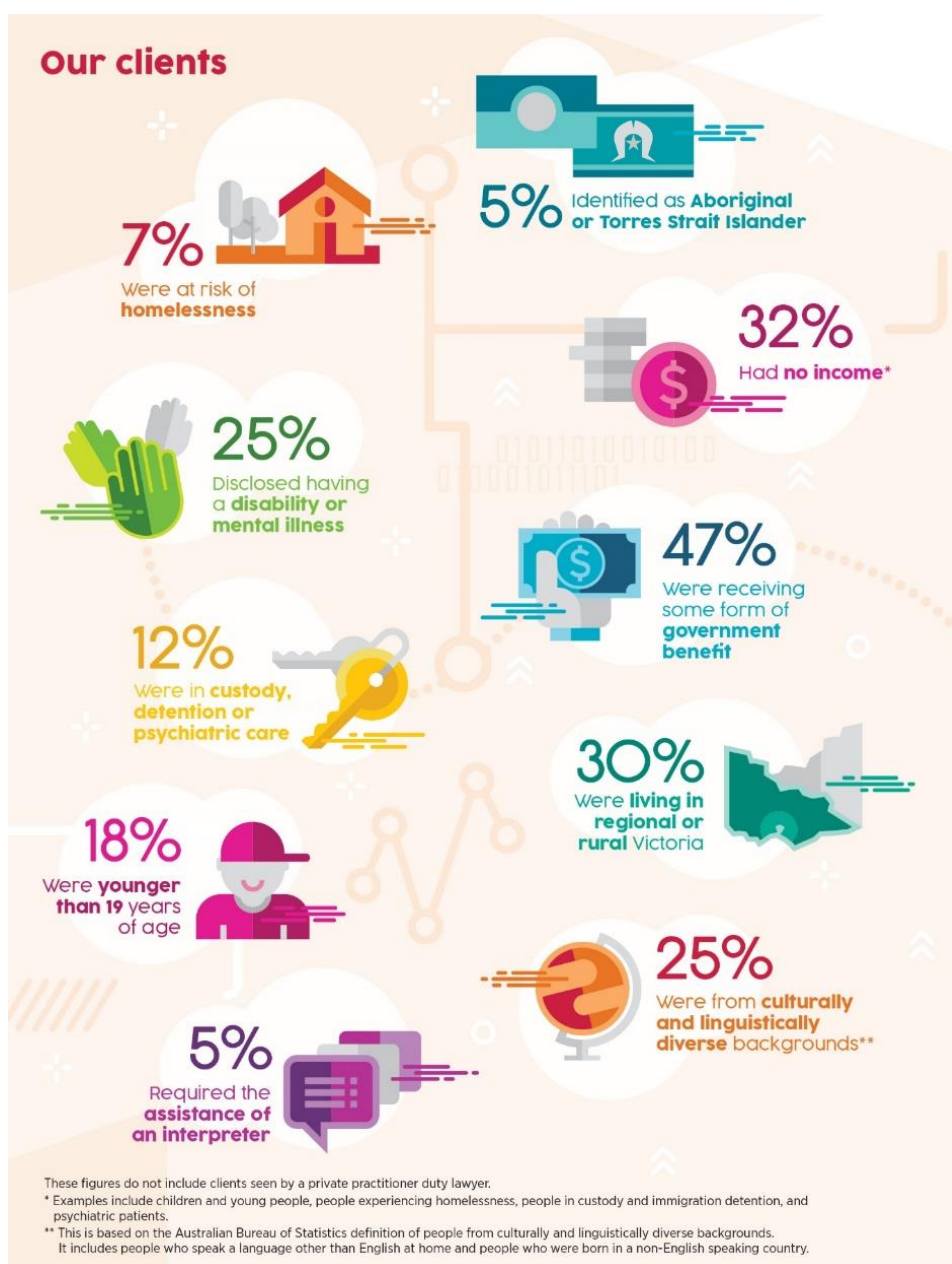
The AHRC Free and Equal inquiry is a vital opportunity to ensure that an Australian Charter is prioritised and strongly endorsed. It is essential that any additional human rights protections do not replace the clear recommendation for an Australian Charter. An Australian Charter is essential for a fairer, more respectful society for us to ensure people are treated with fairness, equality, dignity and respect in all aspects of their lives.

³ See e.g., Victorian Legal Aid, 'Charter of Human Rights and Responsibilities Act 2006: Eight-year review' (June 2015) <https://www.legalaid.vic.gov.au/node/610#Charter-of-Human-Rights-and-Responsibilities-submission>.

2. About Victoria Legal Aid

VLA is a Victorian statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. VLA assists people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

In 2018–19, VLA provided assistance to over 100,000 unique clients from our 14 offices across Victoria.⁴ As the image below shows, our clients from the 2018–2019 financial year are diverse and experience high levels of social and economic disadvantage. Almost half of our clients are currently receiving social security and one in three of our clients receive no income at all. Over 25,000 people disclosed having a disability or experiencing mental health issues and a significant proportion live in regional Victoria or are from culturally and linguistically diverse backgrounds.



⁴ Victoria Legal Aid, Annual Report 2018–19 <<https://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report>>.

3. The role for an Australian Charter of Human Rights

Currently, there is an inadequate legal patchwork of human rights protections at the Federal level. The Australian Constitution provides limited protections for rights, with only a small number of rights being explicitly recognised in the text and some rights being implied through High Court interpretation. Federal laws do not fully implement Australia's international obligations (and in some cases, are inconsistent with them). Federal discrimination laws provide limited coverage, and often inconsistent protections from equivalent state and territory laws, and the AHRC has limited powers to address breaches of human rights and address systemic discrimination.⁵

The introduction of parliamentary scrutiny of new legislation and legislative instruments to ensure consistency with human rights was a welcome step forward for increasing accountability and transparency in developing rights-compliant Federal laws. However, further changes are needed to ensure human rights are properly embedded and central to decision-making at every level of government.

The Australian Government, government agencies and federally funded public authorities have responsibility and control over laws, policies, decisions and actions which have a significant impact on our clients' everyday lives. Gaps in human rights protections have a disproportionate impact on our clients who experience socioeconomic disadvantage as a daily reality, as the client stories in this submission illustrate.

Victoria Legal Aid supports an Australian Charter to address inadequacies in existing Federal human rights protections and to provide clear and principled guidance to government in a way which better protects people's fundamental human rights.

As the Discussion Paper outlines, there are compelling reasons for an Australian Charter, including:

- Improving law and policy development by requiring proactive consideration of human rights impacts at an early stage;
- Improving the quality and transparency of government decision-making (thereby reducing the need for resolution of disputes through the AHRC or courts);
- Enhancing the delivery of public services by prompting consideration of a person's individual circumstances (rather than a blanket approach that might cause hardship);
- Providing a framework for decision-makers to balance competing human rights through a proportionality test; and
- Embedding a respectful and inclusive human rights culture with government and the public service.⁶

An Australian Charter would ensure that human rights are considered at earlier stages in the policy development and decision-making process to prevent harm and injustice. It would ensure that human rights are properly considered before people are subjected to hardship and would provide avenues in the infrequent but significant cases where a person's human rights have been violated. Failing to take into account a person's human rights poses a serious risk to the fair functioning of our democracy and can have a substantial detrimental impact on people who have experienced mistreatment or abuse as a result of Australian Government decisions or actions.

⁵ See Victorian Legal Aid submission to the AHRC's Free and Equal Discussion Paper: Priorities for federal discrimination law reform (November 2019).

⁶ Above n 2, 12.

4. Benefits of the Victorian Charter in practice

VLA has been a strong supporter of the Victorian Charter.⁷ VLA is an important user of the Victorian Charter to achieve fair and positive outcomes, both for individuals seeking legal assistance and more broadly for groups of people who can now live their lives with their human rights respected.

VLA is also a public authority and subject to obligations under the Victorian Charter. The Victorian Charter requires us to consider human rights in developing and implementing policies ranging from recruitment to service delivery, and from equal opportunity provisions to our Reconciliation Action Plan.

4.1 Impact of the Victorian Charter: Embedding rights to secure fairer outcomes

Based on our direct experience, stronger legal protection of human rights in Victoria has brought about a gradual but noticeable improvement in the way decisions are made by public authorities. The Victorian Charter has had a clear and positive impact on the delivery of public services and the operation of public authorities. This leads to better outcomes for Victorians. Much of this impact has been achieved through education, training, cultural change, policy guidelines and growing awareness of the importance and utility of considering human rights in decision-making.

The Victorian Charter has played a crucial role in ensuring that:

- Public authorities in state and local government must act compatibly with human rights;
- The Victorian Government and Parliament must consider human rights when developing new laws and policies; and
- People and public institutions (including the courts) must interpret and apply all laws compatibly with human rights.⁸

The cases in which hardship has been avoided, or court action is no longer necessary, are an often overlooked but essential element of the Victorian Charter's effectiveness. For example, VLA has assisted tenants to avoid being evicted from their homes by negotiating with community housing providers and emphasising the rights and obligations which apply under the Victorian Charter. In our experience, community housing providers are open to discussing the parties' Victorian Charter rights and obligations, and frequently agree to take further steps to address the issues which gave rise to the eviction notice rather than unfairly evicting our clients into homelessness.⁹

The Victorian Charter experience has shown that one of the most substantial effects over time is the cultural shift toward a human rights respecting culture by government departments and public authorities. There have been clear benefits to this approach for the Victorian community as a human rights culture promotes the prevention of human rights violations in the first place. The 2015 Review into the Victorian Charter found that "[o]ver time, implementation of the Charter has helped to build a greater consideration of and adherence to human rights principles by the public sector, Parliament and the courts in key areas."¹⁰ In addition, the utility of the Victorian Charter in bolstering existing legal cases has prompted the development of human rights interpretation through the common law and provided critical guidance to

⁷ See *Ibid.*

⁸ Michael Brett Young, 'From commitment to culture: The 2015 Review of the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2015) 4 https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/08/0b/e9a8d9ca9/report_final_charter_review_2015.pdf.

⁹ See also, Justice Connect Homeless Law, 'Charting a stronger course: Submission to the Eight Year Charter Review' (June 2015) <https://justiceconnect.org.au/wp-content/uploads/2018/08/Eight-Year-Charter-Review-Submission-June-2015.pdf>; Justice Connect Homeless Law, 'Charting the Right Course: Submission to the Inquiry into the Charter of Human Rights and Responsibilities' (6 June 2011) <https://justiceconnect.org.au/about/our-impact/submissions-archive/>.

¹⁰ Above n 5, 22.

lawyers, members of the public and the Victorian Government to clarify the scope of various Victorian Charter rights and responsibilities.

The ability to use the Victorian Charter to remind public authorities of their human rights obligations is only possible because of the implementation of obligations and accountability mechanisms which form the Victorian Charter's legislative dialogue model. A dialogue model ensures that each branch of government preserves its role while facilitating a 'dialogue' between the executive, legislative and judicial branches of government. Both courts and parliaments share responsibility for the interpretation and enforcement of human rights. Parliament retains responsibility for making laws and retains the power to override human rights set out under the Victorian Charter through an express declaration in legislation. Courts can make a declaration of incompatibility where a statutory provision is incompatible with human rights, and then refer the matter to the responsible Minister. Parliament will then decide what action to take to remedy the inconsistency with human rights.

The formal protection of human rights in a guiding document like the Victorian Charter clearly sets out the expected responsibilities, duties and obligations of Parliament and public authorities while reserving a role for courts and tribunals. Over time, this dialogue model between the different branches of government serves to improve just and fair outcomes for people living in Victoria.

4.2 Vital human rights protections for VLA clients

The Victorian Charter is an important tool to promote and protect human rights in Victoria. Through our casework experience, Victoria Legal Aid sees the substantial practical advantages of the Victorian Charter for Parliament, government, the public service, individuals whose human rights have been breached, and our community as a whole. Since its introduction in 2006, the Victorian Charter has improved public service standards, consideration of human rights in drafting new legislation and its use to secure positive outcomes for our clients.

Cultural rights and the right to self-determination for Aboriginal people in Victoria

The Victorian Charter explicitly recognises that human rights have a special importance for Aboriginal people in Victoria as descendants of Australia's first people with diverse spiritual, social, cultural and economic relationships with traditional lands and waters.¹¹

The Victorian Charter has played a role in ensuring that decision-makers take into account the human rights of Aboriginal and Torres Strait Islander people across a range of areas of law. For example, Victoria Legal Aid has raised arguments about Aboriginal and Torres Strait Islander clients' cultural rights as relevant factors for Magistrates to consider as part of bail applications, in line with the Supreme Court case of *DPP v SE*,¹² in which Justice Bell found that cultural rights in the Victorian Charter supply an additional basis upon which Courts should respect cultural rights of Aboriginal and Torres Strait Islander people when conducting bail hearings and interpreting section 3A of the *Bail Act 1977 (Vic)*.¹³

Safeguarding the rights and wellbeing of people experiencing mental health issues

VLA's practice experience reveals the real difference that the Victorian Charter has made for people who are struggling with mental health issues in our community, and for the people who support them – including advocates, service providers and public authority employees. Over time, we have seen public authorities turning to Charter-based frameworks for guidance in making difficult decisions in the face of

¹¹ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* Preamble.

¹² [2017] VSC 13.

¹³ See also *Cemino v Cannon and Ors* [2018] VSC 535.

limited resources and competing priorities. The Victorian Charter has enabled people to live their lives, through ensuring that government decision-makers make decisions and take actions that respect human rights from the outset.

VLA relied on the Victorian Charter as part of the *PBU & NJE*¹⁴ case which led to broader systems change to ensure that people experiencing mental health issues' human rights are appropriately taken into account by treating psychiatrists, doctors and other health professionals, the Mental Health Tribunal (MHT) and the Victorian Civil and Administrative Tribunal (VCAT).

Victorian Charter contributed to improved decision-making in compulsory electroconvulsive treatment cases

PBU agreed he had a mental health issue but not that he had treatment-resistant schizophrenia, as maintained by his doctors. In February 2017, a course of electro-convulsive treatment (ECT) was authorised by the Mental Health Tribunal. PBU regained capacity and refused further ECT and the final treatment was not given. Subsequently, PBU's treating team made two further applications to the Mental Health Tribunal for ECT.

PBU described the impact of being forced to undergo ECT:

"It was one of the most traumatic days of my life, when I was taken into the ECT room and held down on the bed. I didn't know I was going to have ECT ... The most terrifying aspect of having ECT is that I didn't know what state I would be in after."

NJE had been treated for schizophrenia by mental health services for some years, sometimes as a voluntary patient and sometimes as a compulsory patient. At the time of her initial ECT hearing, she instructed that she preferred to remain in hospital and continue to receive depot injection and other prescribed medication, rather than have ECT. NJE felt that ECT would interfere with her psychic capabilities. She did not believe she had any form of mental health issue.

Victoria Legal Aid represented PBU and NJE in the Victorian Supreme Court to clarify when ECT can be performed without a person's consent. Both had ECT ordered against their will by the Mental Health Tribunal which VCAT had affirmed. This case is the first time the court considered laws that govern the use of compulsory ECT in Victoria. Supreme Court Justice Bell found that VCAT had misapplied the law in relation to whether PBU and NJE had the capacity to decide if they wanted ECT and that their rights to equality before the law, freedom from non-consensual medical treatment, privacy and health were all engaged. Justice Bell held that restrictions on human rights under the Victorian Charter must be demonstrably justified to comply with the law, and that people experiencing mental health issues should face the same standard as all other people when their capacity to consent is assessed:

"The issue is closely connected with the need to respect the human rights of persons with mental disability by avoiding discriminatory application of the capacity test. More should not be expected of them, explicitly or implicitly, than ordinary patients ... When respect is afforded to the choice of the person to consent to or refuse medical treatment, the person is recognised for who they are."

By the time of the hearing, both PBU and NJE had been released from hospital and were living in the community. ECT was no longer being sought by their treating doctors, so there was no need for remittal orders. However, the decision provided important guidance for people at risk of compulsory ECT in future cases.

¹⁴ [2018] VSC 564.

Following this test case, VLA provided training to mental health service staff and used the precedent in providing duty lawyer services before the MHT to incorporate the consideration of human rights into day-to-day decision-making practices. This has led to a 20% reduction in compulsory ECT orders overall between 2017/18 and 2018/19.¹⁵ The number of compulsory ECT hearings held on the same day or within 1 business day of an application also reduced from 42% to 29%.¹⁶ The MHT has attributed these changes in its practice to *PBU*¹⁷ and has developed new ECT guidelines referencing the *PBU* decision.¹⁸

After the *PBU* decision, the Chief Psychiatrist's Guideline on ECT was updated to include guidance on a person's capacity to give informed consent, documentation in the file, rights-promoting statements on urgent ECT and referrals to VLA and the Independent Mental Health Advocacy.¹⁹ The MHT

People with disability have a right to dignity in their homes

Our lawyers deal with practical human rights issues every day in their casework and play a crucial role in the protection of human rights in Victoria. Our clients experience socioeconomic disadvantage and are more likely to interact with public authorities or be subject to decisions that impact on their rights.

The Victorian Charter has had a significant impact on how people understand their rights and in securing changes which have tangible benefits for our clients living in our community. The following client story has been provided in our client's own words about her experience with the Victorian Charter.

Victorian Charter helps mum with disability to access essential home modifications

When I got home from seven months in hospital, life just wasn't the same. I had permanent disabilities to my bowel, feet and ankles, meaning I couldn't use the shower or the toilet without the help of my son, who lives with me, or my sister, who lives 30 minutes away. Showering has been a nightmare. I'm a bit old fashioned and don't want others to see me in the shower. If there is an issue with my bowel, I think "I'll just rinse off in the shower". Then I realise it's not safe and have to wait around for my sister to come over. If I need an ambulance, they wouldn't be able to get me out of the house. My occupational therapist said I needed modifications to my bathroom, toilet, laundry and front door because the situation was not safe, dignified or sustainable.

When I called the Department of Housing and Human Services, they told me they couldn't make the modifications but could move me to a smaller house if my son moved out. I was mortified. He's a really good kid and I rely on him as my carer. My depression spiralled, it worsened my agoraphobia and I couldn't handle it. It was like they were trying to uproot our whole lives. While people have passed the buck on modifications, I've had three falls in the house and have broken my ankle. It's been horrific.

After Victoria Legal Aid got involved, things began to move in the right direction. The lawyer pointed out that the Department's refusal to make the modifications was cruel, inhuman and degrading treatment, breaching my rights under the Victorian Charter of Human Rights and Responsibilities. The Department then agreed to the modifications. I feel like I'll finally be able to do things by myself and I will feel safe, independent and dignified. Everybody should have this right. Nobody should have to go through what I've been through.

¹⁵ Mental Health Tribunal, '2018-2019 Annual Report' (2019) Table 12, p 21

<https://www.mht.vic.gov.au/sites/default/files/documents/201910/MHT-2018-2019-Annual-Report.pdf>.

¹⁶ Ibid Table 18.

¹⁷ Ibid 37.

¹⁸ Mental Health Tribunal, 'New electroconvulsive treatment (ECT) guidelines' (23 May 2019)

<https://www.mht.vic.gov.au/news/new-electroconvulsive-treatment-ect-guidelines>.

¹⁹ Department of Health and Human Services, 'Chief Psychiatrist's Guideline on electroconvulsive treatment' (12 January 2016) <<https://www2.health.vic.gov.au/about/publications/policiesandguidelines/chief-psychiatrist-guideline-on-electroconvulsive-treatment>>.

Children have a right to be involved in decisions about where they live

Victoria Legal Aid has also relied on the Victorian Charter to ensure that children with the capacity to give instructions in legal proceedings are able to be heard in relation to important decisions about their own lives. This case highlights how the incorporation of human rights considerations can shift how governments engage with people about how their legal matters are handled, and when deciding how to involve them in critical decisions about their lives. Importantly, these decisions have positive broader effects for others in similar situations and inform the development of government practice to promote principles of self-determination, inclusion and respect.

Victorian Charter upholds child's right to be heard in child protection hearings

Tom* is a 14 year old boy living in out of home care. Since the commencement of protection proceedings in the Children's Court, he has been legally represented by Victorian Legal Aid. He was thoroughly assessed by VLA as capable of giving instructions to his lawyer and he has done so clearly throughout the proceedings.

Following the conclusion of the children's court proceedings, Tom through his lawyer sought a review in VCAT of a Department of Health and Human Services (DHHS) decision not to assess and apply for a long term order to his carers.

At this point, DHHS sought the removal of his long-time lawyer in favour of a best interests lawyer in the Children's Court on the basis that Tom was not capable of giving instructions.

Prior to Tom seeking a review through VCAT, neither the Court nor DHHS considered he was incapable of giving instructions. If DHHS had considered him incapable of giving instructions, it could have applied to the Court for his legal representation to be removed or that a best interests lawyer be appointed. A best interests lawyer is a diminished form of legal representation because the lawyer is bound to act in the child's best interests and not on their instructions. This means the best interests lawyer could advocate for something the child does not want.

The Children's Court refused to hear the application, there being no proceedings in that Court. DHHS then applied to VCAT for the appointment of a litigation guardian.

This would be a further diminishment of Tom's right to be heard in proceedings affecting his life. Tom would be removed from the proceedings and the litigation guardian would be the one giving instructions to a lawyer on what that person considers to be in Tom's best interests.

Victoria Legal Aid referred to the right for a child to be heard under article 12 of the Convention on the Rights of the Child, which underpins the legislative scheme for the legal representation of children under of the *Children, Youth and Families Act 2005* (Vic).

Victoria Legal Aid used the Victorian Charter to raise arguments in relation to rights to equality before the law (section 8), protection of a child's best interests (section 17) and a fair hearing (section 24).

Following Victoria Legal Aid's extensive detailed submissions, the Department withdrew their interlocutory applications for a litigation guardian and for Tom's application for review to be struck out.

As a result, Tom can continue to participate in the proceedings about his home and carers and continue to be legally represented by Victoria Legal Aid on his instructions.

Reducing the risk of imprisonment for unpaid fines

The Victorian Charter has also been the foundation for another significant development in reducing the disproportionate impact of fines and infringements on disadvantaged members of the community, including people experiencing homelessness, mental health issues and substance dependence. The case of *Victoria Police Toll Enforcement v Taha; State of Victoria v Brookes*²⁰ demonstrates the importance of using human rights to demonstrate unfairness in the law, and prompted legislative change with broader benefits for the Victorian community.

Victorian Charter contributes to a fairer fines system for people experiencing hardship

Mr Taha has an intellectual disability and had accumulated fines totalling \$11,000. At the time of sentence, the magistrate was unaware of his intellectual disability and ordered that he serve 80 days jail for failure to pay pursuant to the *Infringements Act 2006* (Vic). Even when the disability was subsequently identified, the absence of an appeal right in the legislation prohibited the magistrate from being able to revisit the client's circumstances and review the decision.

Given the constraints of the infringements legislation, an application for judicial review was made to the Supreme Court. One of the issues under consideration was whether the Victorian Charter supported an interpretation that imposed a duty on a Magistrate to inquire as to Mr Taha's particular circumstances before making an imprisonment order.

The majority found that a unified construction of the relevant provision under the infringements legislation was supported by the Victorian Charter – requiring the rights to equality, liberty and a fair hearing to be taken into account as part of the interpretive process. In addition, Justice Tate found that the right not to be arbitrarily detained includes, among other things, a lack of proportionality. Her Honour found that an interpretation which required individuals to draw attention to their circumstances (such as a disability) would be incompatible with the right to equal protection before the law, as it would have the effect of unreasonably disadvantaging people with an impairment.

Ultimately, the Court of Appeal upheld the Supreme Court ruling that a magistrate is under a duty to inquire into the circumstances of an infringement offender, including whether the person has a disability or whether there are other special circumstances, before making an imprisonment order against them for a failure to pay fines under the *Infringements Act*.

On an individual level, two people avoided being imprisoned for unpaid fines, but the systemic impact of this decision in building a fairer fines system for Victorians is much broader. Following *Taha*, Magistrates are aware of their duty to inquire into whether a person had special circumstances as well as whether imprisonment would be unjust, disproportionate or excessive, in light of all the circumstances.

The decision in *Taha* was also followed by legislative reform, which introduced a limited right of rehearing for people facing imprisonment for unpaid fines where certain circumstances – including links between the offending and mental health issues, substance dependence and homelessness, or the fact that imprisonment would be excessive, disproportionate and unduly harsh – had not been taken into account or were not before the Court at the time the hearing.

Taha demonstrates how the Victorian Charter provided a basis to improve an aspect of the law that was causing the imprisonment of vulnerable people without any right of review or appeal.

²⁰ [2013] VSCA 37.

Access to public places and community for people with disability

The case of *Slattery v Manningham City Council*²¹ demonstrates the important role of the Victorian Charter in allowing individuals to have their human rights taken into account in decisions affecting them, and for systems change to improve human rights training for public authorities.

Victorian Charter upholds Paul's access to local council facilities

The Manningham City Council banned Paul – who was 67 years old at the time – from all buildings that it owned, operated, or managed, in part because it alleged he was disruptive at local council meetings and abusive towards staff. Paul has bipolar disorder, post-traumatic stress disorder, compulsive disorder, an acquired brain injury and a hearing impairment.

Although the Council had concerns about Paul's behaviour, it had other options than simply banning him from more than 200 council-owned, operated, or managed buildings in the City of Manningham. Paul couldn't even take his grandchildren to the local swimming pool.

VLA assisted Paul to lodge a disability discrimination complaint under the *Equal Opportunity Act 2010* (Vic) in VCAT, highlighting our client's rights to freedom of expression, participate in public life and equality before the law under the Victorian Charter.

VLA submitted that Paul's case demonstrated a lack of compliance with section 38 of the Victorian Charter as the local council minutes revealed that no consideration was given to our client's human rights when deciding to exclude him from a range of public facilities. At the hearing, the Chief Executive Officer at the Council gave evidence that he had never received training on the Council's rights and responsibilities under the Victorian Charter and was not aware of anyone else at the Council receiving Victorian Charter training.

VCAT found that the Council had discriminated against Paul and ordered the Council to pay him \$14,000 in compensation. VCAT also ordered compulsory training on the Victorian Charter for Manningham City councillors, chief executive and directors (this was the first known remedy of this kind). A further declaration was made that the Council breached Mr Slattery's human rights to take part in public life (section 18), freedom of expression (section 15) and the right to equality (section 8). Following the decision, Mr Slattery was able to participate more fully in public life through accessing council facilities in his local area.

Paul said that the decision helped him move on with his life:

"I felt demeaned and embarrassed by the ban, and I wanted to fight it to highlight discrimination and help other people in similar situations. I'm really proud that this decision is a landmark in establishing the rights of other people like myself who have a disability".

These examples highlight the role of the Victorian Charter to improve systems and processes, to enable people to realise their rights, and to provide useful guidance for service providers in a way which better protects people's human rights.

²¹ [2013] VCAT 1869 (30 October 2013).

5. Stronger human rights protections across Australia

There are significant opportunities for the Australian Government, government agencies and public authorities to ensure that people's human rights are better protected and to improve internal consideration of human rights.

An Australian Charter would provide important guidance for relevant decision-makers and public authorities on how to embed human rights considerations across all Federal laws, including laws which disproportionately affect our clients, such as social security, discrimination, family, criminal and migration law. Similar to how the Victorian Charter has been implemented at a state level, an Australian Charter could play a significant role in embedding a rights respecting culture and to better protecting the human rights of all people affected by government decision-making.

5.1 Need for better consideration of human rights at a Federal level

This section outlines our clients' current experiences where they have limited avenues to ensure their human rights are taken into account. It highlights the need for an Australian Charter.

Meaningful engagement with human rights in migration cases

Australia's migration laws provide an example where a fairer, more transparent decision-making system could have a substantial impact on improving the lives of people awaiting visa determinations or decisions about where they can live. Through our casework, we have gained a deep understanding of some of the gaps in existing laws which result in suffering and hardship for our clients.

The following client story highlights the significant impact of long-term and indefinite detention on people's mental health and wellbeing, and the need for consideration of human rights when making visa decisions in a timely manner to ensure people can live with dignity and in safety in our communities.

Majid's immigration detention has severely impacted his mental health and wellbeing

Majid is a 40-year-old man who has spent the past 6 years of his life in immigration detention, with no reprieve in sight. He has never been granted a bridging visa since arriving in Australia in 2013.

Majid came to Australia as a result of sectarian violence. He also suffered severe abuse and has been diagnosed with PTSD and depression by multiple psychiatrists. Majid has nightmares in which he relives the trauma of witnessing his friends die and his own experiences of being sexually abused. Majid is Christian and hopes to one day be able to practice and observe his faith in a Christian community outside immigration detention.

Majid's mental health has deteriorated in immigration detention. Psychiatrists have serious concerns about Majid's mental health if he stays in indefinite detention and have recommended a safe therapeutic environment as necessary for him to recover.

Victoria Legal Aid helped Majid to request the Minister for Immigration intervene in his case and grant him a bridging visa in light of the recommendations of medical professionals and the Commonwealth Ombudsman. However, the Minister's powers to intervene are discretionary and non-compellable, meaning there is no way to ensure the Minister even considers Majid's case, let alone takes substantive action.

The absence of Federal human rights legislation, as well as the lack of any prescribed maximum time frame for detaining a person in immigration detention, makes challenging Majid's detention extremely difficult. Departmental officials are not legally required to take into account Majid's human rights in deciding whether he should be granted a visa. Consequently, despite his vulnerability and trauma history, Majid continues to languish in indefinite detention at risk of his mental health deteriorating further.

Targeted processes for ensuring people with disability access adequate supports

VLA, along with other legal aid commissions around the country, have witnessed the harm that failures of the NDIS can cause for our clients in detention. The NDIS has the potential to secure significant benefits for hundreds and thousands of Australians living with a disability, their friends and families. However, through our casework, we see firsthand the harm caused when delays in the NDIS planning process, system interface issues or market failure which leave our clients at risk of serious harm.²²

Our client Alex is currently in prison not because of the seriousness of his offending, but because of failures in the disability service system. His story highlights the real impact on people who have no avenue to obtain fairer, more supportive outcomes because of existing gaps in our human rights frameworks.

Alex is stuck in prison because he has nowhere else to go

Alex is a young person with a number of complex cognitive and developmental disorders.

Alex was charged with non-violent offending and found unfit to plead. He was placed on a non-custodial supervision order and continued to live at home with his family.

Over the next few months, there were some incidents in which Alex put himself in danger and the police were called. Alex was brought before a judge who decided there was an unacceptable risk that Alex might reoffend or hurt a family member or himself. He was placed on a custodial supervision order as there were no other options available for Alex.

There were no available placements in treatment facilities which could support Alex and his disability. Because there was nowhere for Alex to go, he was sent to prison. For almost a month he was held in 23-hour isolation, locked in a tiny cell in conditions which had a detrimental impact on his mental health.

Alex has now been in prison for months. He is acutely distressed and barely eating. His ability to communicate has been affected and he routinely engages in self-harming behaviour. The situation is very distressing for his parents, who are his strongest personal support but have been unable to visit him and have only been able to speak with him on the phone once.

Alex's doctors say his time in prison will harm him further and hinder any progress he has made from treatment.

Since he has been in prison, disability advocates and his NDIS support coordinator have tried to find suitable accommodation for Alex in the community. There have been delays caused because of the lack of available specialist disability accommodation for young adults like Alex as well as misunderstandings about Alex's eligibility for this accommodation under the NDIS. Although Alex is still young, he no longer qualifies for specialist accommodation services which supported him when he was a child. Alex's NDIS plan now includes funding for specialist disability accommodation, but there is no suitable specialist disability accommodation for him to live in.

Alex will continue to stay in harmful conditions in prison until a placement in a suitable specialist disability accommodation becomes available for him.

²² See National Legal Aid 'Putting people first: Removing barriers for people with disability to access NDIS supports: Submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee' (4 November 2019) <https://www.legalaid.vic.gov.au/about-us/news/ndis-participants-need-clearer-timeframes-and-review-rights>; Victoria Legal Aid, 'Ten stories of NDIS 'Thin Market': Reforming the NDIS to meet people's needs: Submission to the Department of Social Services and the National Disability Insurance Agency's NDIS 'Thin Markets' Project' (June 2019) <https://www.legalaid.vic.gov.au/about-us/news/reforming-ndis-to-meet-peoples-needs>.

Barriers to people with disability being able to lead a dignified life

About half of VLA's clients rely on social security payments from Centrelink to pay for their basic daily expenses. In our practice experience, we have seen firsthand how existing systems to access various Centrelink benefits can present significant barriers to people who need support, and the unfair impact this has on our clients.

Our client Sophie has been unable to navigate the Disability Support Pension's program of support requirements and is too unwell to participate in this program, which means that she cannot access the support she needs to make ends meet. Sophie's story highlights how blanket policies can cause hardship without avenues for decision-makers to take into account the individual circumstances of a person's life and how government policies impact on human rights.

Sophie unfairly denied access to the Disability Support Pension

I am 54 years old. I worked for 35 years in the electricity industry. Having worked in the corporate sector my whole adult life, I never needed any support from the Government. About two years ago, I became unwell and was suffering from a number of debilitating conditions. My conditions mean that I have trouble walking, sitting for long periods, driving and sometimes even getting out of bed in the morning. My husband has had to leave work to look after me.

My experience of applying for the Disability Support Pension has been absolutely awful. I have felt frustrated, hopeless and considered giving up. I feel an obligation to fight because there has to be justice.

I believe that the system has to be fair. It has to be focused on helping those who most need it to get the right outcomes. It should be easy to navigate, rather than causing even more stress for those who are already suffering.

In my situation, I ticked every single box to get the Disability Support Pension. When I got through all of those hoops, Centrelink told me that my application was rejected because I had to participate in a program for 18 months to improve my capacity to work before I could get the support I needed.

This was the first time I heard about this – I had no idea about it before. They don't tell you about it at the start of the application process. The worst part is that 18 months before I applied for the pension, I was still working, so I couldn't have participated in any kind of Centrelink program. The requirement to do this unfair program is illogical and just delays people getting the support they need.

All of this time that I've been fighting to get the support I need, I've been put on Newstart. It's just not enough to survive, especially for someone living with disability or illness. On top of that, I have to prove that I'm looking for work, even though I'm too sick to work.

Dealing with Centrelink has been a nightmare. Most people I talk to can't give me answers or they tell me something different to what I've been told before. Everywhere I turn I hit a brick wall. It adds so much stress to my life, which makes me even more sick. It's a vicious cycle.

A fair system would not require someone who has ticked every single box to do a useless program for 18 months, just to delay getting access to the support they need. A fair system would put the needs and rights of people living with disability first.

If the Government had to consider my rights and the rights of people like me, surely it couldn't create such an unfair, illogical and unsupportive process for getting the Disability Support Pension.

I've worked all my life, hoping that if I ever needed support, it would be there for me. It's crushing to see that that's not the case. I'm fighting for justice because people living with disability and illness deserve to live with dignity.

Majid, Alex and Sophie’s stories are just a few examples of significant hardship which highlight the need for stronger human rights protections in situations where people’s human rights have not been adequately considered by decision-makers.

In difficult cases where there is no obvious solution, an Australian Charter could provide guidance to decision-makers, aid in the development of fairer policies to prevent these cases from occurring and allow people to seek a fairer outcome which respects their basic human rights.

5.2A positive model to safeguard human rights protections for all

VLA supports an Australian Charter model which sets out a list of protected rights drawn from the international human rights treaties Australia has ratified. A legislative dialogue model similar to the Victorian Charter would retain our current system for balancing power between the executive, legislative and judicial branches of government by protecting parliamentary sovereignty.

However, it is crucial that any model for an Australian Charter includes a standalone cause of action for people to enforce their human rights. While the Victorian Charter has had a positive impact, there are a range of improvements to the model which should be addressed in an Australian Charter.

For example, VLA client Ramesh was unable to bring a complaint about a breach of his human right to freedom of religion using the Victorian Charter due to the absence of a standalone cause of action. Ramesh’s story below highlights the real impact on people where existing laws provide inadequate protection.

Charter model needs an independent cause of action

When I was in prison it was hard to continue practising my religion. One issue was with showering, because I need to shower before eating or drinking for spiritual hygiene. It was an issue with the evening meal in particular. In the beginning 3 times I fasted and waited for the next morning to shower and eat, but because I’m a diabetic I really had to eat. I ate it but I cried, I was very sad because I couldn’t do it, I took for granted that I could shower anywhere before, I had done it for years. I felt like I’m not following the commandments, not a devotee, and I was feeling very sad during that period. I had to eat and feel extremely guilty and bad about it. I felt like I was doing a moral sin.

I had actually put up a form, I gave it to a supervisor, I explained how it is, but they didn’t do anything. They just made excuses after excuses. They said it wasn’t part of my religion but they weren’t looking at the rituals of my sect. Even in my application I put the website of my sect that explains everything, I said go to the ritual section and you’ll see everything, this is the sect I believe in. To be honest I felt that I am being sentenced again, again and again. They were saying “we’re not listening to you, you’re a liar”. Like they’re torturing me, like you’re screaming but no one is listening.

I wanted to know about my rights to practice my religion and I learned that the protection under discrimination law is not clear, because it only applies to “services”. I wanted to raise my human rights but I was told I couldn’t do that without another claim. I was so scared to raise my rights in case the prison treated me more badly, I didn’t want to do it unless I knew my claim was strong. In the end I didn’t make a complaint, I just had to wait until my sentence ended.

We recommend that the AHRC consider previous recommendations by Victoria Legal Aid and as part of the 2015 Review of the Victorian Charter which would significantly improve their operation and effectiveness of an Australian Charter model,²³ including:

- Expanding VCAT's ability to consider human rights issues pursuant to the Victorian Charter;
- Introducing a standalone cause of action to pursue breaches of the Victorian Charter;
- Clarifying legal provisions that cause confusion and complexity for practitioners;
- Improving the accountability of public authorities, particularly non-government agencies exercising public functions;
- Improving training and resources for magistrates, the judiciary, Victoria Police and legal practitioners on Charter rights and obligations; and
- Giving courts and tribunals discretion about the notice and intervention functions under the Charter.²⁴

We also note further matters for the AHRC to consider as part of its Free and Equal inquiry, including:

- **Rights to self-determination and Aboriginal and Torres Strait Islander cultural rights:** Meaningful consultation with Aboriginal and Torres Strait Islander peoples on protecting core rights to self-determination and specific cultural rights is critical to ensuring the Australian Charter respects and reflects the role of Aboriginal and Torres Strait Islander peoples as the First Nations peoples of our country.
- **Limitations clause for derogable rights:** An Australian Charter could include a general limitations test similar to section 7(2) of the Victorian Charter which establishes when it may be justified to limit a right where reasonable, necessary and proportionate (taking into account all relevant circumstances). However, any proportionality test should not apply to non-derogable rights (e.g. the right to freedom from slavery).
- **Standalone cause of action:** A person whose human rights have been breached should be able to challenge the relevant government decision or action, including a standalone cause of action for breaches of human rights to be resolved through conciliation before the AHRC and escalated to a court or tribunal if unresolved.
- **Interpretation role for courts:** Courts should be required to interpret and apply Federal laws consistently with human rights under the Australian Charter, including considering relevant international guidance.
- **Access to effective remedies:** An Australian Charter should provide a range of enforceable and effective remedies for breaches of human rights, including appropriate compensation, to support them to recover and move on with their lives.

The development of an Australian Charter presents an opportunity to review what is working well in state and territory human rights legislation and where improvements can be made as a possible starting point for an Australian Charter model.

²³ Above n 3 & 5.

²⁴ Above n 3, 3.

6. Additional human rights protections to promote cultural change

Victoria Legal Aid recognises that there are a range of further measures required to ensure that people's human rights are properly respected, protected and fulfilled.

We support a range of measures to improve the positive protection of human rights in Australia, including:

- **Greater incorporation of human rights into laws and policies**, through incorporating human rights obligations in other legislation such as administrative law, objects clauses and statutory interpretation;
- **Stronger support for human rights cultural change**, by embedding it into public service guidelines and frameworks and adequately resourcing public education, resources and training;
- Additional avenues for **redress**, including making avenues available for redress and compensation through tort law, and enhancing the AHRC's functions to address systemic injustice
- **Constitutional reform** to ensure Aboriginal and Torres Strait Islander people's views and voices are heard and have influence in all government decision-making affecting them;
- **Strengthening parliamentary scrutiny processes** and improved policy development to ensure human rights compliance; and
- **Modernising and consolidating Federal discrimination laws** to improve existing protections for people affected by sexual harassment, discrimination and vilification.²⁵

These are important measures to better protect human rights. However, these measures alone will not bring about long-term systemic change or provide enduring safeguards for the protection of human rights into the future. These measures should be *complementary* to the introduction of an Australian Charter and not viewed as an alternative.

²⁵ See above n 2.