

# Charting the Right Course

Submission to the Inquiry into the Charter of Human Rights and Responsibilities

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# 1. Executive summary

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## 1.1 Overview

The PILCH Homeless Persons' Legal Clinic (**HPLC**) welcomes the opportunity to make a submission to the Scrutiny of Acts and Regulations Committee (**SARC**) as part of the Inquiry into the Charter of Human Rights and Responsibilities.

We commend the Victorian Government for its good faith, evidence-based approach to reviewing the operation and impact of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**Charter**).

This submission addresses aspects of the Charter's operation that, as an organisation that provides pro bono legal services to clients who are homeless or at risk of homelessness, the HPLC has direct experience with and is well placed to comment on.

This submission contains 20 detailed case studies of clients for whom the Charter has been used to negotiate and advocate.<sup>1</sup> This work has prevented 42 people being evicted from social housing<sup>2</sup> into homelessness. Forty-two HPLC clients and their family members, including 21 children, have avoided homelessness (and the personal, social and economic consequences that come with it); and the State has avoided adding 42 people to an already overstretched emergency accommodation system.<sup>3</sup> This exemplifies the way in which the Charter has been used to bring about just, fair and efficient outcomes since its commencement. Importantly, in over 50 percent of the case studies presented in this submission, matters were resolved via negotiation. In only nine did the Victorian Civil and Administrative Tribunal need to make the final determination. Annexure A shows a summary of these Charter-based outcomes.

## 1.2 Terms of Reference

Informed by our evidence and experience, as well as consultation with consumers and service providers and use of the Charter in our advocacy, policy and capacity building work, the HPLC has prepared this submission with reference to the following Terms of Reference (**TOR**):

- ▶ the effects of the Charter on the provision of services, and the performance of other functions, by public authorities (TOR 5(c));
- ▶ the effects of the Charter on statutory provisions and the role of courts and tribunals (TOR 5(a), (b) and (d));
- ▶ the overall benefits and costs of the Charter (TOR 6); and

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<sup>1</sup> In addition, this submission contains two case studies (in parts 4.1 and 4.2) that have been provided by workers in the housing and homelessness sector. Names and personal details of all clients have been changed.

<sup>2</sup> "Social housing" includes public housing and the range of housing provided by community housing organisations, including crisis and transitional housing. In June 2009, Victorian public housing had 65,207 units of stock and the community housing sector had another 8,347 units being used for long-term housing. See Family and Community Development Committee, *Inquiry into the Adequacy and Future Directions of Public Housing in Victoria* (September 2010), xxviii and 79 (**Victorian Public Housing Report**).

<sup>3</sup> See, eg Australian Institute of Health and Welfare, *Government-Funded Specialist Homelessness Services: SAAP National Data Collection Annual Report 2008–09 (Victoria Supplementary Tables)* (April 2010) 27 (available at: <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442464950>). Table 7.3 shows figures in relation to 9,200 "closed support periods" in Victoria in 2008–09. It looks at what type of support clients needed when they presented at government-funded specialist homelessness services. These figures show that 21.6 percent of clients requiring accommodation under the Supported Assistance Accommodation Program or the Crisis Accommodation Program (i.e. emergency accommodation) did not have that support provided.

- ▶ options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria (which includes consideration of whether additional rights should be included in the Charter and whether auditing or remedies are needed) (TOR 1(a), 3, 4, 5(e) and 7).

Because we are relying on the evidence-base that stems from our provision of services to inform this submission, we have not addressed TOR 1(b), 1(c) or 2.

### 1.3 Summary of key points and recommendations

The HPLC's work has shown that the Charter is a practical and effective tool for people who are struggling in our community, and for the people who support them – including advocates, service providers and workers in both core and functional public authorities. We are increasingly seeing core and functional public authorities turning to Charter-based frameworks for guidance in making difficult decisions in the face of limited resources and competing priorities. Based on our direct experience, the HPLC can say with confidence that the formal 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 Charter has had a clear and positive impact on the delivery of public services and the operation of public authorities and, therefore, on outcomes for Victorians. Much of this impact has been achieved through negotiation and education.

While negotiated outcomes and systemic changes in policies and practices are where the HPLC considers the Charter has its greatest impact, these results would not have been so efficiently and effectively delivered (and are unlikely to have occurred at all), in the absence of the other obligations and mechanisms under the Charter's dialogue model. Formal protection of human rights, in legislation which places obligations on Parliament and public authorities and contains a role for courts and tribunals, is imperative for the effective delivery of justice and fairness in Victoria. Without all three elements of this model, we would not have seen the positive outcomes that have been delivered to Victorians since 2007.

In the Charter's early days, one of the HPLC's consumers commented: "Our human rights don't exist. We are homeless and it [is] looked upon as our fault. Sometimes it is, other times not; but if someone keeps falling should we pick them up or walk straight over them ..."<sup>4</sup> Legislative protection of human rights in Victoria has made it more likely that Victoria will be a fair and equal society where people are "picked up" rather than "walked straight over".

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<sup>4</sup> Comment by participant at PILCH Homeless Persons' Legal Clinic Consumer Forum, 24 June 2008, Melbourne Town Hall.

By way of summary, the HPLC's key points and recommendations are as follows:

- ▶ the Charter has brought about gradual but noticeable improvements in the provision of services by public authorities. Many of these improvements have been generated through education and negotiation and better, more transparent decision-making processes;
- ▶ the dialogue model is key to the Charter's effectiveness – the roles of each of Parliament, public authorities and courts and tribunals are essential to the provision of accessible, efficient and fair outcomes to Victorians;
- ▶ non-legislative protections, such as service standards, with no role for courts or tribunals would not be as effective as the Charter at addressing systemic injustice;
- ▶ assessing the costs and benefits of the Charter requires balancing of direct costs with the wider flow-on benefits generated across the community. We encourage SARC to consider costs that are avoided as a result of better decision-making and processes within services providers (for example, the HPLC has used the Charter to negotiate and advocate to prevent 42 people, including 21 children, from being evicted from social housing into homelessness); and
- ▶ the regime for protecting and upholding rights and responsibilities in Victoria should be strengthened and improved in the following ways:
  - ▶ inclusion of protections of economic and social rights in the Charter;
  - ▶ inclusion of an independent cause of action in the Charter;
  - ▶ formal monitoring of public authorities' human rights compliance; and
  - ▶ ongoing Charter-based education, training and resources.

## 2. About PILCH and the Homeless Persons' Legal Clinic

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The Public Interest Law Clearing House (Vic) Inc (**PILCH**) is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its work, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice;
- ▶ foster a strong pro bono culture in Victoria; and
- ▶ increase the pro bono capacity of the legal profession.

The HPLC is a project of PILCH and was established in 2001 in response to the unmet need for targeted legal services for people experiencing homelessness.<sup>5</sup> The HPLC has the following aims and objectives:

- ▶ to provide free legal services to people who are homeless or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;
- ▶ to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- ▶ to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- ▶ to reduce the degree and extent to which people experiencing homelessness are disadvantaged or marginalised by the law; and
- ▶ to use the law to construct viable and sustainable pathways out of homelessness.

Free legal services are offered by the HPLC on a weekly basis at 12 outreach locations that are already accessed by people experiencing homelessness, including crisis accommodation centres and social and family services.<sup>6</sup> Since its establishment in 2001, the HPLC has assisted almost 5000 people at risk of, or experiencing, homelessness in Victoria.

In addition to providing legal services, the HPLC undertakes a range of law reform and public policy activities. These activities are intended to identify and seek to change laws and policies that impact in a disproportionate or discriminatory way on people experiencing homelessness.

The HPLC also conducts a range of capacity building activities, including community legal education and consumer participation activities.

In 2005, the HPLC received the national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights. In 2009 it received a Melbourne Award for contribution to community in the City of Melbourne.

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<sup>5</sup> See <http://www.pilch.org.au>.

<sup>6</sup> Host agencies include Melbourne Citymission, Café Credo, The Big Issue, the Salvation Army, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, VACRO, Koonung Mental Health Centre, HomeGround Housing Services, Northside Geelong and Salvation Army St Kilda Crisis Contact Centre. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Baker & McKenzie, Clayton Utz, Corrs Chambers Westgarth, DLA Piper, Freehills, Mallesons Stephen Jaques, Minter Ellison and Harwood Andrews.

## 3. Homelessness, the Charter and the HPLC

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### 3.1 Homelessness in Victoria and its causes

Homelessness continues to be a significant problem in Victoria. On census night in 2006, approximately 20,500 Victorians were homeless, including approximately 6,800 children and young people.<sup>7</sup> Homeless Victorians fall into three broad groups, including those who are:

- ▶ sleeping rough (living on the streets);
- ▶ living in temporary accommodation, such as crisis accommodation and refuges or staying with friends or relatives; and
- ▶ staying in boarding or rooming houses or caravan parks with no secure lease and no private facilities.<sup>8</sup>

The causes of homelessness are complex and varied. They include an acute shortage of public housing, unemployment, poverty, discrimination, family violence, as well as individual hardships such as physical and mental health issues, substance dependence, contact with the criminal justice system and experiences with state care and child protection systems.<sup>9</sup>

In many cases, there are interrelated causes – people may be experiencing more than one of, for example, domestic violence, poverty, mental illness and substance dependence. In other cases, people are simply facing homelessness as a result of job loss and difficulty accessing affordable housing.<sup>10</sup>

In May, the Victorian Minister for Housing, the Honourable Wendy Lovell, announced that the state wide public housing waiting list has fallen for the second successive quarter under the Victorian Coalition Government. Minister Lovell acknowledged that this decrease is “easing the pain for some of Victoria’s most vulnerable families”. At the end of March 2011, there were still 37,430 applicants on the waiting list for public housing.<sup>11</sup> The 2010 Inquiry into the Adequacy and Future Directions of Public Housing in Victoria (**Victorian Public Housing Report**) observed that tenants who either live in or seek to live in public housing are an “increasingly economically and socially disadvantaged” group.<sup>12</sup>

It is in this social and economic context that the HPLC delivers services to Victorians experiencing or at risk of homelessness, including through Charter-based advocacy, case work and negotiation.

### 3.2 The Charter and homelessness

Currently, the Charter does not directly protect the right to adequate housing (or other economic and social rights). However, homelessness (and the risk of it) can bring with it a range of personal, social, economic and legal problems, to which a number of the Charter’s protected civil and political rights are highly relevant. These include:

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<sup>7</sup> Chris Chamberlain and David MacKenzie, Australian Bureau of Statistics, *Australian Census Analytic Program: Counting the Homeless* (2006) available at [www.abs.gov.au](http://www.abs.gov.au); Chris Chamberlain and David MacKenzie, Australian Institute of Health and Welfare, *Counting the Homeless 2006: Victoria* (2006); Victorian Public Housing Report, above n 2, 33 citing Department of Human Services, *Creating Connections, Youth Homelessness Action Plan Stage 2: 2006 – 2010*, 2006, 25ff and 35 ff, which notes that “Young people in 2006 were identified as making up 40 percent of those seeking help from homelessness services” (at iii).

<sup>8</sup> See Victorian Public Housing Report, above n 2, xiii–xiv.

<sup>9</sup> Ibid 58.

<sup>10</sup> Ibid.

<sup>11</sup> Minister for Housing, *Public housing waiting list numbers improving* (5 May 2011) (available at: <http://www.premier.vic.gov.au/media-centre/media-releases/862-public-housing-waiting-list-numbers-improving.html>).

<sup>12</sup> Victorian Public Housing Report, above n 2, xxi.

- ▶ the right to equality and non-discrimination (section 8);
- ▶ the right to life and not to be arbitrarily deprived of life (section 9);
- ▶ the protection from cruel, inhuman or degrading treatment or punishment (section 10);
- ▶ the right to freedom of movement (section 11);
- ▶ protection from arbitrary or unlawful interference with a person's home, privacy, family or correspondence (section 13(a));
- ▶ the protection of families and children (section 17);
- ▶ the right to take part in public life (including to vote) (section 18);
- ▶ the right to enjoy culture, to declare or practise religion and to use your language (section 19);
- ▶ the right to liberty and security of person (section 21); and
- ▶ the right to a fair hearing (section 24).<sup>13</sup>

In addition to experiencing a range of vulnerabilities, people experiencing or at risk of homelessness are often required to interact with a range of different service providers. In this context, the obligation on public authorities (including private sector organisations that perform functions of a public nature), to act compatibly with human rights and to take human rights into consideration in decision-making, is crucial in making sure that Victoria's most marginalised and disadvantaged citizens are provided with fair and just outcomes.<sup>14</sup>

This submission discusses the personal and social benefits of Charter-based decision-making, as well as the economic benefits of the requirement to properly consider human rights. These benefits are particularly apparent in the housing and homelessness sector, where an effective strategy to end homelessness requires "early identification and diversion of people away from homelessness by working to maintain existing housing and by intervention support".<sup>15</sup>

The HPLC's work shows that the Charter is an essential component of this strategy. The Charter's role in preventing homelessness is just one aspect of the way in which it delivers effective, accessible, efficient and fair outcomes for Victorians.

The Charter will not, of course, always prevent eviction into homelessness. It does, however, make sure that all members of the Victorian community – including the most vulnerable – are treated with the dignity and respect that is vital to our society. It is not the "be-all and end-all of justice and fairness for Victorians,"<sup>16</sup> but in the context of the provision of services to Victorians at risk of homelessness it has had a clear and positive impact.

### 3.3 A human rights framework in practice

The HPLC has engaged in human rights based service provision since its establishment in 2001. What this means in practice is that the HPLC develops and executes its case work, advocacy and capacity-building in accordance with the following key human rights principles:

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<sup>13</sup> See, eg, Victorian Public Housing Report, above n 2, 39.

<sup>14</sup> See, eg, Bell J in *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009), [1]: "[d]isadvantaged people in need of social housing and at risk of homelessness are among the most vulnerable in the community. Their human rights are imperilled by their circumstances."

<sup>15</sup> HomeGround Services, *Homelessness 2020: The Victorian Homelessness Strategy – HomeGround Submission – Focusing on What Works* (November 2009), 1 (available at: <http://www.homeground.org.au/assets/homelessness-2020-submission-focusing-on-what-works2.pdf>).

<sup>16</sup> Robert Clark MP, *Towards a Just and Fair Victoria*, 8 December 2010 (edited version of speech opening Human Rights Week panel discussion at Telstra Theatre, Exhibition Street, Melbourne) (available at: <http://www.robertclark.net/news/towards-a-just-and-fair-victoria/>).

- ▶ treating people with dignity, respect, equality and non-discrimination;
- ▶ giving primacy to the client's voice and empathising with the client;
- ▶ adopting a "whole of person" approach to service provision;
- ▶ promoting client empowerment and participation; and
- ▶ engaging in systemic advocacy and public education.

Human rights based service provision is a coherent framework with international recognition – it makes sense to use it as the foundation for policies and practices when providing people with services.

The 2007 commencement of the Charter has strengthened this framework. The HPLC uses the Charter and human rights principles in the four aspects of its work set out below.

- ▶ Direct case work – as discussed in detail throughout this submission, we have used the Charter in over 20 matters to advocate and negotiate on behalf of people experiencing or at risk of homelessness. In addition to the case work for specific individuals, as mentioned above, a human rights framework is used in the development and execution of the HPLC's services.
- ▶ Consultation and engagement – key to the HPLC's human rights based service provision is the informed participation of the HPLC Consumer Advisory Group (**CAG**); a group made up of people with a current or past experience of homelessness who provide the HPLC with comments, guidance and input in relation to our service delivery and advocacy projects. In addition, the HPLC has undertaken extensive consumer consultation as part of the 2005 Victorian Human Rights Consultation; the 2009 National Human Rights Consultation; and the 2010 Victorian Government consultation regarding a homelessness strategy for Victoria.<sup>17</sup>
- ▶ Advocacy and policy work – the Charter's clear formulation of human rights principles and obligations has provided a strong foundation for the HPLC's policy work, which seeks to identify and change laws and policies that have a disproportionate or discriminatory impact on people experiencing homelessness. A specific example of this is discussed in part 4.1 in relation to the criminalisation of sleeping in cars by a local council.
- ▶ Training and capacity building – the HPLC has provided Charter-based training to over 500 people in the housing and homelessness sector (including SHASP workers, regional DHS workers, transitional housing managers, homelessness lawyers, regional homelessness networkers and providers of services in the mental health, aged care, child youth and families, housing and homelessness, disability, domestic violence and drug and alcohol sectors). Much of this training provided guidance to non-legal workers about how to use the Charter in the housing and homelessness context, including both in terms of understanding and complying with obligations under the Charter and as a tool when advocating for clients in social housing.

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<sup>17</sup> See PILCH Homeless Persons' Legal Clinic: *Homelessness and Human Rights in Victoria: Submission to the Human Rights Consultation Committee* (August 2005); *Promoting and Protecting the Human Rights of People Experiencing Homelessness in Australia: National Human Rights Consultation Submission setting out the views and comments of people experiencing homelessness about human rights in Australia* (15 June 2009) (**HPLC NHRC Consumer Report**); and *Victorian Homelessness 2020 Strategy: Summary of consumer consultations* (June 2010) (available at <http://www.pilch.org.au>).

## 4. The effect of the Charter on the provision of services by public authorities

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**This section addresses Term of Reference 5(c).**

As a provider of direct services to disadvantaged Victorians, the HPLC can say first-hand that the Charter has had a positive effect on the provision of services and the performance of other functions by public authorities.

In our work, the aspect of the Charter that we turn to most frequently is the obligation on public authorities to act compatibly with human rights and to give proper consideration to human rights in decision-making processes.<sup>18</sup>

This obligation has brought about both:

- ▶ better outcomes for individuals (including by avoiding eviction where such eviction would have been an unlawful or arbitrary interference with a person's home and, in many cases, would have been incompatible with the rights of children and the protection of families under the Charter); and
- ▶ gradual, but noticeable, improvements in the quality of services provided to clients and the processes and practices that public authorities follow in delivering services and making decisions (in particular, refer to series of case studies in part 4.1 below).

In this part 4, we provide nine case studies of clients that the HPLC has used the Charter to assist. Based on this direct case work, the HPLC's strongly held view is that, in terms of public authorities' provision of services and performance of other functions, the Charter has:

- ▶ improved decision-making processes and practices within government and public authorities;
- ▶ encouraged negotiated outcomes, rather than litigation;
- ▶ provided decision-makers with a helpful framework for making tough decisions;
- ▶ provided an impetus for best practice improvements, including through training and education, and been a catalyst for improvements that would not otherwise have occurred; and
- ▶ not unreasonably constrained public authorities' decisions.

Each of these points is discussed in more detail below.

### 4.1 Improved decision-making processes and practices within government and public authorities

Through our case work and dealings with both core and functional public authorities, we have seen a gradual but noticeable improvement in the decision-making processes, practices and policies of these entities.

The public authority that the HPLC most commonly deals with is the Office of Housing (OOH).<sup>19</sup> A number of clients are also living in short-term or transitional accommodation provided by non-government entities that are providing affordable housing or homelessness services on behalf of the State and are therefore identified as functional public authorities.<sup>20</sup>

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<sup>18</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 38.

<sup>19</sup> The Office of Housing is a division of the Department of Human Services that has responsibility for the provision of housing assistance programs, including social housing and homelessness support services. The OOH is officially called the Housing and Community Building Division, however, in practice it is still called the Office of Housing. See Victorian Public Housing Report, above n 2, xiv.

<sup>20</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 4(1)(c). See, eg, Victorian Public Housing Report, above n 2, xxviii, which states that, in June 2009, Victorian public housing had 65,207 units of stock and the community housing sector had another 8,347

In addition to improved decision making processes in relation to individual clients, through our advocacy work, the HPLC has also observed more effective, well-considered development of policies by public authorities.

### Core public authorities

The series of case studies below each deal with a similar factual situation – a client who had been living in public housing with a partner or family member, but not listed as a tenant, was faced with eviction when the listed tenant died.

The *Public Housing Policy and Procedure Manuals (OOH Policy Manuals)* provide practical and procedural guidance for front-line housing workers.<sup>21</sup> Each manual covers a relevant area of public housing. The OOH Transfer of Tenancy Manual requires a person applying for a transfer of tenancy (i.e. for the lease to be transferred into his or her name) to demonstrate 12 months continuous residency at the property via inclusion in the rental rebate.<sup>22</sup>

In late 2006, just prior to the Charter's commencement, a man and his two children were evicted after their partner and mother died, because – consistent with the OOH Transfer of Tenancy Manual – the father could not establish that he had been living in the property continuously for 12 months with reference to the rental rebate.

In early 2011, since the Charter has started to entrench itself in the decision-making processes of public authorities, two men, both of whom had experienced mental health problems, and a teenage girl, avoided eviction when the Charter was used to question whether the decision-maker had given proper consideration to the clients' Charter rights in rejecting the applications for transfer. The rejection of the applications for transfer would most likely have resulted in eviction on the basis of illegal occupation of the properties, which, in light of the clients' circumstances, would have caused them to become homeless.<sup>23</sup>

The Charter provided a mechanism by which housing office staff could weigh their obligation to manage the waiting list for public housing against the needs of these individuals.

These case studies show:

- ▶ the difficulties of decision-making prior to the Charter, and the potential for this to lead to undesirable and inefficient outcomes;<sup>24</sup>
- ▶ since the Charter, decision-making processes have improved because the Charter provides a helpful framework, which means better outcomes can be achieved through negotiation; and
- ▶ staff in public authorities are growing more aware of, and more responsive to, the framework for decision-making that the Charter provides.<sup>25</sup>

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units being used for long-term housing (citing the Housing the Community Building Division, *Summary of Housing Assistance Programs 2008–09* (2010), 46). See also discussion in part 4.1 regarding the decision in *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009) on the question of whether a non-government social housing provider was a "public authority" for the purposes of the Charter.

<sup>21</sup> The Department of Human Services *Public Housing Policy and Procedure Manuals* are available at:

<http://www.housing.vic.gov.au/publications/manuals/public-housing-policy-and-procedure-manuals>. The site explains: "Each chapter within a Manual is divided into two sections, Policy and Procedures. The Policy section describes the guidelines and requirements that determine the extent to which the Department of Human Services - Housing delivers housing services within departmental and legislative boundaries. The method of implementing these housing services is described in the Procedures section of the chapter".

<sup>22</sup> Eligible public housing tenants pay reduced rent, calculated at 25% of the household income (household income includes the combined incomes of all household members 18 years of age or over). The difference between the rent charged to a public housing tenant and the market rent of their property is known as the "rental rebate": see Department of Human Services, *Types of Rent* (available at: <http://www.housing.vic.gov.au/living-in-housing/rent/types-of-rent>).

<sup>23</sup> *Residential Tenancies Act 1997* (Vic) s 344.

<sup>24</sup> See, eg, Victorian Public Housing Report, above n 2, xxv – xxvi referring to "inconsistent service provision" within public housing.

In late 2006, before the Charter commenced, this father and his children were evicted from public housing after their partner and mother passed away.

### **Pre-Charter eviction into the cycle of homelessness for man and two children**

Dan and his partner had two children aged eight and 10. They had a public housing property in regional Victoria and had lived there together on and off for several years. The relationship was tumultuous and both Dan and his partner suffered from substance dependence problems.

In 2005, Dan was incarcerated and in 2006 his partner died suddenly. Dan was released from prison on compassionate grounds so that he could care for his children after their mother's death.

The children had remained living with their mother in the public housing property while Dan was in gaol.

Upon Dan's release the DOH issued him with a Notice to Vacate on the basis that he was not the listed tenant at the property and he could not show 12 months continuous residency in the property.

Dan's support worker attempted to negotiate with OOH staff and to explain Dan and the children's hardship and the reasons why he could not establish 12 months continuous residency.

This was not successful and the DOH applied to VCAT for a possession order. This was granted by VCAT and the DOH proceeded to purchase a warrant and have Dan and the children evicted.

The family became homeless at a time when they were suffering from the grief of losing their partner and mother. They couch surfed with friends for about three or four months, during which time the children disengaged from school.

Dan was then referred to a homelessness support service. His housing worker was able to arrange transitional housing for the family and to help them to complete an application for public housing. Then, more than a year after their partner and mother had died, it was arranged that they would move back into public housing.<sup>26</sup>

In early 2011, in a similar circumstance, but where the Charter was raised by the HPLC, the Housing Appeals Office prompted the local housing office to reconsider its decision to evict this vulnerable client.

### **Young man given a second chance at (smaller) housing**

Ben had lived in public housing with his mother for 18 years. After she passed away in 2005, when he was 29, he developed depression. His business as a tradesman fell behind and he was evicted for rental arrears. Ben entered a period of ongoing homelessness, during which he stayed for a time in a caravan park and did various stints in private rental which he could not afford.

He lived with his partner on and off from 2005 until her sudden death in mid-2010. He had lived with her permanently since mid-2009 but was not listed as a resident. The Office of Housing told him he would have to move out or they would apply for possession. Ben applied for the tenancy to be transferred into his name.

This application was rejected. One of the stated reasons for this was that Ben could not demonstrate 12 months continuous residency at the property via inclusion in the rental rebate, which was one of the criteria listed in the OOH Transfer of Tenancy Policy.

<sup>25</sup> See, eg, Victorian Equal Opportunity and Human Rights Commission, *Talking Rights: 2010 Report on the Operation of the Charter of Human Rights and Responsibilities* (2011), 41 (**VEOHRC 2010 Report**), which refers to the OOH's new briefing note to assist staff when making recommendations in relation to proceedings before VCAT. The briefing note requires staff to clearly demonstrate that they have considered any restrictions on human rights in the decision-making process, including whether the limitation is reasonable and necessary or whether a less restrictive alternative is available. VEOHRC also reports that the OOH has introduced a more transparent appeals process to assist clients.

<sup>26</sup> This case study was provided by the Grampians Region Homelessness Network Coordinator.

The HPLC appealed to the Housing Appeals Office. The Charter was used to highlight Ben's hardship and the need to properly consider his circumstances before evicting him. The appeal highlighted the OOH's obligations under section 38 of the Charter and queried whether Ben's rights under section 13(a) of the Charter (not to have his home or privacy arbitrarily or unlawfully interfered with) had been given proper consideration in making the decision to reject his application for transfer.

While the appeal was on foot, as a result of the stress and grief, Ben had breakdown and was hospitalised. He was discharged under a mental health care plan, but his mental health remained fragile.

This matter was resolved without going to VCAT. After being prompted by the Housing Appeals Office, the relevant housing office indicated that they did not want to evict Ben into homelessness, but could not leave him in the three bedroom property he was in because he was a single man. Ben accepted this, saying "I'm not greedy; I just don't want to be on the streets," and willingly relocated to a one bedroom unit.

The HPLC wrote to the relevant housing workers thanking them for being receptive to their Charter-based obligations and co-operative in negotiating an outcome that met both the OOH's needs and Ben's.

Again in early 2011, the OOH's Charter obligations were raised through an internal appeal and the decision to evict a man and his daughter into homelessness was reconsidered.

### **Eviction of man and daughter prevented after partner and mother passed away**

Josh was living with his partner, Tracey, in her public housing property at the time of her sudden death, which Josh witnessed. Josh was not listed as a tenant or a resident on the Office of Housing's records.

Josh and Tracey had been in a relationship for over twenty years. Tracey suffered from health issues and, as a result Josh and Tracey did not always live together. They had one (now adult) child together who had recently moved in with them. Within the space of two years, between 2005 – 2007, they had lost each of Josh's son from another relationship, Tracey's daughter (Josh's step daughter) and Josh's best friend through cancer. Prior to all this, Josh had worked in the same job for 16 years and he and Tracey had purchased a house (which they later lost).

Days after witnessing Tracey's death, Josh attended the Office of Housing to alert them of her death. During the interview Josh asked for the tenancy to be transferred into his name so that he and his daughter could remain there. The OOH staff interviewed Josh and asked him how long he had been residing with Tracey. Josh was unsure of the length of time due to their relationship being tumultuous and him not being "good with dates". He explained that he had lived there on and off for many years, but estimated that he had consistently resided there for about 8 months. He also informed the OOH worker of his own circumstances, which included a diagnosis of major depression, significant experiences of loss and grief and prolonged history of substance abuse.

The OOH rejected Josh's transfer application because he could not establish that he had resided in the property for the last 12 months.

The HPLC appealed this decision to the Housing Appeals Office. The appeal clarified (including through submission of statutory declarations) that Josh had been living in the property for approximately 19 months at the time of his partner's death. It identified the OOH's obligation under section 38 of the Charter to give proper consideration to Josh's human rights, in particular his rights under section 13(a) of the Charter. The appeal questioned whether proper consideration had been given to Josh's rights in making the decision to reject his application for transfer.

The appeal also provided documents from a variety of professionals treating and assisting Josh (including a GP, a psychologist and a grief counsellor), which outlined his significant and ongoing issues with depression, loss and grief and cognitive and other difficulties related to prolonged substance use.

The Housing Appeals Office reviewed the decision and approved the transfer of tenancy to Josh. By doing so, the need to pursue the matter to VCAT, as well as Josh and his daughter's potential homelessness, were avoided.

### Functional public authorities

For the purposes of the Charter, a public authority includes “an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)”.<sup>27</sup>

With guidance from the Victorian Civil and Administrative Tribunal in *Metro West v Sudi*<sup>28</sup> (**Metro West**), it has come to be understood that:

- ▶ the function of providing social housing, which includes the management of transitional housing tenancies, is a function of a public nature;<sup>29</sup> and
- ▶ although determined on a case by case basis, this function is generally performed on behalf of the State (for example, under a service agreement with the State and with public funding).

In his decision in *Metro West*, Bell J stated:

The state cannot shirk its human rights responsibilities by implementing its programs and policies through private entities acting on its behalf. Where private entities exercise public functions of a public nature on behalf of the State or a public authority, the functions come with unavoidable human rights responsibilities for the entity itself.<sup>30</sup>

Without denying that there were some initial questions about Charter compliance,<sup>31</sup> in principle, this is not a notion that community organisations disagree with. As articulated by Tony Keenan, CEO of Hanover Welfare Services: “It is a perfectly reasonable expectation that community organisations delivering homelessness services should comply with the Charter in their day to day operations”.<sup>32</sup>

Accordingly, the improvements in processes and practices that the Charter has brought about have not been limited to core public authorities. The below case studies show that decision-making practices have also improved within organisations performing public functions on behalf of the State.

Both of these case studies deal with a previously common practice of transitional housing managers, which was to periodically issue tenants with a Notice to Vacate as a way of ensuring that tenants did not overstay their short-term tenancies and were proactive in arranging long-term accommodation. The difficulties with this model are discussed in more detail in part 4.4 below.

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<sup>27</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(c).

<sup>28</sup> *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009).

<sup>29</sup> *Ibid*, [146].

<sup>30</sup> *Ibid*, [123].

<sup>31</sup> See, eg, Tony Keenan, CEO, Hanover Welfare Services, “From Human Rights Compliance to Human Rights Culture”, Law Institute Human Rights Conference (May 2010), 1: “The Charter also presented a difficulty which community organisations have had to confront; the need to comply with the Charter as a public authority while at the same time delivering government contracts which contain terms which may result in Charter breaches”.

<sup>32</sup> *Ibid*, 5. In this paper, Mr Keenan also provides suggestions for organisations wanting to “move beyond basic compliance towards establishing a culture of human rights” (including: the inclusion of Charter compliance in case note audits or other internal audits; the inclusion of Charter obligations in case worker supervision practices; and developing a “Charter Checklist” to be used with any evictions that need to occur).

### Housing support provided to an elderly man

Frank was an elderly man with a lengthy history of mental and physical illness. A private agency that provides transitional housing issued Frank with a 120 day no-reason Notice to Vacate (NTV) requiring him to leave his transitional housing property.

Frank had not been provided with support to find alternative accommodation so that he could exit transitional housing. He had tried to negotiate with his landlord and explain his circumstances but this had not been successful.

Frank's lawyer sent the agency a letter questioning their decision to issue a NTV and asking whether they had considered the reasonableness of this decision in light of Frank's circumstances.

The letter requested that the NTV be withdrawn on the basis that it had been issued without proper consideration. The letter did not expressly refer to the Charter, but reminded the agency of its obligations.

The agency withdrew the NTV and arranged a support worker to help Frank find long term accommodation.

### Young woman given a chance to find longer-term housing

Marguerite was in her early 20s. She had come to Australia as a refugee in 2006 and had been exposed to serious violence from a young age. Since coming to Australia, she had experienced recurring homelessness.

Marguerite was living in transitional housing managed by a private provider. She was issued with a Notice to Vacate (NTV) under section 261 of the *Residential Tenancies Act 1997 (Vic)* because it was the end of her three-month fixed-term tenancy agreement.

Marguerite had been engaged with a case worker to assist her to find longer term accommodation and had lodged an application for public housing, but had not been provided with adequate support to find appropriate long-term housing.

The case worker had provided Marguerite with limited options, including moving into a boarding house, which Marguerite was very reluctant to do because she had been the victim of racial abuse and threats of violence while staying in a boarding house in the past.

#### **First eviction proceedings**

Once the notice period expired, the transitional housing provider applied to VCAT for a possession order that would have led to Marguerite's eviction from the property.

In response to the application, the HPLC sent a letter to Marguerite's landlord expressing concern over the decision to apply to have Marguerite evicted. The letter set out Marguerite background and highlighted the apparent lack of support she had been provided to find alternative accommodation.

In light of these considerations, the letter suggested that, in applying for a possession order, the agency was acting incompatibly with Marguerite's rights under the Charter (which it was bound by as a functional public authority). The HPLC asked the transitional housing provider to consider not only the integrity of the housing program and the needs of individuals and families in housing crisis, but also a tenant's right under the Charter not to have her home unlawfully or arbitrarily interfered with (under section 13(a) of the Charter).

The letter requested that the application for possession be withdrawn and that Marguerite be permitted to remain in the premises until alternative accommodation was found. In response, the transitional housing provider withdrew the application for possession and signed another three-month lease with Marguerite. In return, Marguerite agreed to work more closely with her case worker to find alternative accommodation.

### ***Second eviction proceedings***

Approximately four days after signing the new lease (in accordance with the general practice of some transitional housing providers), the housing provider issued Marguerite with a NTV, again under section 261 of the RTA and, once this notice period expired, applied to VCAT for eviction.

In a pre-hearing conference, the HPLC asserted that, despite her efforts, viable alternative accommodation had not been secured for Marguerite. She was therefore at acute risk of homelessness if she was evicted and seeking a possession order would (again) be contrary to the housing provider's obligations under section 38 of the Charter.

In the meantime, Marguerite had been linked with the HPLC's Homeless Persons' Liaison Officer, who had identified that, based on her recurring homelessness, Marguerite may be eligible for the segment 1 public housing list (i.e. the priority list). She assisted Marguerite to put together this application.

It was agreed at the pre-hearing conference that the application for possession should be adjourned until Marguerite's application for the segment 1 public housing list was determined. Further, if she was placed on the segment 1 list, the application for possession (and the NTV) should be withdrawn.

Marguerite's application for the segment 1 public housing list was approved. She acknowledged that, as soon as suitable public housing or appropriate community housing became available, she would be required to leave the transitional property.

In the meantime, she was permitted to stay in the property. She avoided homelessness and continued to engage with a local youth group, including assisting to organise a leadership and recreational camp for other young people. She hopes to continue the studies she had commenced prior to the first eviction proceedings.

## Improved policy development and consultation

The HPLC has used the Charter, not only to advocate for individuals, but also to strengthen its policy work, with the aim of identifying and preventing or amending laws and policies that impact in a disproportionate or discriminatory way on people experiencing homelessness. The case study below exemplifies how the Charter obligations on public authorities – in this case a local council – have contributed to better policies and laws at the local level.

### Avoiding the criminalisation of sleeping in cars

In January 2011, the Shire of Yarra Ranges (**Shire**) proposed a by-law prohibiting sleeping in cars. The proposed by-law prohibited a person from: camping; or erecting, placing or occupying a caravan, vehicle, tent or similar structure, on a road or council land or in a public place.

Although the intention of the by-law was to target backpackers who had been using local parks and amenities without permits, the effect of the by-law would have been to criminalise poverty and homelessness by penalising people who were sleeping in their cars due to lack of alternative accommodation (the maximum fine was almost \$2,400).

With the proposed by-law scheduled to be voted on in two-weeks, the HPLC, together with the Council to Homeless Persons, commenced a campaign to stop the introduction of the by-law and to encourage the Shire to focus on addressing the causes and effects of homelessness, rather than taking a punitive approach to this problem.

The HPLC took a practical, awareness raising approach to the campaign, explaining that Victorian support services had identified a sharp increase in homeless clients living in their cars because of lack of affordable housing and identifying that it was these people who would be targeted by the proposed law.

The HPLC also focussed specifically on local issues, drawing attention to levels of homelessness in the local municipality, referring to local services and addressing local councillors. Human rights principles were used to reinforce and provide a framework for these practical, local arguments.

The Charter was drawn on to identify that imposing penalties on car-dwellers criminalises what is ultimately a human rights issue. Under the Charter, the Shire is a public authority and is therefore obliged to give proper consideration to human rights when making its decisions. The HPLC referred specifically to the rights to life, security and freedom of movement and questioned whether councillors had been provided with advice regarding human rights in considering the proposed by-law.

The result of the two-pronged campaign – combining a practical, local evidence base with rights-based arguments – was that the councillors deferred consideration of the local law until the law was redrafted and implementation guidelines were developed. These guidelines were prepared in consultation with the HPLC and a number of local homelessness and community service providers. They aim to make sure that people experiencing homelessness are not penalised by this by-law and require that, when an officer assesses a person to be homeless, they are under an obligation to, with that person's consent, contact a relevant community agency to link the person with appropriate supports.

More broadly, the issue received media attention,<sup>33</sup> educated Shire staff and councillors about issues of homelessness and attracted interest from other local councils eager to know more about best practice homelessness policies.

A human rights framework and specific Charter-based obligations were used to highlight the flaws in the proposed by-law and, when combined with local evidence-based arguments, effectively brought about a positive outcome, not just for people based in the Shire but more broadly in relation to local councils dealing with homelessness.

## 4.2 Negotiated outcomes rather than litigation

Of the 20 detailed case studies contained in this submission, 11 of these were resolved via negotiation; only nine were determined by VCAT.

Six matters where clients were facing eviction from public or social housing were finalised with a negotiated outcome that allowed the client to remain in housing (in some cases, this was different, smaller housing, which allowed the Office of Housing or the social landlord to better manage its resources by reallocating the original property to avoid under-utilisation). As a result of these negotiations, 13 people, including five children, avoided eviction into homelessness.

Based on this experience, we assert that the suggestion that the Charter encourages litigation or that it is a complicated tool for lawyers, is a misconception.

The HPLC's case work shows that the Charter is extremely effective when used outside courts and tribunals. It opens the doors to negotiation and discussion and allows competing priorities to be considered and balanced. It also allows for practical solutions that are outside the narrow range of possible outcomes that policies or procedures might otherwise present.

These negotiated outcomes provide quick, affordable and effective remedies to injustice.

By way of example, in the case study below, the Office of Housing was able to consider the client's circumstances against its obligations to manage the waiting list for public housing and then to present the option of the client moving to another property. If policies or procedures alone had been relied on, there would have been little room for the suggestion that this man be offered an alternative property – if he was not eligible for a transfer, the alternative would have been eviction.<sup>34</sup>

### Alternative property for elderly carer

Bob was an elderly man who suffered from depression and had recently attempted to commit suicide.

He had lived in a public housing property for four years as a full-time carer for his mother, who was the listed tenant. When Bob's mother passed away, the Office of Housing applied for possession of the property.

The HPLC sent a letter to the OOH asserting that the OOH's application for possession was contrary to the Charter because, as a public authority, the OOH is bound to act in a way that is compatible with human rights and must consider the human rights impact of any decision to remove the client from the premises (under section 38).

<sup>33</sup> See Farah Farouque, "Council Parking Ban Would 'Punish' Homeless", *The Age* (24 January 2011); Emily Webb, "Fears Over New Law", *Yarra Ranges Lilydale & Yarra Valley Leader* (25 January 2011).

<sup>34</sup> Refer to part 4.1 above, which discusses the OOH's policy regarding applications for transfer of tenancy. Ordinarily, if the client is not eligible for a transfer, the OOH will apply for a possession order on the basis of illegal occupation of the property under section 344 of the *Residential Tenancies Act 1997* (Vic).

The letter pointed out that a number of rights, including the rights to home and family (under sections 13 and 17), as well as the rights of the child (under section 17(2)) were engaged by the action proposed by the OOH (Bob's young nephews also spent a significant amount of time at the property).

The letter set out Bob's circumstances and stated that, if possible, the HPLC would like to avoid litigation and attempt to resolve this matter.

In response, the OOH offered Bob an alternative property that met his medical needs, which Bob accepted and relocated to.

Similarly, in the below case study, the HPLC was able to negotiate for a family of seven (with a new baby due shortly) to stay in a public housing property that was otherwise vacant. The Charter was used to identify the family's severe hardship and to question whether the OOH had considered the family's rights in its decision-making process. It became apparent to the housing officers that eviction was not the best solution to this situation. Again, this matter did not end up in VCAT – it was resolved with a letter and subsequent conversations between the HPLC, the clients and the Office of Housing.

### **Family of seven avoid homelessness through negotiation**

Mr Mesfin moved to Australia in 2001. His family joined him in 2006. Their limited income and supports meant that they had experienced insecure housing since their arrival. Mr Mesfin had been on the waiting list for public housing for eight years.

The family, made up of Mr and Mrs Mesfin and their four children, had been permitted by the OOH to sub-let a public housing property. When the original tenant returned they were required to move out. They were engaged with a local emergency housing support service, but no stable accommodation was available for them.

They later noticed that the property they had sub-let was vacant. It had apparently been damaged by fire and had needed repair. Once these repairs had been undertaken, it remained vacant. Mr Mesfin understood that he should not move his family back into the property, but he was at a point where they had no other options.

Mr and Mrs Mesfin and their children moved into the vacant property. When Mr Mesfin attempted to discuss the situation with the OOH, a staff member indicated that the police would be sent around to remove the family.

The HPLC sent a letter to the OOH asserting that the decision to have the Mesfin family removed was contrary to the Charter because, as a public authority, the OOH is bound to act in a way that is compatible with human rights and must consider the human rights impact of any decision to remove the family from the property (under section 38).

The letter pointed out that the rights to home and family (under sections 13 and 17(1)), as well as the rights of the child (under section 17(2)) were engaged by the action proposed by the OOH.

The letter set out the clients' circumstances. It explained that the children attended the local school; Mrs Mesfin was pregnant and was receiving medical care from the local hospital; and Mrs Mesfin was also undertaking English classes at a nearby community centre.

The letter reiterated that the family would be homeless if evicted and requested an opportunity to discuss this matter with the OOH. The OOH arranged a meeting with the HPLC lawyer and the clients (including their children) at the local office. At this meeting the OOH agreed to allow Mr and Mrs Mesfin to arrange to sign a tenancy agreement for the property and, therefore, to avoid returning to homelessness.

In addition to providing the HPLC with a helpful instrument to advocate for clients facing eviction (of the 20 case studies, 15 matters involved clients facing eviction), the Charter has also been valuable in negotiating

alternative housing outcomes for clients. In the case studies below, one client acknowledged that his rooming house accommodation was not a suitable arrangement and agreed to move out – the Charter was used to negotiate more time for him to leave so that he could find alternative accommodation. In the second case, an elderly woman was extremely distressed because of abuse by her neighbours and the Charter was used to negotiate her transfer to a public housing property that was more appropriate for a woman of her age and fragility.

### **Mediated outcome buys young man more time**

Stuart was living in a rooming house run by a community housing organisation. He was issued with a 120 day no-reason Notice to Vacate.

At the time of receiving the NTV, Stuart had no alternative accommodation. If he had moved out within the 120 day period, he would have been sleeping rough. He did not move within the required timeframe and the landlord applied to VCAT for a possession order.

The HPLC helped Stuart to prepare for the hearing. The draft submissions asserted that, as a public authority, the landlord had acted unlawfully in issuing the NTV (under section 38 of the Charter), because this decision interfered with Stuart's rights:

- (i) not to have his privacy or home arbitrarily or unlawfully interfered with under section 13(a) of the Charter;
- (ii) to life under section 9 of the Charter, because Stuart's chronic health problems (which included depression and long-term substance dependence) would present a genuine danger to his life. Further, the right to life encompasses a right to live with dignity and homelessness brings with it a loss of human dignity, identity and self-respect; and
- (iii) to security under section 21 of the Charter, because Stuart's homelessness would expose him to significant risk of violence and crime and would jeopardise his physical and personal security.

The landlord acknowledged that it was a public authority for the purpose of the Charter. They had also indicated that they were applying for eviction because of Stuart's behaviour in the rooming house, but stated that they had used a no-reason Notice to Vacate so he would have more time to move out. The HPLC's draft submissions asserted that, if Stuart's behaviour was the problem, the breach of duty and compliance order mechanisms under the *Residential Tenancies Act 1997* (Vic) should have been used. This would have given VCAT the opportunity to determine whether a breach of duty notice had been complied with and, if not, to issue a compliance order (or make a possession order if the same provision had been breached on two previous occasions). It was proposed that issuing the Notice to Vacate was therefore a disproportionate means of managing Stuart's tenancy.

The consequence of using the no-reason Notice to Vacate provision was that Stuart had no opportunity prior to being evicted to question any of the allegations made against him and was denied the procedural protections that other types of notices under the RTA attract.

The parties agreed to a mediation to try to resolve this matter.

The HPLC's draft submissions were provided to the landlord before the mediation. The landlord also prepared their own Charter-based submissions.

A settlement was negotiated at mediation. Stuart was given an additional two months to move out of the rooming house. He agreed that he was not happy there and it was not good for his health. The extra two months gave him time to find alternative accommodation and meant he avoided sleeping on the streets.

### Vulnerable senior given transfer priority

Maria was a 66 year old woman, who had been diagnosed with depression, anxiety, agoraphobia and claustrophobia-type nervous state. Her public housing property was exacerbating her health conditions, because of exposure to excessive noise and yelling, as well as death threats.

Maria had been approved for an early housing transfer, but she was advised that she would be waiting at least three years before a transfer would be possible.

The HPLC wrote to the Office of Housing encouraging them to consider Maria's rights to life and security (under sections 9 and 21 of the Charter), in determining when she would be eligible to be transferred to more appropriate housing.

The letter requested that Maria's housing transfer be prioritised. Within one month, the OOH granted the request and Maria's transfer was prioritised on the early transfer list. She was moved to alternative accommodation approximately two weeks later.

The HPLC also points out that the Charter is not an instrument that is used only by lawyers. Through our consultations with non-legal advocates, in particular Social Housing Advocacy and Support Program (**SHASP**) workers, we understand that these workers are also using the Charter to advocate for their clients. In a (confidential) case study provided to the HPLC, a Melbourne SHASP worker set out how she had used the Charter to avoid the eviction of her 64 year old client, who suffered from schizophrenia, depression and anxiety, from public housing into homelessness. De-identified copies of the worker's correspondence showed how the Charter had been used in a practical way – setting out:

- ▶ a chronology of the client's circumstances;
- ▶ information about his links with the property, the local area and his neighbours;
- ▶ details about his inability to access other housing if evicted (including examples of the cost of one-bedroom private rental properties in the area, which were clearly not financially feasible for the client, as well as comments from the local community housing provider about waiting lists for community housing); and
- ▶ references to the OOH's obligations under section 38(1) of the Charter and to the relevant human rights (in this case, the rights to life, liberty and security and not to have his privacy or home unlawfully or arbitrarily interfered with (under sections 9, 21 and 13 respectively).

In this matter, the SHASP worker also pointed out that eviction of this vulnerable client into homelessness would "impact on the resources of community and support agencies in the area".

The SHASP worker was successful in avoiding the client's eviction and negotiating for the Office of Housing to transfer the tenancy agreement for the property into the client's name.

The growing use of the Charter by advocates in the non-legal sector is evidence of the way in which it can provide accessible, clear, practical frameworks for negotiated outcomes.

#### 4.3 Framework for making tough decisions

In a paper called "From Human Rights Compliance to Human Rights Culture", CEO of Hanover Welfare Services, Tony Keenan, stated:

The real impact of the Charter should be most evident in those areas of public activity which are difficult, complex and require a balance between competing rights, obligations, lawful coercion and safety. Organisations working in homelessness deal with many circumstances where it is quite possible for breaches of the Charter to occur. Managing the complex nature and behaviour of some clients, combined with the need to ration a scarce resource (subsidised and supported housing) to ensure those in greatest need receive it, presents significant challenges. This reinforces the need for considered policies and procedures in relation to the Charter,

particularly if an organisation wants to move beyond basic compliance. Importantly in some circumstances it also means that organisations have to review and change the way they currently operate.<sup>35</sup>

This recognition of the complexity of providing public services, particularly to disadvantaged and vulnerable client groups and in the face of limited resources, reinforces the practical importance of the Charter. The Charter provides clear, binding standards and principles to assist workers in the public and community sector to deliver services that best satisfy multiple competing priorities.

In relation to public housing, the Victorian Public Housing Report noted a number of issues with the quality of service provision, including:

- ▶ increased complexity of tenant profile;
- ▶ incompatibility of skills and qualifications of staff to job requirements;
- ▶ inconsistent service provision; and
- ▶ unsustainable workloads.<sup>36</sup>

The Report's recommendations for improving the quality of service in public housing included:

- ▶ implementing a professional development program to build the understanding of housing workers about specific needs such as disability, mental illness, homelessness and culturally and linguistically diverse (**CALD**) backgrounds;
- ▶ a commitment to promoting a culture of transparency, learning and active partnerships in the public housing workforce;
- ▶ an assurance of consistency of service provision;
- ▶ a review of complaints processes, with a view to having an external body responsible for complaint resolution and standardising responses to complaints in local housing offices to ensure consistency in processes; and
- ▶ a review of the effectiveness of its tenant participation framework and the extent to which it includes individual, community and structural involvement of tenants.<sup>37</sup>

These recommendations are precisely what Charter compliant service provision looks like. The Charter requires consideration of a person's specific circumstances in the context of their relevant rights under the Charter (for example, the right under section 13(a) not to have his or her home arbitrarily or unlawfully interfered with or the protections of children and families under section 17), and provides a framework for balancing these considerations with the broader objectives of public housing workers (including management of tenancies and the waiting list for public housing). The Charter requires equality and non-discrimination in service provision and it applies a clear, coherent framework across all public services. It also encourages participation in public life under section 18.

Anecdotally, the HPLC has received comments from workers in local housing offices, who were relieved to have received the full-day Charter training run by the Department of Human Services in 2010 – 2011. They said the training had provided practical guidance that was directed at workers making decisions on the ground. One worker said words to the effect of, "we don't want to evict this man into homelessness, he will just be added to our waiting list and stuck in emergency accommodation in the meantime; the Charter is still new to us, but it's helpful in terms of making these decisions".

As the Victorian Equal Opportunity and Human Rights Commissioner has said:

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<sup>35</sup> Keenan, above n 31, 4.

<sup>36</sup> Victorian Public Housing Report, above n 2, xxv – xxvi.

<sup>37</sup> Ibid, xxxv – xxxvi.

Whilst many examples that we hear about deal with the legal or political applications of the Charter it must be said that the Charter's greatest impact has been in its preventative role. When legally we question if a limitation of a human right is reasonable, necessary, justified and proportionate, it is this last – the 'proportionate' question – that has the most application. Many advocates are realigning this question in their everyday work to an even simpler question: **Is there another way I can do the same thing that will have less impact upon human rights?**<sup>38</sup>

The legislative requirement to consider other options when making decisions – and to do so with human rights in mind – provides a practical, workable framework for people working in Victoria's public and community service sector. These people are forced to make difficult decisions on a day-to-day basis and providing them with clear obligations and a mandated balancing mechanism provides support in this process and leads to better, more transparent decision-making.

#### 4.4 Catalyst for best practice changes and improved education and training

The Charter's introduction provided an impetus for education, training and policy changes focusing on best practice. Importantly, such initiatives were not gratuitous exercises in compliance. As this submission makes clear, there were aspects of the provision of services by government and non-government organisations that needed to be reconsidered. Changes in policy and practice within public authorities needed to take place to improve the provision of services to Victorians and to make sure that unfair and unjust outcomes were avoided – the Charter has been a catalyst for improvements that would not otherwise have occurred.

This part discusses the extent to which Charter-based training has been carried out in the community sector and the other ways in which the Charter has been a catalyst for improved practices and more appropriate policies.

##### Training and education

In 2010 – 2011, the Department of Human Services rolled out revised human rights training across the State to housing workers on the ground. Rather than the high level Charter training that was provided at the time of its introduction, the HPLC understands that this training had a practical focus; and that it concentrated on how workers could comply with their obligations under the Charter – to act compatibly with human rights and to take human rights into consideration in decision-making – in carrying out their day-to-day work.<sup>39</sup>

In addition to training delivered within government (and by other entities including the Victorian Equal Opportunity and Human Rights Commission, the Human Rights Law Centre and the Victorian Council of Social Service),<sup>40</sup> the HPLC has been approached by a number of community organisations requesting Charter-based training within the housing and homelessness sector. The HPLC has delivered training to:

- ▶ Salvation Army Housing Assistance Services;
- ▶ the Loddon Mallee Homelessness Network;<sup>41</sup>

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<sup>38</sup> Dr Helen Szoke, Commissioner – Victorian Equal Opportunity and Human Rights Commission, Government Lawyers' Conference, Law Institute Victoria (18 June 2010) (available at: <http://www.humanrightscommission.vic.gov.au>) (emphasis added).

<sup>39</sup> The HPLC's understanding of the nature and content of this training is based on conversations between HPLC staff and Department of Human Services staff who had both designed and received the training. SARC members should confirm specific details with the DHS.

<sup>40</sup> Refer to the websites of these organisations for further information.

<sup>41</sup> See <http://www.loma.net.au>: "The Loddon Mallee Homelessness Network (**LOMA**) is a group of twenty homelessness assistance agencies funded under the Supported Accommodation Assistance Program (SAAP) and Community Housing Program (transitional housing and long-term housing) in the Loddon Mallee region. The agencies extend from Gisborne in the south up through Kyneton, Castlemaine, Maryborough, Kyabram and Bendigo to Echuca then west along the Murray River to Mildura. Some of these agencies

- ▶ members of the Victorian Council of Social Service;
- ▶ volunteer lawyers working with the HPLC;
- ▶ lawyers from community legal centres across Victoria;
- ▶ Southern Homelessness Network; and
- ▶ Hume Homelessness Network.

In total, these training sessions have been attended by approximately 500 workers in the community sector, including SHASP workers, regional DHS workers, transitional housing managers, homelessness lawyers, regional homelessness networkers and providers of services in the mental health, aged care, child youth and families, housing and homelessness, disability, domestic violence and drug and alcohol sectors.

The requests for training by these organisations are indicative of the interest of the community sector in the Charter, the commitment to human rights education and the willingness of organisations to incorporate Charter-compliance into their service delivery.<sup>42</sup> This has been further exemplified by non-profit organisations that have run their own training sessions that are specific to the services and advocacy they provide. One particular example is the “Human Rights Masterclass” run by Uniting Care, which presented “an opportunity for people in the community sector to work together in using the Victorian Charter of Human Rights and Responsibilities to achieve positive outcomes for their clients and communities”.<sup>43</sup>

The ongoing delivery of relevant, practice-based training will continue to entrench human rights compliance into the day-to-day activities and decision-making of individual workers within public authorities and, in doing so, will lead to improved services and better outcomes.

#### Review of OOH Policy Manuals

In addition to extensive education and training, the Charter has also prompted the review of policies and practices by public authorities. By way of example, during 2011, the HPLC will consult with the Department of Human Services in relation to the review of the *Public Housing Policy and Procedure Manuals (OOH Policy Manuals)*. The OOH Policy Manuals each cover a relevant area of public housing. They are practice-based documents that provide guidance to front-line housing workers – they are also discussed in part 4.1 above.

The OOH Policy Manuals are referred to in a number of the case studies in this submission, primarily where strict adherence to the policies had led to an unjust or unfair outcome, but this outcome was avoided through application of the Charter. Presently, with the exception of a reference in the revision history of the Tenancy Breaches & Dispute Resolution Manual, the OOH Policy Manuals do not refer to the Charter.<sup>44</sup> The incorporation of practical guidance regarding Charter-compliance into the OOH Policy Manuals will generate further improvements in the provision of services to Victorians, living in, or seeking to live in, public housing. This is another example of the way in which the Charter is producing positive changes to practices and policies. Given that the review of the OOH Policy Manuals is only scheduled to take place this year, this is

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have specific target groups such as domestic violence, youth, Indigenous people and people with a mental illness and the majority with all homeless people within a district”.

<sup>42</sup> See also, Victorian Council of Social Service, *Audit and Needs Analysis: Human Rights Education and Training* (2008), 7, which, as early as 2008, concluded: “Human rights education and training appears to be widespread in the community sector. Overall, organisations demonstrated a high level of commitment to human rights education amongst both their staff and clients”. This audit also reported that two thirds of all respondents to the survey indicated that they would like training about at least one of the three Charter options suggested, with 60% of those indicating that they wanted training about how the Charter might assist policy, research and advocacy or campaign work (at 18).

<sup>43</sup> See Uniting Care Victoria and Tasmania, *E-News* (18 January 2011) (available at: <http://victas.unitingcare.org.au/enews/2011/01/18/human-rights-masterclasses/>).

<sup>44</sup> See Victorian Public Housing Review, above n 2, 243.

also an example of the fact that it takes time for institutional change to take effect. This inquiry into the operation of the Charter provides a significant opportunity to reflect on the very noticeable improvements in public services that have already occurred, but also to recognise that comprehensive improvements do not happen instantly.

### Rent recovery processes and practices in public housing

In the 2010 Victorian Public Housing Report, the Family and Community Development Committee identified the tension in the Victorian Government's role as a provider of "services to public housing tenants in the greatest housing need while also relying on revenue generated from these individuals and families on very low incomes, who at times experience financial hardship and inability to meet their rental commitments".<sup>45</sup>

While the Report found that, broadly, the OOH's policies and procedures relating to rental recovery are sound, it commented that "[t]he variability in the implementation of these processes by local housing offices ... was notable and in need of improvement".<sup>46</sup>

The Charter has provided the necessary momentum for improving these policies and practices. In the interim, while improvements are still taking place, the Charter has provided vulnerable individuals with protection against the variable practices at local levels, which might otherwise have caused them to become homeless.

Importantly, of the 42 evictions that have been avoided through the HPLC's Charter-based advocacy, 20 people were facing eviction for rental arrears.

While the HPLC recognises the importance of compliance with the obligation to pay rent, we also assert that the vulnerabilities, hardship and complex circumstances of many tenants in public housing should be considered as part of any policy regarding eviction based on rental arrears.<sup>47</sup>

The most coherent framework for such a policy is the obligation under section 38 of the Charter i.e. the requirement to act compatibly with human rights and to give proper consideration to human rights in the decision-making process. Or, as the Victorian Equal Opportunity and Human Rights Commissioner has phrased it, the obligation to consider: "Is there another way I can do the same thing that will have less impact upon human rights?"<sup>48</sup>

As is apparent from the case studies in this submission (many of which are in part 5.3 below, because a determination by VCAT was needed to deal with the OOH's decision to proceed with an application for eviction), flawed decisions can be made by individual housing workers,<sup>49</sup> which will have a significant impact on the lives of disadvantaged Victorians and their families. The Charter helps to avoid these outcomes both by promoting better decision-making at first instance and providing some protection in the event that a failure to give proper consideration to a person's human rights does occur.

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<sup>45</sup> Ibid, 229.

<sup>46</sup> Ibid, 228.

<sup>47</sup> Ibid, 227, which notes that the Victorian Government allocates the majority of its public housing to people who have experienced homelessness and/or tenancy failure. The Report states that over 70 percent of people being allocated public housing have experienced homelessness (at 241): citing Dr J Hall et al, Australian Housing and Urban Research Institute, *Operating Deficits and Public Housing* (2007), 83.

<sup>48</sup> Dr Helen Szoke, above n 38.

<sup>49</sup> See, eg, Victorian Public Housing Report, above n 2, 237, which found that, while the OOH's policies in relation to rental arrears were "theoretically sound, the practice in local housing offices varies".

## The transitional housing system

Another example of the Charter providing the impetus for improved practices is the reconsideration by transitional housing managers (**THMs**) of the practice of periodically issuing tenants with a Notice to Vacate to compel them to move out of short-term housing and into longer-term housing. A common manifestation of this policy was the practice of issuing tenants with a “no reason” Notice to Vacate<sup>50</sup> at the same time the tenant signed the lease. This Notice to Vacate gave the tenant 120 days to find alternative accommodation, before the landlord could apply to VCAT for a possession order. Often these short-term leases were rolled over more than once, but having the Notice to Vacate constantly on foot meant the landlord could choose to apply for a possession order at the end of these short periods.

When it commenced, this process was a logical way for THMs to make sure that people were actively trying to find long-term accommodation, so that other people who needed short-term housing could access transitional properties. Unfortunately, the acute shortage of affordable housing in Victoria means that there is often no long-term accommodation for tenants to relocate to upon leaving transitional housing. For this reason, the standard practice of issuing 120 day Notices to Vacate to move people out of transitional properties was no longer an appropriate policy or practice.<sup>51</sup>

Public authorities providing transitional housing continued to be bound by government funding agreements that set performance targets regarding length of stay and number of people cycling through transitional housing,<sup>52</sup> and there was no impetus to change the outdated practice until the Charter was used to identify the impact it was having on marginalised Victorians.

The VCAT decisions in *HomeGround Services v Mohamed*<sup>53</sup> (**Mohamed**) and *Metro West v Sudi*<sup>54</sup> (**Metro West**) (discussed above part 4.1), drew attention to the fact that these policies risked pushing people into a revolving cycle of rough sleeping and emergency accommodation.<sup>55</sup>

In the case of Mohamed, the 120 day Notice to Vacate was not given at the time of entering the tenancy agreement, but rather because Mr Mohamed had been living in the transitional property for 14 months and could not yet show that he had an “exit strategy”. While this decision was in accordance with the landlord’s “youth tenancy policy”, it did not take into account the fact that:

- ▶ for reasons that were unclear, Mr Mohamed had not been assisted by his housing worker to lodge an application for public housing;

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<sup>50</sup> *Residential Tenancies Act 1997* (Vic) s 263.

<sup>51</sup> See Victorian Public Housing Report, above n 2, xxxiii, which recommended that the “Victorian Government reviews the Transitional Housing program to determine its effectiveness in the context of extensive waiting times to access public housing and in context of broader changes to social housing provision”. See also Maggie Kirkman et al, “Does Camping Count?” *Children’s Experiences of Homelessness – Final Report* (September 2009), 56, which refers to the current model of THMs which “keeps people moving and exacerbates the experience of insecurity”.

<sup>52</sup> See, eg, Tony Keenan, above n 31 referring to the VCAT decision of Bell J in *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009): “Under the THM program, agencies are contracted to provide transitional accommodation for a fixed term and this was reflected in the contract with [the Department of Human Services]. Metro West’s practice was to apply to VCAT for notice to vacate immediately after the tenants moved into the property. They claimed that this allowed them to put pressure on the tenants to find alternative longer term accommodation, such as private rental, thus helping to manage the huge demand for, and limited supply of, public housing”. See also, Victorian Public Housing Report, above n 2, 210–213 regarding transitional housing, including a quote from HomeGround that: “the concept of transitional housing needs to be reconsidered in the context of a changing public housing system ...”; and that “many housing providers that operate transitional housing services are struggling to meet the targets associated with their funding”.

<sup>53</sup> *HomeGround Services v Mohamed* [2009] VCAT 1131 (6 July 2009).

<sup>54</sup> *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009).

<sup>55</sup> See, eg, *HomeGround Services v Mohamed* [2009] VCAT 1131 (6 July 2009), [18].

- ▶ Mr Mohamed had a strong record in terms of rental payments and maintenance of the property;<sup>56</sup> and
- ▶ the likely effect of obtaining a possession order would have been to make Mr Mohamed homeless “(through, on the evidence, no wrong-doing or fault on his part), and to give a home to a person who is currently homeless”.<sup>57</sup>

VCAT found that the landlord’s implementation of its “youth tenancy policy” was arbitrary for the purposes of section 13(a) of the Charter (i.e. that it was an arbitrary interference with Mr Mohamed’s home) because the landlord had not considered the reasonableness of the decision to issue the Notice to Vacate or of the implementation of the “youth tenancy policy” in Mr Mohamed’s circumstances.<sup>58</sup> Therefore, the Notice to Vacate was unlawful under section 38 of the Charter, because it was incompatible with Mr Mohamed’s right under section 13(a) of the Charter or, alternatively, the landlord had not given proper consideration to Mr Mohamed’s rights under section 13(a).

There was some recognition by VCAT of the difficulty that managers of transitional housing face in trying to manage a limited supply of short-term accommodation. Member Perlman considered the argument that the policy was not arbitrary because it “reflects a need to achieve broader aims, that is, to maintain the landlord’s ability to provide transitional housing for indigent people who require it”, but rejected this argument, finding that there was no evidence that transitional housing arrangements would be undermined in the absence of a “strict policy whereby tenants may be asked to leave ... after a suitable period”.<sup>59</sup>

Both Mohamed and Metro West bear factual similarities to the case studies discussed above in part 4.1, where the HPLC was able to use the Charter to successfully negotiate for the clients to avoid eviction.

The Charter has provided legislative grounds for emphasising that rigid application of these policies was no longer delivering the best outcomes for Victorians.<sup>60</sup> It also protected the individuals who would otherwise have been homeless as a result of outdated policies and procedures.

#### 4.5 Not an unreasonable constraint on decision-makers

Importantly, while there is a complex policy debate around the utility of evicting insecure tenants into homelessness,<sup>61</sup> the HPLC is not suggesting that landlords should not have discretion to manage their tenancies because of their obligations under the Charter. The Charter does not prohibit evictions. The OOH and THMs can, and do, still evict people – the obligation under the Charter is to properly consider human rights before making the decision to do this, rather than applying “one-size-fits-all” policies to clients with complex circumstances and needs.

This point is well made by Tony Keenan, CEO of Hanover Welfare Services:

[A] homeless crisis accommodation centre requires the management of a large number of individuals, often with multiple and complex issues such as drug and alcohol and mental illness ... Clearly in these circumstances,

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<sup>56</sup> Ibid, [16].

<sup>57</sup> Ibid, [18].

<sup>58</sup> Ibid, [19].

<sup>59</sup> Ibid, [21].

<sup>60</sup> See, eg, The Salvation Army Southern Territory, *A Submission to the Victorian Homelessness 2020 Strategy Discussion Paper* (November 2009), 4, which states: “The Charter has proved an important tool in protecting tenancy rights for service users of the homelessness and supported accommodation system. Rather than seeing this as a threat to these programs, the Victorian Government should design a new service system that will aim to respect and promote homeless people’s human rights and charter rights”.

<sup>61</sup> See, eg, Victorian Public Housing Report, above n 2, 227: “In a context in which the Victorian Government allocates the majority of public housing to people who have experienced homelessness and/or tenancy failure, the focus on sustaining tenancies is increasingly important.”

rules and procedures, including the circumstances in which an eviction may occur, need to be in place so as to create and maintain a safe environment. It is entirely possible to do this and be compliant with the Charter.<sup>62</sup>

The case studies below provide examples of situations where the Charter was raised, the public authority responded and the outcome was unchanged. While the outcomes the clients were seeking were not achieved, in each case, the public authority could establish that it had given proper consideration to the client's human rights in its decision-making processes and the Charter-based advocacy was not pursued any further.

Each of the case studies below also shows that the obligations the Charter imposes on public authorities do not unreasonably constrain their decision-making. The Charter provides a framework for concerns to be raised and addressed. It requires transparency and accountability in the decision-making process, but it does not mandate unfeasible or unworkable outcomes.

### Man offered emergency accommodation and required to move on

Peter was homeless and had been living in a local reserve for 18 months. He was issued with a Notice to Comply by the local council fining him for camping on council land and requiring that he leave the property.

Peter was a middle-aged man and did not want to live in hostel accommodation; he believed he was ineligible for public housing.

After Peter refused to relocate, the council attended his campsite with police and impounded a number of Peter's possessions.

The HPLC sent a letter to the council reminding them of their obligations under section 38 of the Charter to act in a manner that is compatible with human rights, and to give proper consideration to human rights in any decision-making process. It explained that the Charter protects the rights to liberty and security of person (section 21), protection from cruel, inhumane or degrading treatment or punishment (section 10) and freedom of movement (section 12).

The letter requested that, before the council took any further action, it provided reasons showing that proper consideration had been given to Peter's relevant human rights.

Although the council did not respond in writing, they contacted the HPLC lawyer by phone and indicated that they had given Peter a long time to comply with the Notice, and had repeatedly offered him housing and other support services, which were refused. The council stated that it had no other option – it could not let Peter camp on the land.

This was accepted as a reasonable response by the council – they had considered Peter's hardship and had made their decision with his circumstances in mind.

### Lengthy wait for property transfer couldn't be avoided

Ann had been living in her public housing property for approximately eight years. During that time, she had been the victim of home invasions, vandalism and verbal and physical abuse.

She was experiencing post traumatic stress disorder as a result of the home invasions. Each of her GP, psychologist, psychiatrist and housing worker had identified a causal connection between Ann's mental health condition and her housing situation. Her mental illness had prevented her from engaging in meaningful employment for over three years and had significantly affected her self-esteem.

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<sup>62</sup> Keenan, above n 31, 4–5.

Five years earlier she had been approved for early housing transfer, but she had recently been told by a staff member at her local housing office that the wait could be another five years.

This response had left her feeling hopeless, desperate and frustrated.

The HPLC wrote to the Office of Housing and, referring to the obligations under section 38 of the Charter, asked them to give proper consideration to Ann's rights under the Charter, including:

(i) the right to life under section 9 of the Charter – Ann's housing situation and the risks it presented to her health and wellbeing did not allow her to live with human dignity, which is an important component of the right to life; and

(ii) the right to security of person under section 21 of the Charter – Ann did not feel secure in her home because of the extreme conditions she was exposed to.

The letter requested that the OOH undertake an immediate review of Ann's transfer request and provide information regarding the outcome of the review and expected timeframe for transfer.

The OOH responded within a fortnight. They acknowledged the urgency of Ann's circumstances and confirmed that she was on the Early Housing Waiting List. Unfortunately, the waiting time for a one-bedroom property in Ann's listed districts remained indefinite because of the acute shortage of one-bedroom properties available for 25 – 55 year olds.

### Alleged assault not established – obligations of Victoria Police considered

Rob was a middle aged man whose health problems meant he was reliant on a disability support pension as his sole source of income.

Victoria Police officers arrested Rob for being drunk in a public place under section 13 of the *Summary Offences Act 1966* (Vic). Rob admitted that he was intoxicated at the time, but instructed that he was not behaving in an anti-social manner and did not resist the arrest. He said he was, nevertheless, pushed to the ground and kicked in the right eye by the officers carrying out the arrest.

Rob suffered an injury to his right eye, migraines, temporary impaired vision and scarring as a result of the alleged assault by police officers.

The HPLC assisted Rob to lodge a complaint with Office of Police Integrity (OPI). The complaint reiterated that, as a public authority, Victoria Police is bound by the Charter and, therefore, members of Victoria Police must act in a manner that is compatible with human rights. The letter questioned whether the conduct of the police officers contravened section 10 of the Charter, which recognises a person's right not to be treated or punished in a cruel, inhumane or degrading way.

The letter recognised that the OPI could not award financial compensation – it sought only a written apology from the responsible police officers and appropriate disciplinary action.

The OPI determined that the matter had enough merit to be investigated. In accordance with normal procedures, the matter was referred to the Victoria Police Ethical Standards Department which conducted an investigation and reported back to the OPI.

The investigating officer arranged a meeting with the HPLC and Rob, so that he could interview Rob in relation to the incident.

The OPI found that the balance of the available material did not support Rob's account of the events over the account given by the relevant police officers (who conceded that force was used but said that this was because Rob resisted arrest). Consequently, the OPI determined that the officers had not acted incompatibly with the Charter in arresting and detaining Rob.

Essentially this matter was decided on the facts and evidence, which could not establish the events alleged – the Charter, together with the *Police Regulation Act 1958 (Vic)*, provided a helpful framework for communicating Rob’s complaint and ensuring accountability and transparency in Victoria Police processes.

In the following case study, the decision was made by VCAT, which held that, based on the facts, the decision of the Office of Housing was not unlawful under section 38 of the Charter. VCAT considered the decision-making of the OOH staff and held that they had given proper consideration to the general hardship that the client would suffer if she was evicted. They had balanced this with the public interest in efficiently managing the public housing waiting list.

### Charter obligation weighed against imperatives of managing public housing – single mother evicted

Karen had a long history of homelessness, having first applied for public housing about 20 years ago. She had spent several periods in public and private rental accommodation, but had suffered domestic violence during these periods. As a result of her experience of domestic violence and family breakdown, Karen had also suffered drug abuse, depression and recurring homelessness throughout the preceding decade.

Karen was engaged in custody proceedings concerning her three youngest children and her ability to find stable housing was fundamental to her ability to obtain shared custody of her children. Karen’s experience of homelessness was also affecting the wellbeing and development of her teenage daughter, who had previously missed five months schooling as an indirect result of Karen’s homelessness.

At the time she approached the HPLC, Karen had been living in a public housing property that had been leased to her mother for approximately 23 years. Karen moved to the property, which was her family home, several weeks prior to her mother’s death. When the Director of Housing became aware of Karen’s occupation of the property, they sought to regain possession (on the basis that the premises was occupied without consent under section 344 of the *Residential Tenancies Act 1997 (Vic)*).

Karen sought to negotiate a transfer of the tenancy from her mother’s name into hers but this was refused (despite the fact that Karen had been approved for early housing by the DOH and had reached the top of the early housing waiting list in other broadband areas).

Karen did not attend, and was not represented at, the VCAT hearing at which the possession order was made and the principal registrar was directed to issue, without delay, a warrant of possession to be executed within 30 days.

The HPLC assisted Karen to apply to VCAT for a review of the possession order (under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*) on the basis that, with a reasonable excuse, she had not attended and was not represented at the hearing where the order was made. This was granted and at the substantive hearing, which had been adjourned, the HPLC submitted that VCAT lacked jurisdiction to make the order sought by the DOH because the DOH had acted unlawfully in bringing the application for possession (under section 38 of the Charter):

- (i) the DOH had not given proper consideration to Karen’s rights not to have her privacy, family and home arbitrarily or unlawfully interfered with under section 13(a) of the Charter;
- (ii) the DOH had not given proper consideration to Karen’s daughter’s right to such protection “as is in her best interests” under section 17(2) of the Charter; and
- (iii) the decision to evict Karen was incompatible with the rights under sections 13(a) and 17(2), and infringement of these rights was not justified in the circumstances by application of section 7(2).

The VCAT member ultimately held that the decisions of the DOH were not unlawful by application of the Charter. She held that the DOH had not acted “unlawfully or arbitrarily” under section 13(a) and therefore the right to privacy under the Charter was not engaged. Further, even if this right had been engaged, she held that the DOH had fulfilled its obligations under the Charter because its staff were aware of the general

hardship that Karen would encounter if made homeless and they balanced this with the public interest in housing those most in need in accordance with the DOH's policies for managing its waiting list.

The possession order was affirmed and Karen was required to vacate the property within 30 days of VCAT's decision.

On Karen's instructions, the HPLC did not appeal this decision – the decision-making of the OOH had been the subject of independent review, and had, on the facts, been deemed to have properly considered Karen's individual circumstances and her human rights.

## 5. The effects of the Charter on statutory provisions and the roles of courts and tribunals

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This section addresses Terms of Reference 5(a), (b) and (d).

### 5.1 The dialogue model

The dialogue model is key to the Charter's effectiveness. The three-pronged obligations under the Charter – on Parliament, public authorities and the courts – **together** provide effective protection of rights in Victoria.

This model entrenches a system where: human rights are taken into consideration from the outset in developing laws; public authorities build human rights into their practices and decision-making processes and service delivery; and, as a last resort, there is recourse to courts and tribunals. If one or more of these elements is removed, it will leave an inefficient and ineffective gap in the system.

Essentially, while much of the positive impact of the Charter identified by the HPLC stems from the obligations on public authorities under section 38, this provision would not be as effective in the absence of:

- ▶ the requirements that Parliament consider human rights when making new laws; and
- ▶ the ability of courts and tribunals to consider decisions that fail to give proper consideration to human rights.

These “front end” and “back end” mechanisms, and the benefits they bring in terms of more efficient and effective protection of rights for Victorians, are discussed in more detail below.

### 5.2 Front end – the role of Parliament and SARC

The mechanisms in part 3 of the Charter make sure that human rights are considered in the initial stages of developing legislation and regulations:

- ▶ section 28 requires a member of Parliament introducing a Bill to prepare a Statement of Compatibility, indicating, in the member's opinion, if and how the Bill is compatible with human rights or, if the member considers that the Bill is incompatible with human rights, the nature and extent of the incompatibility; and
- ▶ section 30 requires SARC to consider any Bill introduced into Parliament and to report to the Parliament as to whether the Bill is incompatible with human rights.

These provisions establish that Parliament has the primary role in ensuring that legislation is compatible with human rights under the Charter. They recognise “the ultimate sovereignty of Parliament to make laws for the good government of the people of Victoria”.<sup>63</sup>

As SARC has noted:

The requirement that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed.<sup>64</sup>

SARC has recognised the importance of this process in *Practice Note No. 2 (Practice Note)*, which provides that SARC will regard Statements of Compatibility as equivalent to explanatory memoranda and will write to Ministers if SARC regards a statement as inadequate or unhelpful in describing provisions that may engage

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<sup>63</sup> Charter of Human Rights and Responsibilities Bill, Second Reading Speech, Legislative Assembly, Parliament of Victoria (4 May 2006), 1293.

<sup>64</sup> Scrutiny of Acts and Regulations Committee, *Alert Digest No 11 of 2009*, 3.

or infringe a Charter right.<sup>65</sup> The Practice Note states that SARC “considers that the provision to Parliament of reasonable explanatory material is critical to the Parliament’s exercise of legislative power in an informed manner”.<sup>66</sup>

Reporting on the effect of the mechanisms requiring scrutiny of proposed laws, the Victorian Department of Justice 2009–2010 Annual Report states:

The Charter has ensured more transparent and accountable government. By March 2010, almost 300 Statements of Compatibility had been tabled in Parliament explaining how proposed laws affected human rights. To date, only two statements have identified incompatibilities with the rights set out in the Charter.

In both instances, the government decided to proceed with the legislation because of the overriding public interest in protecting the community. The Charter does not prevent the government from taking strong, decisive action in order to protect and promote law and order; it requires that limitations on rights are publicly explained and justified.<sup>67</sup>

This part discusses examples of the operation of “front end” mechanisms in relation to proposed laws that are particularly relevant to the HPLC’s client group. These examples show the benefits of the dialogue model and the importance of Parliament’s role. This process has:

- ▶ served to both inform Parliamentary debate and ensure that human rights are properly considered when legislation is being developed;<sup>68</sup>
- ▶ presented the opportunity for increased community consultation and engagement in the development of the legislation; and
- ▶ provided the impetus for review of outdated legislation, including the *Mental Health Act 1986 (Vic)* (**Mental Health Act**) and the *Guardianship and Administration Act 1986 (Vic)* (**Guardianship Act**).

Specific examples of the front end processes that the HPLC has been involved in are set out below.

#### Police powers legislation

In November 2009 and August 2010, amending Acts were introduced in Victoria,<sup>69</sup> which increased police powers to: stop and search people (including children); compel people to “move on”; and issue fines for disorderly conduct.

Both sets of amendments were introduced as part of the then-government’s “tough on crime” agenda.

When the legislation was first put forward, the HPLC (and a number of other community organisations) publicly expressed serious concerns that:

- ▶ the powers did not contain sufficient protections to ensure that they would be exercised appropriately;
- ▶ there was a lack of empirical evidence, both domestically and internationally, demonstrating a correlation between parallel police powers and reduced crime rates; and
- ▶ the laws would prove to be discriminatory in effect. In particular, that people experiencing homelessness would be targeted by this legislation because, without secure housing, many are forced to carry out basic daily living activities in public spaces.

In the legislative development process:

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<sup>65</sup> Scrutiny of Acts and Regulations Committee, *Practice Note No. 2* (6 August 2007).

<sup>66</sup> *Ibid.*

<sup>67</sup> Department of Justice, *Annual Report 2009 – 2010* (September 2010), 19. See also, VEOHRC, above n 25, 46, which records that, in 2010, Hansard recorded debate on human rights issues in relation to 42 Bills presented to the Victorian Parliament.

<sup>68</sup> Scrutiny of Acts and Regulations Committee, above n 64, 3.

<sup>69</sup> *Summary Offences and Control of Weapons Acts Amendment Act 2009 (Vic)*; *Control of Weapons Amendment Act 2010 (Vic)*.

- ▶ the relevant member of Parliament acknowledged that the discretionary nature of the police powers to randomly search people (including children) and vehicles in public places, even if there is no reasonable suspicion that they are carrying a weapon, could not be justified as reasonable and proportionate (in accordance with the permitted limitations on human rights under section 7(2) of the Charter);<sup>70</sup>
- ▶ SARC identified that the second Bill authorised “potentially widespread repeated use of random personal search powers without notice or any threat of violence or disorder, and [left] the incidence, recording of particulars and independent supervision of nearly all such searches to the police’s discretion”;<sup>71</sup> and
- ▶ SARC identified that the proposed amendments may be incompatible with the rights to privacy and liberty under sections 13(a) and 21(1) and the rights of children under section 17(2) of the Charter.<sup>72</sup>

Despite the above concerns, both pieces of legislation were passed unamended.

While the legislation passed with these partially incompatible provisions, the level of public and Parliamentary debate around the human rights implications of the legislation should be recognised. There was transparent recognition about the limitations on rights imposed by this law, and government was required to be accountable for this. In the absence of the part 3 mechanisms under the Charter, this discussion would not have occurred.

The Charter now has a role to play in monitoring that members of Victoria Police, as a public authority, give proper consideration to human rights in acting under these new laws. The VEOHRC 2010 Report notes that the Department of Justice had reported: “since there are no ‘reasonable suspicion’ prerequisites to the exercise of these powers, police have been rigorous in ensuring that they are exercised in a strictly random way”<sup>73</sup> i.e. not in the discriminatory or disproportionate way that the HPLC and other community organisations had expressed concerns about.

Arguably, police officers are being particularly cautious about implementing the laws in a human rights compatible way because of the significant amount of attention that the front end processes under the Charter drew to these provisions.

### Severe Substance Dependence Treatment Bill

The Severe Substance Dependence Treatment Bill proposed the introduction of short-term involuntary detention and treatment for people experiencing severe substance dependence in circumstances where it is necessary as a matter of urgency to save a person’s life or prevent serious damage to a person’s health.

The Statement of Compatibility recognised that the Bill engaged and potentially limited several human rights under the Charter, including the right:

- ▶ not to be subjected to medical treatment without consent under section 10(c);
- ▶ to freedom of movement under section 12;
- ▶ to privacy under section 13;
- ▶ to liberty and security of person under section 21;
- ▶ to a fair hearing under section 24; and

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<sup>70</sup> See Statement of Compatibility in Hansard (12 November 2009), 4024 (Summary Offences and Control of Weapons Amendment Bill 2009); Statement of Compatibility in Hansard (24 June 2010), 3127 (Control of Weapons Amendment Bill 2010).

<sup>71</sup> Scrutiny of Acts and Regulations Committee, *Alert Digest 8 of 2010*, 11 (reporting on the Control of Weapons Amendment Bill 2010).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, 37.

- ▶ to equality and non-discrimination under section 8.<sup>74</sup>

The Statement of Compatibility concluded that the Bill was compatible with the Charter “because to the extent that some provisions may limit rights, those limitations are reasonable and demonstrably justified in a free and democratic society”.<sup>75</sup>

The HPLC and a number of community organisations<sup>76</sup> made submissions to SARC urging them to, amongst other things, request empirical evidence from the Minister of Health, showing that the proposed detention and compulsory treatment was an effective way of treating substance dependence. If this could not be provided, it was suggested that the proposed limitations on rights were not demonstrably justified under section 7(2) of the Charter.

SARC observed that the Bill significantly limited the Charter rights of people with severe substance dependence against non-consensual medical treatment and to privacy and liberty, but acknowledged that it aimed to promote the Charter rights to life and security.<sup>77</sup>

SARC stated that, while it considered that “the goals of saving the life and welfare of people with severe substance dependence are sufficiently important to justify limiting other Charter rights of those people”, it had concerns about whether aspects of the Bill satisfied “the Charter’s test for limiting rights, including its requirements that any limits be demonstrably justified, legally circumscribed and reasonable”.<sup>78</sup>

SARC referred to Parliament for its consideration the question of whether or not the Bill satisfied the test for reasonable limits on rights under section 7(2) of the Charter.<sup>79</sup> SARC noted that the Bill authorised substantial limits on people’s rights against non-consensual treatment and to privacy and liberty and:

- ▶ cited only anecdotal evidence for beneficial effects of compelled treatment;
- ▶ did not define the substances that people can be forced to withdraw from;
- ▶ did not expressly require a court to determine whether treatment is in the person’s best interests; and
- ▶ did not provide for a court to set a lower detention period than the statutory maximum.<sup>80</sup>

The Minister responded to each of SARC’s questions and reiterated her confidence that the Bill was compatible with the Charter.

In this case, the Charter led to more informed Parliamentary debate,<sup>81</sup> transparency and accountability in the development of legislation, with Parliament satisfied of the compatibility of the legislation with the standards contained in the Charter. In addition, in relation to the *Severe Substance Dependence Treatment Act 2010* (Vic), which came into effect in March 2011, the Victorian Department of Health emphasises that:

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<sup>74</sup> Statement of Compatibility in Hansard (10 December 2009), 4579.

<sup>75</sup> Ibid, 4583.

<sup>76</sup> See, eg, Human Rights Law Centre, *Severe Substance Dependence Treatment Bill 2009 – Submission to the Scrutiny of Acts and Regulations Committee* (January 2010) (available at: <http://www.hrlrc.org.au/content/topics/health/human-rights-safeguards-needed-under-severe-substance-dependence-treatment-bill-jan-2010/>).

<sup>77</sup> Scrutiny of Acts and Regulations Committee, *Alert Digest 1 of 2010*, 27.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid, 29.

<sup>80</sup> Ibid.

<sup>81</sup> See, eg, Minister Wooldridge in Hansard, Second Reading Speech (9 March 2010), 623 who stated: “a lot of concern has been expressed about certain provisions in the bill by consumers and the legal fraternity, many of whom deem aspects of this legislation to be in contravention of the Victorian Charter of Human Rights and Responsibilities. The Scrutiny of Acts and Regulations Committee received a number of submissions regarding this legislation which expressed some concern about provisions in the bill limiting and impinging on the freedom and liberty of people subject to an order application. SARC found there was not enough evidence to support the effectiveness of short-term compulsory detention, about which I talked previously. The Human Rights Law Resource Centre believes the failure to justify the effectiveness of this form of treatment contravenes the requirements of section 7(2) of the charter.”

- ▶ the Act applies to people with the most severe substance dependence who urgently require treatment to save their life or prevent serious damage to their health;
- ▶ it is a last resort treatment option for a very small group of people who without this life saving intervention would most likely become permanently disabled or die;
- ▶ the maximum period of treatment and detention is limited to 14 days; and
- ▶ the Act is not targeted to people who are capable of making choices about their substance use, including refusing treatment.<sup>82</sup>

From this, it is clear that the concerns of the community sector, SARC and some members of Parliament have been considered in the development of the policies for implementing this legislation, so that the limitations on human rights are minimised to the greatest extent possible.

### Review of outdated legislation

Mental illness can be both a causal factor in the lives of people experiencing homelessness, as well as a consequence of the social dislocation, isolation and hardship that homelessness entails.<sup>83</sup> Consequently, a number of the HPLC's clients will come into contact with either or both of the mental health or guardianship and administration regimes in Victoria.

It was therefore welcomed when the Victorian Government announced:

- ▶ in May 2008, the commencement of the review of the *Mental Health Act*, and
- ▶ in June 2009, that the Victorian Law Reform Commission would undertake a review of the *Guardianship Act*.

The Terms of Reference for both reviews refer to the need to reconsider the legislation to ensure that the Acts appropriately protect human rights in light of the Charter.<sup>84</sup>

The framework for both the process for undertaking the review and the proposed reforms has been human rights focused. For example, both reviews have acknowledged the specific Charter rights that are engaged by the legislation,<sup>85</sup> and both have engaged in extensive consultation with people and organisations working with, or affected by, the laws.<sup>86</sup>

The Charter:

- ▶ was a key factor in the decision to review these Acts, which were over 20 years old and reflected attitudes and practices that were not consistent with principles of dignity, respect and individual autonomy; and

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<sup>82</sup> See Victorian Department of Health, *Severe Substance Dependence Treatment Act 2010 – A Summary* (available at: <http://www.health.vic.gov.au/ssdta/>).

<sup>83</sup> See Guy Johnson and Chris Chamberlain, 'Are the Homeless Mentally Ill?' – A paper presented at the Australian Social Policy Conference, University of New South Wales (8–10 July 2009) (available at: <http://www.sprc1.sprc.unsw.edu.au/ASPC2009/papers/Paper375.pdf>). This paper presents the findings of a study undertaken by Johnson and Chamberlain, involving a sample of 4,291 homeless people in inner Melbourne, which found that 31 per cent of the sample had mental health problems: 15 per cent of the sample had mental health problems before becoming homeless, and 16 per cent developed mental health issues after becoming homeless. See also Victorian Government Department of Human Services, *Because Mental Health Matters: A New Focus for Mental Health and Wellbeing in Victoria – Consultation Paper* (May 2008), 93, which found that approximately 30 percent of people experiencing homelessness in Victoria experience mental illness.

<sup>84</sup> See The Honourable Lisa Neville MP, Minister for Mental Health, *Mental Health Act 1986 Review Terms of Reference* (19 July 2008) (available at: <http://www.health.vic.gov.au/mentalhealth/mhactreview/termsofref.pdf>); Guardianship – Terms of Reference (available at <http://www.lawreform.vic.gov.au>).

<sup>85</sup> *Ibid*, 19

<sup>86</sup> See, eg, *Review of the Mental Health Act 1986 Consultation Report* (July 2009), 17.

- ▶ provided a framework for reviewing these pieces of legislation, including through consultation and engagement.

The HPLC is strongly of the view that the role of the Charter in informing both the review process and the new Acts, will lead to better, clearer, more effective legislation and policies.

### 5.3 Back end – the role of courts and tribunals

Resolution of Charter-based issues before a court or tribunal is a last resort that only arises when the front end measures have failed. For the reasons discussed in this part, though, the protection of rights under the Charter would not be as effective and efficient if there was no enforcement role for courts and tribunals:

- ▶ preventative function – it provides a more compelling incentive to avoid breaches;
- ▶ guidance by the courts and tribunals – these decisions provide clarity about the application of the Charter in practice; and
- ▶ additional layer of protection – on rare but important occasions an independent decision-maker is needed to avoid unjust outcomes.

#### Preventative function – incentive to avoid breaches

This submission has emphasised the clear and positive effect the Charter has had on the delivery of public services and the performance of other functions by public authorities. In representing our clients, the HPLC has experienced better decision-making and seen complex matters being resolved through negotiation.

The HPLC is strongly of the view that these outcomes would not have been effectively delivered if it was not possible for a person to seek relief or remedy on the ground of unlawfulness under the Charter (under section 39).

Although currently, the relief or remedy for Charter-based unlawfulness can only be sought if the person has another cause of action (the potential to improve this provision is discussed in part 7.2 below), even in this form, there is a clear legislative statement that failure to act compatibly with human rights or to give proper consideration to human rights is “unlawful”. If a person comes before a court or a tribunal (i.e. there is another cause of action to “piggyback” off, such as an eviction proceeding brought by a landlord),<sup>87</sup> the client can raise the issue of unlawfulness on the basis of Charter non-compliance and have their human rights enforced.

In the example set out in part 4.1 above, in the absence of enforceable rights under a Charter a man and his two children were evicted into homelessness. The same policies applied in 2006 as in 2011 when the HPLC was able to successfully negotiate a transfer of tenancy for two clients and avoid three people becoming homeless. The key difference in the legal and policy landscape was that pre-Charter there was no prospect of VCAT being able to enforce a person’s human rights. There was therefore little individual or institutional incentive to negotiate a better, fairer outcome.

The knowledge that rights are enforceable in a court or tribunal is a powerful motivator in terms of compliance. If there was no enforcement role for courts or tribunals, human rights considerations would take longer to become entrenched in policies and practices; and systemic changes would be significantly slower (if they occurred at all).

This point has been raised by Tony Keenan, CEO of Hanover Welfare Services, who addressed the suggestion that registration and accreditation, codes of conduct and public education could have ensured

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<sup>87</sup> The question of whether the Charter can be used as a defence has been raised in the Supreme Court of Appeal during the appeal of *Director of Housing v Sudi* [2010] VCAT 328. See below part 7.2.

that public authorities carried out their functions consistently with human rights (i.e. that legislation was not needed). To this he said:

Conversely, it can be argued that the increased emphasis on human rights which has occurred, and will continue to occur, to these “softer” areas of regulation is as a direct result of the introduction of the Charter i.e. these changes have been introduced to ensure public authorities comply with the Charter.<sup>88</sup>

Similarly, the Salvation Army has acknowledged: “The Victorian Charter of Human Rights and Responsibilities has added weight to the standards by ensuring that individuals and organisations are held accountable for respecting the rights of all people.”<sup>89</sup>

Essentially, the enforceability of rights makes it less likely human rights breaches will occur in the first place. This is important not only terms of avoiding litigation and cost saving, but also in terms of avoiding the consequences of human rights breaches for the affected individuals. It is worth remembering at this point that unlawfulness under section 38 of the Charter is not an abstract idea – for 42 people that the HPLC assisted, a breach of the obligation under section 38 would have resulted in their homelessness. For this reason, the preventative role of enforceable human rights is an important one.

### Guidance from courts and tribunals

Courts have an important role in developing jurisprudence about the scope of Charter obligations.

Similarly, VCAT decisions (although not binding in the same way as a court decision) have created clarity and provided useful guidance to the sector about the content of Charter obligations and how to apply them in practice. These public statements have been used to encourage policy and practice-based changes.

Two key examples are:

- ▶ the clarification of the scope of a “public authority” in the housing sector (under section 4(c) of the Charter); and
- ▶ the legitimacy of the practice of issuing tenants in transitional housing with a Notice to Vacate at the commencement of their tenancy or periodically throughout.

The relevant VCAT decisions, *Metro West v Sudi* and *HomeGround v Mohamed*, were discussed in part 4.1. As mentioned in relation to “functional public authorities” above, the analysis of Bell J in *Metro West* has provided a degree of clarity to community housing providers about the scope of the obligations on public authorities. The decision provided practical guidance about what factors need to be considered in determining whether an entity is a public authority. Within the housing and homelessness sector, this decision removed some of the confusion as to whether non-government providers of public housing were covered by the Charter.<sup>90</sup> In providing this clarification, the *Metro West* decision also created awareness and reiterated the importance of Charter compliance in decision-making processes and practices.

Similarly, in *Mohamed*, Member Perlman considered the common practice of transitional housing providers of issuing a periodic Notice to Vacate as a mechanism for managing their limited supply of short-term accommodation. While not binding, Member Perlman’s consideration of these practices became well-known in the community housing sector. The decision made it clear to many organisations who engaged in similar

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<sup>88</sup> Tony Keenan, above n 31, 6–7.

<sup>89</sup> Salvation Army Southern Region, *National Quality Framework Submission* (2010) (available at: <http://www.fahcsia.gov.au>).

<sup>90</sup> See Tony Keenan, above n 31, 2: “From 2006, there was a high degree of uncertainty and debate as to whether not for profits, which have their own private income and importantly limited negotiating capacity in contracting with government, or control over housing programs or budgets, are public authorities when delivering homeless services”. Mr Keenan then states that the decision in *Metro West*: “has provided a degree of certainty as to the public authority issue” (although he notes that, as decisions of VCAT are not binding, “the scope still exists for a different decision in a case with similar facts to be made by VCAT at a later date”) (at 3).

practices that blanket application of policies is not an appropriate mechanism to meet the needs of vulnerable clients and was unlikely to be permitted under the Charter.

In addition to carefully considered guidance about how Charter principles apply in practice, the decisions of courts and tribunals are statements on the record for the public about the Charter and its application. In the case of Metro West and Mohamed, VCAT's consideration of enforceable human rights reminded public and social landlords about their obligations under the Charter and provided guidance about what kinds of policies and practices were at risk of breaching clients' rights under the Charter.

### Additional layer of protection

As the case studies in this submission show, the decision-making processes of public authorities are not always consistent or predictable.<sup>91</sup> The Charter protects people from the ad hoc approaches within organisations. It provides one clear set of standards that, if needed, can be enforced by a court or tribunal, and it provides protection against human error, which might not otherwise be detected or avoided.

This additional protection is only needed when decision-makers within public authorities fail to adhere to the obligations under section 38 of the Charter. Therefore, although it is only turned to as a last resort, the enforceability of human rights by a court or tribunal when other protections have fallen short is a crucial component of the safeguards the Charter provides to Victorians.

Unlike the case studies set out above, in the seven case studies below, negotiated outcomes were not possible. The relevant public authority in these cases would not agree to proposed alternatives to eviction. If VCAT had not had an enforcement role in these matters (i.e. as an independent tribunal assessing the HPLC's submissions, which included Charter-based arguments), it is highly likely that these clients – 29 people in total, including 16 children – would have been evicted.

It is highly unlikely that these clients would have sought judicial review of the decision. Rather, they would have ended up in emergency accommodation and back on the waiting list for public housing.

### Teenage daughters allowed to stay in home while father overseas and unwell

Rashida and Reem were both full time university students. They were 18 and 19 and lived in public housing with their parents (who were the tenants of the property) and seven younger siblings.

The Office of Housing granted Rashida and Reem's parents a six-month temporary absence so they could return to Lebanon. The family, except for Rashida and Reem, travelled to Lebanon, but were unable to return to Australia as planned because their father became very ill with cancer.

Due to their extended stay overseas, the parents had no income and the two sisters were left to try to meet rental payments for the property on their own. Unsurprisingly, Rashida and Reem were unable to keep up with the rent and were issued with a Notice to Vacate for rental arrears (under section 246 of the *Residential Tenancies Act 1997 (Vic)*).

The OOH then applied to VCAT for a possession order, which had the potential to lead to the eviction of the 11 family members.

The HPLC sent a letter to the OOH outlining the orders that it would seek from VCAT (including adjournment, dismissal, or an order that Rashida and Reem be added to the existing tenancy agreement on the grounds that they would suffer severe hardship if forced to vacate the premises).

In encouraging the OOH to enter into a Local Agreement with Rashida and Reem (this being a standard option presented by the OOH whereby tenants enter into an agreement to pay their normal weekly rent plus

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<sup>91</sup> See also, Victorian Public Housing Report, above n 2, xxiv: "the variability in housing office implementation of these processes [regarding rental recovery] ... was notable and in need of improvement".

an additional amount toward the arrears), the HPLC referred to the sisters' rights under section 13(a) of the Charter not to have their home and privacy unlawfully or arbitrarily interfered with.

The letter referred to section 38(1) of the Charter, noting that public authorities such as the OOH are required to act compatibly with human rights and, when making a decision, are required to give proper consideration to relevant human rights.

The letter also reiterated that Rashida and Reem and their parents respected the obligation to pay rent and were eager to do so. It set out the steps the daughters had taken to put themselves in a position to pay the arrears and to avoid incurring further arrears, which included: attendance at a financial counsellor; working with a SHASP housing support worker; and seeking assistance from family members to make one-off payments toward the arrears.

The letter also encouraged the OOH to enter into a Local Agreement so that Rashida and Reem could make increased rental payments (i.e. to cover the arrears) via Centrepay (if there is no Local Agreement, this cannot happen). The letter pointed out that it is the experience of the HPLC that "the Centrepay facility offers people experiencing financial hardship a tool to better manage their finances and meet financial commitments".

Unfortunately, attempts at negotiation with the OOH were unsuccessful.

The HPLC prepared submissions to VCAT, including seeking an order that, pursuant to section 38 of the Charter, the decision of the OOH to pursue its application for a possession order and to seek eviction of the tenants' daughters was unlawful. The submissions also referred to section 7(2)(e) of the Charter and questioned whether the OOH had considered the requirements of section 7 before making the decisions to issue the NTV and lodge the application for possession. The HPLC proposed that there were less restrictive means to achieve the OOH's purpose (including entering into a Local Agreement), and therefore their decisions were not reasonable or justifiable.

At VCAT, a new Local Agreement was reached with the OOH before submissions could be made. The Local Agreement meant that the sisters, as well as their parents and seven younger siblings avoided eviction into homelessness and were able to commence manageable payments that began to address the outstanding arrears.

### Information needed for a fair hearing

The Abrahams had lived in a public housing property with their two children for 10 years. Mrs Abraham suffered from a chronic health condition and received care from a nearby hospital; the children attended the local school; and the family had developed strong ties to the local community.

The Director of Housing applied for a possession order on the basis of alleged breaches of a compliance order that the Abraham family were subject to.

If the DOH's application had been granted, it would have led to the eviction of the Abraham family and exposed them to a serious risk of homelessness.

The HPLC contacted the Office of Housing to request the evidence that formed the basis of the DOH's application for possession, but the OOH indicated that they would provide this evidence at the hearing itself, not before the hearing.

At the hearing, the HPLC submitted that the DOH's failure to provide the evidence it was relying on breached the Abrahams' right to a fair hearing under the Charter (section 24) because they were not made aware of the case they had to answer. Further, the OOH had failed to give proper consideration to the Abrahams' rights under sections 13(a) and 17 in making the decision to apply for eviction.

VCAT ordered the DOH to provide the evidence being relied on and adjourned the hearing until such evidence was provided to the HPLC.

The DOH then withdrew the application for possession and agreed to meet with the Abrahams to reach an alternative resolution.

### Eviction of parents and newborn twins prevented and housing support provided

Mahdi was originally from Somalia and had come to Australia as a refugee when he was 16. At 17 he became homeless due to family breakdown and later suffered from drug dependence and mental health problems. His partner had recently given birth to twins.

The twins were born prematurely and, on the day of their birth, Mahdi was due to appear at a bail hearing in relation to drug related offences. Because of the birth, he had missed his bail hearing and was required to serve a one month custodial sentence.

While he was in prison, he was sent a notice of hearing – the Director of Housing had applied to VCAT for a possession order because Mahdi owed almost \$8000 in outstanding rent.

He did not receive the notice and did not attend the VCAT hearing. A possession order was made at the hearing and, one month later, the DOH purchased a warrant. Victoria Police were due to execute the warrant (i.e. to remove Mahdi and his partner and their six-week old twins) from the property on a set date in approximately two months.

Shortly after the warrant was issued, Mahdi approached the Office of Housing to try to explain his situation and avoid eviction. The OOH referred Mahdi to a Social Housing Advocacy and Support Program worker.

Mahdi's SHASP worker assisted Mahdi to apply to have the possession order reviewed (under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*) on the basis that, with a reasonable excuse, he had not attended and was not represented at the hearing where the order was made.

The SHASP worker then linked Mahdi with the HPLC who represented him at VCAT. VCAT granted the application for a review hearing and proceeded to hear the substantive matter.

The hearing lasted approximately four hours. The HPLC submitted (amongst other things) that:

- (i) the DOH had acted unlawfully in seeking a possession order because it failed to give consideration to the rights under the Charter in accordance with section 38(1); and
- (ii) in seeking a possession order, the DOH acted incompatibly with Mahdi's right not to have his home or privacy unlawfully or arbitrarily interfered with under section 13(a) of the Charter, and that such an incursion was not justified by application of section 7(2) of the Charter.

Following a brief adjournment for negotiation, the parties reached an agreement. The VCAT member made orders by consent that the possession order be set aside and the warrant be cancelled. Mahdi was ordered to pay a lump sum to the OOH and to pay rent, together with an additional \$40 per fortnight toward the arrears.

Given the very large sum owed by Mahdi, the VCAT member balanced the Charter-based submissions against the (quite significant) financial loss of the landlord and the fact that there appeared to be little prospect of mitigating that loss quickly.

The Charter was crucial to the HPLC's ability to convey information about the client's circumstances to both the DOH and to VCAT. Prior to the hearing, the representatives for the DOH were unwilling to negotiate with Mahdi. However, after the HPLC's submissions had encouraged them to consider his circumstances in the context of Charter-based rights, the DOH's representatives had greater compassion for Mahdi and his family and were willing to give him another chance at fulfilling his obligations as a tenant.

Mahdi's SHASP worker offered to assist him to apply to have his partner formally added to the lease and to organise a financial counsellor to assist Mahdi and his partner with budgeting in the future.

## Young man avoids being evicted for consequences of stress-induced breakdown

Joseph was a young man with a history of homelessness and alcohol dependence (although he had been sober for four years).

The stress of his living situation (which included bullying by other residents) caused Joseph to suffer an episode of mental illness.

The housing organisation issued Joseph with a Notice to Vacate based on successive breaches of a duty provision (under section 283 of the *Residential Tenancies Act 1997 (Vic)*).

The HPLC represented Joseph at VCAT and argued that the housing provider (although in fact a private non-profit company) exercised a function of a public nature (being the provision of social housing) on behalf of government and was therefore a functional public authority for the purposes of section 38 of the Charter. In issuing the NTV, the HPLC suggested that the landlord had failed to act compatibly with Joseph's right to equal protection of the law under section 8 of the Charter (that is, by treating him less favourably than other residents in the same situation) and unlawfully or arbitrarily interfered with his right to home under section 13(a) of the Charter.

The HPLC requested that VCAT:

- (i) make a declaration under section 124 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* that the NTV was invalid and of no effect;
- (ii) grant an injunction restraining the housing association from acting to evict Joseph and failing to comply with its obligations under the Charter.

These arguments were used in conjunction with, and as an alternative to, arguments as to the technical invalidity of the Notice to Vacate and the application for possession was dismissed.

## One year compliance order for mother and children

Miriam was issued with two breach of duty notices in relation to her public housing property. She had been living in the same unit for over 15 years and had not previously had any complaints made against her.

Miriam now had three young children and they were living in a two bedroom unit. She had been on the waiting list to be moved to a larger property to meet her children's needs for over six years.

Miriam's partner, who did not live at the property, was involved in verbal altercations with other public housing tenants and the OOH issued Miriam with breach notices for her partner's nuisance.

Miriam had approached her housing office worker to discuss ongoing issues with the neighbours, but she had been told that it could not be dealt with unless a complaint was put in writing.

After the two verbal altercations between Miriam's partner and the neighbours, for which Miriam was issued with breach of duty notices, the OOH applied for a compliance order (under section 209 of the *Residential Tenancies Act 1997 (Vic)*).

At the hearing, the HPLC submitted to VCAT that:

- (i) the OOH has an obligation to accept and register verbal complaints about tenant behaviour, pursuant to section 2.4 of their Tenancy Breaches and Dispute Resolution Manual;
- (ii) the OOH had other options for dispute resolution open to it, including under section 2.3.3 of its Tenancy Breaches and Dispute Resolution Manual, which provides that the OOH "encourages and assists the involved parties in a mediation process" (in Miriam's case, her version of events has been overlooked and did not appear in official records); and
- (iii) the DOH is a core public authority with obligations under section 38 of the Charter. The decision to apply for a compliance order was an interference with Miriam and her children's rights under sections 13 and 17 of

the Charter and there were less restrictive means available for the DOH to deal with the disagreement between tenants, rather than issuing breach of duty notices and proceedings in VCAT for a compliance order.

VCAT made the compliance order against Miriam, but taking the submissions into account, limited it to one year in duration, rather than making an indefinite order, which would have placed Miriam at ongoing risk of eviction.

### Mother and three children avoid eviction and attempt to relocate to avoid conflict

Jennifer was living in public housing with her three young children who attended the local primary school. They had been living there for three years and, prior to this, had experienced ongoing homelessness. Since moving into the property, Jennifer had been able to start studying and had engaged with support workers to assist her to manage her anxiety and depression.

The family had had an amicable relationship with the neighbours until an incident involving one of Jennifer's children being injured by the neighbours' son caused the relationship to deteriorate. Jennifer's former partner, who did not live at the property, had a number of altercations with the neighbours.

Jennifer was issued with two breach of duty notices in relation to noise and nuisance at the property. She felt that these notices were the result of bullying, harassment and discrimination by her neighbours.

As a result of Jennifer's failure to remedy the alleged breaches, the OOH applied to VCAT for a compliance order, which was granted. The compliance order required Jennifer and any visitors and other occupants of the property to refrain from verbally abusing neighbours and from interfering with the privacy, peace and comfort of the neighbours.

Three months later, a Notice to Vacate was issued as a result of Jennifer's alleged failure to comply with the compliance order and an application for a possession order was sent to Jennifer.

The VCAT hearing was adjourned to allow Jennifer's HPLC lawyers sufficient time to properly prepare for the hearing. The HPLC had been having difficulty getting documentation from the OOH, so the VCAT member also ordered that the parties provide documents and other evidence that they intended to rely on at least one week prior to the hearing.

At the VCAT hearing, the HPLC made three sets of arguments opposing the application for a possession order. One of these was based on the Charter.

The HPLC asserted that issuing the Notice to Vacate by the DOH was unlawful and, therefore, VCAT could not make the possession order pursuant to section 330 of the Residential Tenancies Act 1997 (Vic).

Given that the DOH is a "public authority" under the Charter, it is unlawful for the DOH to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right. The HPLC submitted that the DOH's decision to apply for a possession order interfered with the following human rights:

- (i) Jennifer's right not have her home arbitrarily interfered with (section 13(a));
- (ii) Jennifer and her children's rights to protection of their family (section 17(1)); and
- (iii) the rights of Jennifer's children (section 17(2)).

The HPLC also submitted that there was a lack of justification for the interference with Jennifer's rights and that the limitations on Jennifer and her children's rights were not reasonable under section 7(2) of the Charter. In particular, the OOH had not considered alternatives to seeking a possession order, such as assisting Jennifer to find alternative accommodation.

VCAT did not make a possession order. Instead, the member adjourned the matter for six-months, subject to an undertaking by Jennifer to comply with the original compliance order, use her best efforts to ensure her children comply with it, seek alternative accommodation and not to invite Jennifer's former partner to the

property. At the VCAT hearing, the Member addressed Jennifer and her neighbours (who were in attendance) about the alleged conduct of all parties. The Member noted that although Jennifer had to comply with the undertaking, the neighbours also had a responsibility to refrain from interfering with Jennifer and her family and to avoid conflict in the neighbourhood.

Since this time, the HPLC has assisted Jennifer to make an application for an Early Housing Transfer to the OOH. The VCAT adjournment has allowed Jennifer to remain in her home while making this application and for her children to continue attending the local primary school. OOH staff have been supportive of trying to arrange a “mutual swap” for Jennifer and her children so that they can remove themselves from the ongoing conflict with the neighbours.

### Guardian older sister and three younger siblings allowed to stay in home

Angela’s father had passed away and her mother was incarcerated as a result of offences related to her heroin addiction. Angela, who was 23, had agreed to be the guardian for her three younger siblings.

Angela maintained their public housing tenancy and rental payments for the property were automatically deducted from her Youth Allowance payments. She supported her siblings with this payment and her casual work in retail.

In mid-2009, Angela was given the opportunity to go overseas as part of her studies. Angela informed both DHS and Centrelink of her intention to do this and was told that this would not affect her payments or her tenancy.

However, while she was away Angela’s Youth Allowance was suspended (she had temporarily changed her enrolment due to a breakdown caused by her struggle with depression). Her rental rebate was also cancelled, which meant that she was paying market rent for the property. Angela’s payments were no longer being automatically deducted from her Youth Allowance and, as a result, she accrued significant arrears. She was unaware of this because she had not received any correspondence while she was away.

A Notice to Vacate was sent to the property and an application for an order of possession was made by the DOH one month later.

The HPLC was able to liaise with Centrelink to arrange for Angela’s Youth Allowance to be reinstated and backdated (in recognition of Angela’s exceptional circumstances and the needs of her siblings).

The HPLC engaged in negotiations with the local housing office to arrange a payment plan with a view to avoiding eviction proceedings. While an OOH worker indicated that this would be possible, the day before the hearing the worker said that a possession order would in fact be sought by the OOH.

At the VCAT hearing, the HPLC presented two main points. The first was that the member should dismiss the application on the basis of section 331(1)(b) of the *Residential Tenancies Act 1997* (Vic), which allows VCAT to dismiss or adjourn an application for possession order if it considers that satisfactory arrangements have been or can be made to avoid financial loss to the landlord. The second argument was based on the Charter.

The HPLC argued that VCAT should not make an order for possession because, the DOH is a public authority under the Charter, and in making the decision to issue a Notice to Vacate and to apply for possession of the property, the DOH had failed to give proper consideration to Angela and her siblings’ rights under the Charter. The relevant rights were Angela’s rights not to have her privacy or home arbitrarily or unlawfully interfered with under section 13(a); and the rights of Angela and her siblings to protection of their family and, in the case of the younger siblings, protection of children, under section 17.

VCAT did not make a possession order. Instead, the member made an order directing Angela to pay \$10 per week towards her rental arrears (in addition to regular rental payments) until the debt is paid in full.

It is clear from each of the above case studies that, without the role of VCAT – as an independent tribunal that can consider Charter-based arguments – unjust outcomes would more than likely have transpired for each of these clients and their families.

#### 5.4 Non-legislative protections will not be as effective as the Charter

The HPLC appreciates that the Government and Parliament both agree that high quality public services should be provided to Victorians. The HPLC also agrees that non-legislative, sector-specific, accreditation-based service standards play an important role in the regulatory framework of public and community sector organisations.

The HPLC does not, however, accept the suggestion that non-legislative service standards with no role for Parliament or courts and tribunals would tackle injustice on a systemic level more effectively than the Charter.<sup>92</sup>

Our research and work in the sector tells us that these standards will not be as effective as the Charter for the following reasons:<sup>93</sup>

- ▶ service standards are process focused – they can lead to “one-size-fits-all” responses rather than responses tailored to individuals’ needs;
- ▶ service standards are sector-specific and, therefore, are complex and inaccessible, create the potential for inconsistency within services and have isolated impacts, rather than leading to broad improvements in standards of public service;
- ▶ service standards are generally aspirational and compliance is not enforceable by individuals; and
- ▶ service standards can impose an administrative burden on under-resourced organisations.

These points are discussed in more detail below.

#### Service standards are process focused

Standards and codes provide a detailed guide for the operations of service providers by imposing obligations on the service provider. They establish minimum service levels within the context of the particular service, such as the provision of transitional housing or longer term accommodation.

Service providers are often subject to a range of quality assurance frameworks, such as services standards, codes of conduct and consumer charters. Examples of these in the homelessness and housing sectors include:

- ▶ **Homelessness Assistance Service Standards (HASS)** – standards published by the Office of Housing that are used in the accreditation and review of organisations that provide housing services in Victoria. The HASS only apply to funded homelessness assistance services. This includes

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<sup>92</sup> See, eg, Robert Clark MP, *Towards a Just and Fair Victoria*, 8 December 2010 (edited version of speech opening Human Rights Week panel discussion at Telstra Theatre, Exhibition Street, Melbourne): “[R]ather than relying primarily on a Charter Act specified in broad and vague terms, to best avoid and remedy such injustices requires clear statements of the public services and standards to which individuals are entitled, with honest and thorough benchmarking and reporting of service delivery performance, and proper channels of internal redress, backed up by an independent and diligent Ombudsman and accessible administrative law remedies”.

<sup>93</sup> In April 2010, the HPLC was appointed by the Victorian Department of Human Services to undertake six consumer consultations to inform the development of Victoria’s homelessness strategy: see PILCH Homeless Persons’ Legal Clinic, *Victorian Homelessness 2020 Strategy – Summary of Consumer Consultations* (June 2010) (**DHS Consultation Report**). While these consultations were not focused specifically on service standards, the discussion regarding service provision for people experiencing homelessness provided insight into the experience of consumers of services in terms of the quality of service that they are able to access; stories of good and bad experiences with services; and suggestions for improvements in service provision.

providers funded to offer Supported Accommodation Assistance Program (**SAAP**) and Transitional Housing Managers (**THMs**).

- ▶ **Consumer Charter for Community-Managed Housing and Homelessness Services (HASS Charter)** – the HASS require service providers to refer to and employ the HASS Charter. Service providers are expected to uphold the consumer rights it contains, to provide services in accordance with the HASS Charter, the HASS or the National Community Housing Standards, and to notify consumers of their rights, responsibilities and complaints mechanisms available.<sup>94</sup> The HASS are part of Victoria's response to SAAP which was developed to implement a nationally consistent approach to providing services and support to people experiencing homelessness.<sup>95</sup>
- ▶ **Homelessness Assistance Programs Guidelines (HAP Guidelines)** – the HAP Guidelines complement the HASS, and are intended to assist homelessness support services with their self-assessment, quality improvement, daily service delivery and program operations.<sup>96</sup>
- ▶ **Registered Agency Performance Standards (RAPS)** – not-for-profit non-government rental housing agencies that receive funding from, or manage properties on behalf of, the Victorian Director of Housing must comply with the RAPS. The RAPS are enforced through the *Housing Act* 1983 (Vic), which requires that a registered housing agency comply with the relevant performance standards.<sup>97</sup>
- ▶ **Public Housing Consumer Services Charter** – this applies to interactions between the OOH and consumers looking for or living in public housing.<sup>98</sup>

The specificity of service standards can be helpful in terms of establishing minimum procedural and practice-based requirements. By way of example, the privacy obligations in the HASS focus on specific measures such as making sure files are stored in a locked cabinet.<sup>99</sup> In contrast, the Charter contains a broad protection of a person's right not to have his or her privacy arbitrarily or unlawfully interfered with.

The rights in the Charter are given content by domestic and international sources,<sup>100</sup> but ultimately the Charter requires the service provider to determine how best to comply with obligations imposed by the Charter in a particular situation.

While there is certainly a place for the specificity of service standards, the distinction between these two forms of protection of a person's privacy exemplifies the difference between process-focussed service standards and the rights-focussed Charter.

The level of detail and specificity in standards and codes creates the risk that they may become "too prescriptive",<sup>101</sup> and that procedures will be strictly followed, creating a "one-size fits all service delivery

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<sup>94</sup> Victorian Department of Human Services, *Consumer Charter*, 3 (available at: <http://www.housing.vic.gov.au/homelessness-and-family-violence/getting-help/consumer-charter>).

<sup>95</sup> See Australian Institute of Health and Welfare, *Supported Accommodation Assistance Program*, (available at: <http://www.aihw.gov.au/supported-accommodation-assistance-program/>). From 1 July 2011, the Specialist Homelessness Services collection will replace the SAAP.

<sup>96</sup> The Homelessness Assistance Programs Guidelines are available at: <http://www.housing.vic.gov.au/homelessness-and-family-violence/homelessness/for-service-providers/standards-and-guidelines>.

<sup>97</sup> *Housing Act* 1983 (Vic) s 95.

<sup>98</sup> Victorian Government, Department of Human Services, *Public Housing Consumer Charter* (19 July 2010) (available at: <http://www.housing.vic.gov.au/living-in-housing/rights-and-responsibilities/consumer-charter>).

<sup>99</sup> HASS 1.4.11.

<sup>100</sup> *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 32(2); for an example of the use of international sources see *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 at [111] and [590].

approach”.<sup>102</sup> Even where a recommendation or requirement in a standard or code may be generally applicable or would lead to beneficial client outcomes in a majority of cases, more flexibility better enables the service provider to ensure that the individual circumstances of each particular consumer are taken into account.

By focusing on the rights of each individual consumer, the Charter provides service providers with a measure of discretion when determining how to provide appropriate service levels. This discretion enables the service provider to be flexible when helping consumers. This is particularly important when providing services to Victorians experiencing homelessness, because of the varied and complex circumstances they may be experiencing.<sup>103</sup>

The case studies in part 4.1 above are an important example of the risks presented by rigid adherence to policies or procedures with no grounding in rights. In those cases, when the OOH policy was strictly applied, the transfer applications of three vulnerable people were rejected. Only through the Charter’s protections, was the eviction of two of these people into homelessness avoided. The Charter opened the doors to negotiation and allowed for consideration of the particular hardships of the individuals.

### Service standards are sector-specific

#### *Complex and inaccessible*

The diagram in the Annexure B shows a range of the services which a person experiencing homelessness may be required to access, and some of the various pieces of legislation, codes of practice and service standards that apply to each service provider. Service standards are generally limited to one sector as they are implemented by a department with a specific portfolio, or authorised by legislation which only applies to a particular sector.

As shown in the annexure, the Charter provides a helpful, coherent and consistent set of standards that apply across all public authorities in Victoria, which can be contrasted with the variety of sector-specific codes, standards and regulations that apply to different service providers.

This uniformity is particularly important for people experiencing homelessness, who may interact with services across a range of sectors (including health, housing, family violence, mental health care and/or drug and alcohol services). In particular, consumers are more likely to be aware of their rights under the Charter, than they are of various divergent rights and redress mechanisms under sector-based service standards.

The Office of Housing’s processes are an example of the sector-specific policies and procedures that are confusing for both workers and consumers. Firstly, the OOH is not regulated by HASS, it has its own separate set of standards. The OOH has published the *Public Housing Policy and Procedure Manuals*, which set out appropriate guidelines and requirements for public housing. There are several internal and external review mechanisms available to consumer who has concerns about the services provided by the OOH:

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<sup>101</sup> Homelessness Australia, *Submission to the National Quality Framework (NQF) Consultation for the Specialist Homelessness Sector* (2010) (available at:

[http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/national\\_quality\\_framework/Documents/nqf\\_submission/sub\\_35.htm](http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/national_quality_framework/Documents/nqf_submission/sub_35.htm)).

<sup>102</sup> The risks of a ‘one size fits all’ approach are highlighted in: Council to Homeless Persons, *Opening Doors Framework and Implementation: Sector Survey* (2009), 21 (available at: [http://www.chp.org.au/public\\_library/items/2010/05/00265-upload-00001.pdf](http://www.chp.org.au/public_library/items/2010/05/00265-upload-00001.pdf)).

<sup>103</sup> The need for consumers’ individual situation to be considered when providing social services is considered in British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2<sup>nd</sup> Ed, December 2008), 24–26 (available at: [http://www.bihhr.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL\\_0.pdf](http://www.bihhr.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL_0.pdf)).

- ▶ internal review of some decisions through the relevant Housing Services Manager and then the Housing Appeals Office provides scope for the decision to be reconsidered within the OOH;<sup>104</sup>
- ▶ external review may be available for some decisions through VCAT. VCAT provides a forum to have some decisions reviewed on their merits. Through such a hearing, VCAT has all the functions of the original decision-maker;<sup>105</sup>
- ▶ the OOH and other public authorities are subject to judicial review through the court system. This oversight is derived from the notion that public authorities must exercise power that is based on legal authority. Judicial review may consider the validity of decisions made by public authorities based on a number of grounds, including procedural fairness, excess of power and legality more generally;<sup>106</sup> and
- ▶ requests for non-binding investigations and reviews into decisions of the OOH and other public authorities may be made to the Ombudsman, Privacy Commissioner and the Victorian Equal Opportunity and Human Rights Commission.<sup>107</sup> Although the opinions of these bodies are persuasive and are likely to impact upon future decisions made by service providers, non-binding reviews and determinations do not provide the consumer with the personal ability to enforce the appropriate level of service.

While the HPLC has achieved very good outcomes for clients through making Charter-based applications for internal review to the Housing Appeals Office, the internal review process has inherent limitations and robust external review processes are needed to provide adequate checks and balances that avoid unjust outcomes for individuals and ensure high quality service delivery. In particular, the 2010 Victorian Public Housing Report noted an increase in the number of complaints and appeals made regarding decision-making and expressed concerns regarding the “complaints and appeals processes, particularly the lack of independence and the complexity of the process”. The report stated “this ultimately leads to people choosing not to pursue complaints”.<sup>108</sup>

Further, although the courts are likely to consider any standards or codes in the judicial review process, they are ultimately seeking to determine the legal basis for the decision and so are not necessarily bound by the standards or codes.<sup>109</sup> In this respect, the consumer is unable to ensure that any standards or codes are enforced.

#### *Potential for inconsistency*

If an organisation provides services which fall within different sectors, it may be subject to overlapping standards and codes. Such overlap may potentially result in inconsistent obligations being imposed on the service provider.

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<sup>104</sup> The OOH appeals process is available at: <http://www.housing.vic.gov.au/applying-for-housing/appealing-a-decision/housing-appeals>.

<sup>105</sup> Ibid; *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss 42, 48 and 51.

<sup>106</sup> See, generally, Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3<sup>rd</sup> Ed., 2004).

<sup>107</sup> See the *Ombudsman Act 1973* (Vic); *Information Privacy Act 2000* (Vic); the *Equal Opportunity Act 1995* (Vic); and the *Racial and Religious Tolerance Act 2001* (Vic).

<sup>108</sup> Victorian Public Housing Report, above 2, xxvi.

<sup>109</sup> A decision-maker is required to consider the merits of the particular matter before them; cannot blindly apply a policy or standard; and must keep an open mind in cases where deviation from the policy may be appropriate: see, eg, *Yang v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 571; *Minister for Immigration and Ethnic Affairs v Tagle* (1983) 67 FLR 164. As the previously mentioned cases demonstrate, in a judicial review application a court is able to not follow a policy or standard which has been implemented by or applied to the original decision maker. We note however that internal policies, standards and codes, are likely to be a relevant consideration which the court will consider when reviewing a decision, and that failure by a person or organisation to consider a policy or standard may itself be a basis for judicial review (see eg *BHP Direct Reduced Iron Pty Ltd v CEO, Australian Customs Service* (1998) 55 ALD 665).

For example, a THM may provide services through the Social Housing Advocacy and Support Program (**SHASP**) in addition to providing transitional housing services. In this situation, the THM may be both landlord and advocate for a tenant experiencing or at risk of homelessness. As a provider of transitional housing, the THM is subject to the HAP Guidelines.<sup>110</sup> As a provider of SHASP services, the THM would be subject to the Public Housing Infrastructure Programs framework and guidelines.<sup>111</sup>

In certain circumstances, inconsistency may arise between these two standards and codes. For example, guideline 4.5.4 of the HAP Guidelines provides guidance in respect of the eviction of tenants, and states that a THM has an obligation “to ensure that transitional housing is being appropriately utilised to enable the most effective response to homelessness”. This broad social obligation contrasts with the obligation of a SHASP provider to ensure that the individual needs of “social housing tenants unable to advocate on their own behalf are met”.<sup>112</sup> While these two roles may not necessarily clash, there is clearly potential for the obligations imposed on a THM to conflict with those imposed on a SHASP provider.

It is not clear how this potential tension would be resolved in the absence of the Charter. As it is, guideline 4.5.4 of the HAP Guidelines moderates the obligation to ensure that transitional housing is being “appropriately utilised” by stating that in fulfilling that obligation, the “principles of the [Charter] must be observed at all times”.

This example demonstrates that the Charter, by providing a legislated baseline protection for human rights, which applies across various sectors, assists service providers to interpret and balance obligations imposed by standards and codes.

#### *Isolated impacts*

As has been made clear in this submission, the dialogue model of the Charter has promoted improvements in the delivery of public services. The Charter has provided an impetus for changes in policies and practices that would not otherwise have occurred; and it has generated systemic changes across government agencies that have led to better treatment of, and outcomes for, ordinary Victorians.

Jurisdictions that have formally protected human rights for longer than Victoria report similar positive changes. In particular, the formal review of the operation of the *Human Rights Act* 1998 (UK) (**UK Human Rights Act**), carried out by the Department for Constitutional Affairs (UK) found that the Act had “led to a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals”.<sup>113</sup>

Further, the report of the British Institute of Human Rights (**BIHR**) on the operation and impact of the UK Human Rights Act summarises over thirty case studies where rights were used to improve the delivery of public services.<sup>114</sup> The BIHR report notes that, the UK Human Rights Act is often associated with “technical

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<sup>110</sup> Victorian Government, Department of Human Services, *Homelessness Assistance Programs Guidelines – Part Four: Housing Management* (May 2010) (available at: [http://www.housing.vic.gov.au/\\_\\_data/assets/pdf\\_file/0004/333454/Homelessness-Assistance-Program-Guidelines-06-09-revised.pdf](http://www.housing.vic.gov.au/__data/assets/pdf_file/0004/333454/Homelessness-Assistance-Program-Guidelines-06-09-revised.pdf)).

<sup>111</sup> Victorian Government, Department of Human Services, *Public Housing Infrastructure Programs: Program framework and funding guidelines 2009 – 2012* (June 2010) (available at: <http://www.housing.vic.gov.au/living-in-housing/support-services/social-housing-advocacy-and-support-program/public-housing-infrastructure-program>).

<sup>112</sup> *Ibid*, section 4.2.

<sup>113</sup> Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006), 4.

<sup>114</sup> British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2<sup>nd</sup> Ed, December 2008) (available at: [http://www.bihr.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL\\_0.pdf](http://www.bihr.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL_0.pdf)).

legal arguments”, but in reality it is used by a range of people and organisations to “improve people's experience of public services and their quality of life generally”.<sup>115</sup>

The disparate, sector-specific, non-binding nature of service standards means that they do not have the capacity to generate systemic change in the same way as the Charter, which, as a single piece of legislation that contains simple statements of rights, lends itself to best practice education and awareness.

### Service standards are generally aspirational and compliance is not enforceable by individuals

While some organisations provide internal and external avenues for complaints and review of individual decisions,<sup>116</sup> standards and codes are often designed to be enforced through an accreditation process or overall review of the service provider.

Standards and codes that are used as part of an accreditation system focus on the actions of the service provider to ensure minimum service standards. The Quality Improvement Council (**QIC**) is an accreditation body serving the health and community services sector through the development and administration of standards and codes.<sup>117</sup> One of QIC's functions is to licence accreditation assessors such as the Quality Improvement and Community Services Accreditation (**QICSA**), which is the organisation that oversees accreditation under the HASS.<sup>118</sup>

Under HASS, housing support and case managed housing services funded by the Department of Human Services – Housing are assessed against a set of standards and their performance reviewed against those standards. The HAP Guidelines are intended to assist homelessness support services with their self-assessment, quality improvement, daily service delivery and program operations.<sup>119</sup>

Although accreditation practices are a beneficial means of establishing minimum standards across an organisation, QIC acknowledges that “QIC Accreditation is not a guarantee that the organisation is mistake free, or that it is fully compliant with government funding guidelines”.<sup>120</sup>

While the accreditation process is extremely important in terms of making sure that, overall, an organisation's processes, policies and practices are appropriate, this is not the same as giving individuals recourse in the event that proper consideration is not given to their rights and circumstances in decision-making. Aberrations happen in service delivery, particularly in high-pressure, under-resourced environments. While they are rare and they are not an indication that an organisation should not be accredited, this provides little comfort to an individual that is the subject of an oversight or misapplication of policy. For this reason, as the

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<sup>115</sup> Ibid, 5 and 24.

<sup>116</sup> The HASS (part 1.3.1) provide that service providers should have documented systems that make it easy for consumers to raise issues, make a complaint or appeal a decision. See, eg, Mission Australia, which, as a provider of homelessness assistance services, has implemented several levels of internal review, in addition to the external review which is available through VCAT, the Ombudsman, Consumer Affairs Victoria and the Victorian Equal Opportunity and Human Rights Commission (see Mission Australia Housing (Victoria) Limited, *Policy and Procedures Manual: Vic: Tenants Rights and Participation* (available at: <http://www.missionaustralia.com.au/downloads/ma-housing/vic/119-tenants-rights-and-participation-policy-and-procedures-vic/download>).

<sup>117</sup> Quality Improvement Council, 'About Us' (available at: <http://www.qic.org.au/about.html>).

<sup>118</sup> Quality Improvement Council, 'Getting Started' (available at <http://www.qic.org.au/started.html>); and Quality Improvement Council, 'Contact Us', (available at: <http://www.qic.org.au/contact.html#providers>).

<sup>119</sup> The Homelessness Assistance Programs Guidelines are available at: <http://www.housing.vic.gov.au/homelessness-and-family-violence/homelessness/for-service-providers/standards-and-guidelines>.

<sup>120</sup> Quality Improvement Council, 'Accreditation' (available at: <http://www.qic.org.au/accreditation.html>).

case studies in this submission make clear, the enforceable rights set out in the Charter are an important mechanism that needs to co-exist with sector-specific service standards.<sup>121</sup>

### Service standards can impose an administrative burden on under-resourced organisations

The focus of standards and codes on process-driven and procedural obligations of the service provider can create a regulatory burden for service providers, and lead to high costs of implementing and complying with the standards.<sup>122</sup> Submissions on the development of the proposed National Quality Framework (NQF) identify the burden which standards and codes can impose. The Council to Homeless Persons reflected on the HASS and accreditation requirements in Victoria, stating that:

[s]mall services, such as youth refuges in Victoria have estimated around \$40,000 in direct time and resource cost to reach homelessness specific accreditation readiness. Larger organisations with dedicated quality positions have estimated around \$120,000 to reach this stage. Victorian organisations have indicated that this expenditure has limited their capacity to adequately support and resource staff and consumers and to take on any innovative work. Anecdotally, people were working long hours to achieve results, particularly in smaller services and there were concerns about the sustainability of this work.<sup>123</sup>

Such accreditation requirements are particularly problematic for small service providers with relatively few staff and limited financial resources. One such agency has reported that its focus upon compliance with QICSA can compromise the quality of client service delivery.<sup>124</sup> In some cases, staff have been withdrawn from direct service delivery in order to focus on standards compliance administration.<sup>125</sup>

In a submission to the NQF, Homelessness Assistance Youth Service, YP Space MNC stated:

Comprehensive evaluation of existing accreditation and regulatory models needs to be undertaken, across all levels of the process. Accreditation can be extensively resource intensive and as such would need to be funded correctly to achieve effective outcomes. That being said, accreditation, with minimum standards, does not necessarily equate to quality service provision or the protection of human rights, social inclusion or social justice.<sup>126</sup>

One cause of the regulatory burden created by standards and codes is that they often contain detailed procedural requirements or recommendations. The HASS incorporates high level statements of rights through the HASS Charter, and also includes specific statements on how these rights should be implemented by service providers.<sup>127</sup> In many circumstances, this sort of detailed guidance on the practical

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<sup>121</sup> See, eg, Salvation Army Southern Territory, *National Quality Framework Submission*, which notes: “The Victorian Charter of Human Rights and Responsibilities has added weight to the standards by ensuring that individuals and organisations are held accountable for respecting the rights of all people.”

<sup>122</sup> See: Quality Improvement Council, Quality Management Services, and Quality Improvement & Community Services Accreditation, Submission No 18 to Standing Committee on Family, Community, Housing and Youth, *Inquiry into Homelessness Legislation* (August 2009) (available at: <http://www.aph.gov.au/House/committee/fchy/homelessness/subs/sub018.pdf>); and Australian Council of Social Services (ACOSS), *Submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth Inquiry into Homelessness Legislation* (August 2009), (available at: [http://www.acoss.org.au/images/uploads/ACOSS\\_Submission\\_to\\_Inquiry\\_into\\_Homelessness\\_Legislation.pdf](http://www.acoss.org.au/images/uploads/ACOSS_Submission_to_Inquiry_into_Homelessness_Legislation.pdf)).

<sup>123</sup> Council to Homeless Persons, *Submission to the National Quality Framework (NQF) Consultation for the specialist homelessness sector* (2010), (available at: [http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/national\\_quality\\_framework/Documents/nqf\\_submission/sub\\_32.htm](http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/national_quality_framework/Documents/nqf_submission/sub_32.htm)).

<sup>124</sup> Annie North Women’s Refuge and Domestic Violence Service, ‘The impact of external accreditation on a small agency’ (presentation delivered at the 6<sup>th</sup> National Conference on Homelessness), which offers an insight into the impact of external accreditation on a small agency offering Supported Accommodation Assistance (crisis and transitional housing).

<sup>125</sup> Quality Improvement Council, Quality Management Services, and Quality Improvement & Community Services Accreditation, ‘Submission to the House of Representatives Inquiry into Homelessness Legislation’ (August 2009), 4.

<sup>126</sup> YP Space MNC, *National Quality Framework Submission* (available at: <http://www.fahcsia.gov.au>).

<sup>127</sup> HASS 1.4.11.

implementation of rights can be valuable and may assist service providers to ensure that their consumers' rights are protected, but the level of detail and specificity in standards and codes also creates the risk that they may become "too prescriptive",<sup>128</sup> and that compliance, rather than client outcomes, becomes the organisation's focus.

For each of the reasons set out above, the HPLC is firmly of the view that, while they have an important place in the regulatory framework for the government and community sector, non-legislative service standards with no role for courts and tribunals would not provide adequate guarantees of fair outcomes in Victoria.

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<sup>128</sup> Homelessness Australia, *Submission to the National Quality Framework (NQF) Consultation for the Specialist Homelessness Sector* (2010), (available at: [http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/national\\_quality\\_framework/Documents/nqf\\_submission/sub\\_35.htm](http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/national_quality_framework/Documents/nqf_submission/sub_35.htm)).

## 6. Overall benefits and costs of the Charter

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**This section addresses Term of Reference 6.**

Assessing the costs and benefits of the Charter requires balancing of direct costs with the wider flow-on benefits generated across the community. While it is difficult to attach an economic figure to the benefit of the Charter, this submission makes it clear that there have been significant benefits to Victorians in terms of improved delivery of public services, particularly to marginalised and vulnerable members of our community. We encourage SARC to consider costs that are avoided as a result of better decision-making and processes within services providers.

To the extent that costs and benefits of the Charter can be analysed or monetised, this is discussed below.

### 6.1 Cost savings of preventing homelessness

In May 2011, the Victorian Government announced that the state wide public housing waiting list had fallen for the second successive quarter under the Coalition Government.<sup>129</sup> Referring to the Victorian Housing Strategy and the Government's new approach to the delivery of public and social housing for the long term, the Honourable Wendy Lovell, Minister for Housing, said: "The Coalition Government is determined to help break the cycle of disadvantage for those most vulnerable, and target housing for those who need it most".<sup>130</sup>

Based on our experience, the HPLC can unequivocally say that the Charter plays an essential role in breaking the cycle of disadvantage for vulnerable Victorians.

The HPLC's Charter-based outcomes include preventing 42 people, including seven families and 21 children from being evicted into homelessness. This is entirely consistent with the Government's aims.<sup>131</sup>

In addition to addressing disadvantage, studies that have looked at the cost-effectiveness of homelessness programs show that, to some extent, a monetary value can be put on these results.

The "cost-effectiveness" of the Charter could be measured by the extent to which Charter compliant services improve client outcomes per dollar spent, over and above what would otherwise have occurred. The net cost of delivering Charter based services would be the gross cost (of training and policy changes, for example) less any savings or cost offsets achieved from improved client outcomes (i.e. by lowering government spending in other areas such as justice and health).<sup>132</sup>

The Government will, of course, be in a better position to identify these cost savings in Victoria, but we note the following sample figures:

- ▶ while homeless, the average annual health and justice costs for a single male are approximately \$10,200 above the normal population level;
- ▶ people experiencing homelessness use more health services:
  - on average, females experiencing homelessness use approximately \$6,800 more in health costs than average in a 12 month period (prior to receiving homelessness support); and

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<sup>129</sup> Minister for Housing, above n 11.

<sup>130</sup> Ibid.

<sup>131</sup> See also, Victorian Public Housing Report, above n 2, xxxiv, which recommended: "That the Victorian Government explore alternative and flexible processes for working with tenancies at risk to prevent eviction of public housing tenants into homelessness".

<sup>132</sup> This is the method used by the Australian Housing and Urban Research Institute (AHURI) in assessing the cost-effectiveness of homelessness programs in Western Australia. See AHURI, *The Cost-Effectiveness of Homelessness Programs: Final Report* (June 2008) (available at: [www.ahuri.edu.au](http://www.ahuri.edu.au)) (AHURI Report).

- the average per annum health costs of a single man accessing Supported Assistance Accommodation Program (**SAAP**) homelessness services is approximately \$9,000 per person greater than the population average (the cost of hospital visits makes up 90 percent of the difference);
- ▶ it costs approximately \$26,000 to provide homelessness services to a family in medium term-transitional housing; and
- ▶ it costs approximately \$4,700 per annum for a single male to be provided with homelessness assistance.<sup>133</sup>

Further, in a 2006 project on high risk tenancies, the Victorian Government acknowledged that: “Instability of a public housing tenancy and/or tenancy failure is costly to tenant families, individuals, local communities and the housing and broader service sectors”.<sup>134</sup> The Victorian Public Housing Report stated that turnover of tenants is “costly for tenants and the government,”<sup>135</sup> and noted that the Victorian Government has recognised this with programs such as SHASP which support tenants to sustain tenancies and therefore reduce “turnover and associated costs”.<sup>136</sup>

The Final Report of the Australian Housing and Urban Research Institute the (**AHURI**) into the cost-effectiveness of homelessness programs concludes:

the cost of providing homelessness prevention services is more than offset by potential savings from reduced use of health and justice service, resulting in a net saving to government from preventing a period of homelessness.<sup>137</sup>

Importantly, the figures in the AHURI study compare the costs of providing homelessness services with the cost savings of providing homelessness services (because less spending on health and justice is required). The study concluded that the potential annual whole-of-government savings are at least twice as large as the annual cost of delivering effective homelessness programs.

What has been discussed in this submission, however, is the Charter’s role in the preventing homelessness through better, more transparent, more accountable decision-making. In the case of 42 people referred to in this submission, the State has not incurred costs for homelessness services or in areas of health and justice (to the extent that they stem from homelessness), because the person or family has been able to avoid eviction into homelessness.<sup>138</sup>

By way of example, eight of the case studies in this submission dealt with families facing eviction. In seven of those matters, eviction was avoided. Using AHURI’s figures, the cost savings from these matters are estimated below.

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<sup>133</sup> These figures are taken from the AHURI Report, above n 132. See AHURI, “The Cost-Effectiveness of Homelessness Programs”, *AHURI Research and Policy Bulletin*, Issue 104 (July 2008) (**AHURI Policy Bulletin**).

<sup>134</sup> Housing and Community Building Division, *Final Report – Support for High-Risk Tenancies Strategic Project* (2006), 19 cited in Victorian Public Housing Report, above n 2, 226. See also Australian Council of Social Service, *Submission to the Senate Community Affairs Committee Inquiry into Appropriation (Nation Building and Jobs) Bill (No. 2) 2008 – 2009 relating to the social housing program*, Appendix A – Background Paper (National Housing Advocacy Day, Housing for a Fairer Australia, 24 September 2008) (2009), which identifies an increase in costs of health and social support services in dealing with the social impact of a lack of affordable housing (cited in Victorian Public Housing Report, above n 2, 58).

<sup>135</sup> Victorian Public Housing Report, above n 2, 226.

<sup>136</sup> *Ibid*, 227.

<sup>137</sup> See AHURI Policy Bulletin, above n 133.

<sup>138</sup> The HPLC acknowledges that there may be other costs to the State in relation to some clients, including SHASP support, rebated rent in public housing or, in two cases, transitional housing.

### Estimated cost savings of avoiding eviction of seven families into homelessness<sup>139</sup>

X = \$12,000 per annum in health and justice costs while homeless

Y = \$26,000 per family in direct homelessness program costs (if the family engages with a medium-term transitional accommodation provider)

X + Y = \$38,000

\$38,000 x 7 (families) = \$266,000.

The cost saving of avoiding the eviction of these families can be estimated at \$266,000.

These figures are an example of the costs and benefits that the Government needs to take into account when assessing the economic cost of the Charter.

The personal benefits of avoiding homelessness are a separate issue. The personal effects of housing instability have been recognised by the Office of Housing:

Housing instability works against people organising their lives, dealing with their problems and developing/consolidating the independent living skills required to manage a tenancy. Above all, unstable housing deleteriously affects the growth, development and social adjustment of children.<sup>140</sup>

To the extent that policies and practices which take human rights into account in decision making avoid these outcomes, this is another significant benefit of the Charter.

## 6.2 Cost savings of better delivery of public services

The Charter has provided effective, efficient and accessible ways of advocating for disadvantaged Victorians. It has brought about direct benefits for individuals, but it has also generated positive changes in practices, policies, processes and general approaches of public authorities.

Policies and procedures that are informed by the Charter help organisations to provide responsive, effective and fair services to Victorians. As articulated by CEO of Hanover Welfare Services, Tony Keenan:

While there are still substantial legal questions around the Charter still unanswered, the next phase of the life of the Charter needs to be lived as much in board rooms and managers' meetings as in courts and tribunals. Service reform and changes to governance practice are where we should see the major impact of the Charter.<sup>141</sup>

Although organisations and government may have incurred costs in the process of adapting to the Charter (including through engaging in the training, policy reviews and implementation of changes), any such initial expenses will decrease going forward, because much of the work has now been done.<sup>142</sup>

As set out in part 4.4, a significant amount of effort has gone into educating people about human rights standards and incorporating these standards into the delivery of public services. This has led to better

<sup>139</sup> The figures for X and Y are taken from the AHURI Report, above n 132.

<sup>140</sup> Housing and Community Building Division, *High-Risk Tenancies Report*, above n 134, 19 cited in Victorian Public Housing Report, above n 2, 226.

<sup>141</sup> Keenan, above n 31, 9.

<sup>142</sup> In 2006–07, the Victorian Government allocated total funding of \$6.5m for human rights initiatives over 4 years. Victoria Police and the Department of Human Services were allocated amounts over two years (\$1,806,000 and \$624,000 respectively); and Corrections Victoria was funded for one year (\$119,000), all with "nil ongoing" funding. These figures indicate that, while additional resources were required to prepare for the commencement of the Charter and adapt to its requirements, ongoing funding was not needed for these agencies. See The Allen Consulting Group, *Analysis of Options Identified During the National Human Rights Consultation: Final Summary Report* (September 2009), 15 (citing "figures requested from and provided by the Victorian Department of Justice, 14 September 2009") (NHRC Options Report).

quality services and fair and just outcomes for Victorians. The economic costs of bringing public authorities and government into line with the Charter have therefore been worthwhile in terms of the improvements to operations and outcomes. The “Analysis of Options” conducted by The Allen Consulting Group as part of the National Human Rights Consultation considered the suggestion that the costs of training government staff to understand human rights obligations would be outweighed by the value added through better quality services and associated savings gained through avoidance of breaches to human rights.<sup>143</sup> The Final Report stated: “There is clearly the potential for costs savings in both economic and social terms as a result of a strengthened human rights system”.<sup>144</sup>

The HPLC encourages SARC to consider the potential cost savings that stem from having fairer, more responsive services and lower levels of disadvantage in Victoria.

### 6.3 Cost savings of negotiated outcomes

As discussed in part 4.2, over 50 percent of matters in which the HPLC raised the Charter were resolved by negotiation. Only nine matters needed to be determined by VCAT.

The HPLC’s experience also indicates that, as the Charter becomes more entrenched in the policies and decision-making processes of public authorities, negotiated outcomes will become more likely. The two most recent HPLC matters are referred to in part 4.1 above. These were both resolved in early 2011 and both outcomes were achieved in a co-operative, practical, fair and respectful way, without the need for legal proceedings beyond internal appeal.

From the HPLC’s evidence base, the area in which the OOH is still most resistant to negotiated outcomes is in relation to rental arrears. Matters involving rent owing to the OOH make up the majority of the matters that proceeded to VCAT (four of the nine). Moreover, of the 20 case studies, only four of the HPLC’s Charter matters involved rental arrears i.e. every matter relating to rental arrears proceeded to VCAT, despite considerable attempts by HPLC lawyers to reach a negotiated outcome.

This is consistent with the Victorian Public Housing Report, which made the following findings:

- ▶ early intervention to resolve rental arrears cases is important in avoiding escalation and legal intervention;
- ▶ improvement in rental arrears procedures and their implementation will potentially lead to greater rental recovery for the Victorian Government;
- ▶ VCAT conducts a disproportionate number of *Residential Tenancies Act 1997 (Vic)* hearings for public housing tenants;
- ▶ attendance at VCAT Residential Tenancies List hearings by tenants is poor; and
- ▶ applications for possession orders constitute the majority of VCAT’s workload with public housing tenants.<sup>145</sup>

The figures VCAT provided for the Report showed that from 2004–05 to 2008–09, an average of 8.2 percent of public housing households had been subject to a VCAT case determining an application for a possession order in relation to rental arrears annually.<sup>146</sup>

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<sup>143</sup> NHRC Options Report, above n 142, 16 referring to: Law Council of Australia, *A Charter: Protecting the Rights of all Australians*, Law Council of Australia’s Submission to the National Consultation on Human Rights (May 2009).

<sup>144</sup> NHRC Options Report, above n 142, 16.

<sup>145</sup> Victorian Public Housing Report, above n 2, 224.

<sup>146</sup> *Ibid*, 239 citing Victorian Civil and Administrative Tribunal, *Response to Request for Data and Information*, Correspondence to the Family and Community Development Committee, 19 July 2010.

Proper application of the Charter has the potential to avoid the unnecessary costs of applying for possession orders when there is a more proportionate and appropriate way of addressing the arrears. Such proceedings are a burden on VCAT and, as discussed in part 4.4 above, are not necessarily the best way of handling arrears matters in relation to public housing tenants.

The HPLC encourages SARC to consider:

- ▶ the cost of VCAT proceedings in the Residential Tenancies List; and
- ▶ any differences between 2005–06, compared with 2010–11, in the number of:
  - applications for possession orders by public or social landlords; and
  - possession orders granted.

These figures, in addition to parallel information from the OOH, may provide an indication of whether or not there has been an increase in the number of negotiated outcomes (and a decrease in VCAT proceedings) since the Charter's introduction.

It is the HPLC's experience that, with the exception of matters relating to rental arrears, there has been a noticeable trend toward negotiated outcomes in tenancy matters involving social landlords.

If this trend continues, this will bring (if it has not already) a cost saving to the State in terms of the reduced burden on VCAT. It is also more efficient for the OOH to resolve matters via negotiation and to avoid expenditure of time and resources preparing for and attending VCAT proceedings.

While the HPLC asserts that it is imperative that VCAT and the courts have a role in enforcing human rights under the Charter, to the extent that matters can be resolved to the satisfaction of both parties without the need for such enforcement, this represents a significant cost saving.

## 7. Options for improvement and strengthening of rights protection

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**This section addresses Terms of Reference 1(a), 3, 4, 5(e) and 7.**

In the HPLC's view, the regime for protecting and upholding rights and responsibilities in Victoria should be strengthened and improved in the following ways:

- ▶ inclusion of protections of economic and social rights in the Charter;
- ▶ inclusion of an independent cause of action in the Charter;
- ▶ formal monitoring of public authorities' human rights compliance; and
- ▶ ongoing Charter-based education, training and resources.

These recommendations are discussed in more detail below.

### 7.1 Protections of economic and social rights

The HPLC recommends that the rights under the International Covenant on Economic, Social and Cultural Rights should be included in the Charter. In particular, the HPLC is focused on the rights to:

- ▶ an adequate standard of living (including adequate food, clothing and housing);<sup>147</sup>
- ▶ the highest attainable standard of physical and mental health;<sup>148</sup> and
- ▶ education.<sup>149</sup>

These are the rights that are most relevant to our client group (and within the scope of State responsibility).

Our reasons for recommending the inclusion of economic and social rights in the Charter are:

- ▶ they are the rights that matter the most to many Victorians;
- ▶ protection of economic and social rights is necessary to create a fair society and to address disadvantage – it will bring significant benefits to Victoria; and
- ▶ it is practicable to protect economic and social rights in the Charter – it will not bring about a flood of litigation or impose unworkable obligations on Government.

These reasons are discussed in more detail below.

#### Economic and social rights matter the most to many Victorians

These are the rights that are most important to the HPLC's clients, because these rights are at greatest risk. As part of the National Human Rights Consultation, throughout March – May 2009, the HPLC held 18 workshops at homelessness service providers in Victoria to ask people experiencing homelessness about their views on human rights in Australia. In total, the HPLC consulted with 145 people who were experiencing homelessness, or who had formerly experienced homelessness.<sup>150</sup>

Ninety-nine percent of participants said that a Human Rights Act should protect economic, social and cultural rights in Australia.

This is consistent with the finding from the National Human Rights Consultation:

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<sup>147</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3, art 11 (entered into force 3 January 1976) (ICESCR).

<sup>148</sup> *Ibid*, art 12.

<sup>149</sup> *Ibid*, art 13.

<sup>150</sup> See Public Interest Law Clearing House, *National Human Rights Consultation* (available at: <http://www.pilch.org.au/hplc/humanrightsconsultation>).

The most basic economic and social rights – the rights to the highest attainable standard of health, to housing and to education – matter most to Australians, and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community.<sup>151</sup>

The circumstances of Victorians experiencing homelessness make the interrelationship between civil and political rights and economic and social rights clearly apparent – without protection of basic economic and social rights (including to adequate housing, health care and education), their ability to enjoy the civil and political rights that the Charter currently protects is seriously constrained. As one participant in the HPLC’s 2009 consultation said: “you can’t have one right without the others.”<sup>152</sup>

#### Improved law making, delivery of public services and outcomes – lower levels of disadvantage

Just as the enforceable protections of civil and political rights under the Charter have led to improved decision-making, practices and policies in relation to these rights, protections of the rights to adequate housing, health care and education would lead to improved services in these areas.

Inclusion of economic and social rights in the Charter would mean that these rights are also considered and debated in the initial stages of law making. As we have seen with the rights currently protected under the Charter, this leads to well-considered and transparent laws and policies. Formal legal protection of these rights would also have a positive impact on decision-making within public authorities. As noted in VEOHRC’s consultation paper on economic, social and cultural rights, in relation to the views of people with an experience of homelessness:

The findings indicated that the strong desire in this group for the proposed economic, social and cultural rights to be formalised and included in the Charter is linked not only to changing or improving their material circumstances but to changing or improving the way in which they are treated by public authorities (and the broader community) when attempting to access government services and programs.<sup>153</sup>

The inclusion of economic and social rights as part of the Charter would strengthen the Charter’s capacity to improve the treatment of struggling Victorians and address disadvantage and inequality in Victoria.

#### It is practicable to protect economic and social rights in the Charter

Just as the current Charter rights have not imposed blanket constraints on government decision-making, protections of economic and social rights would not impose such constraints. The protection of economic and social rights is not an absolute protection. In the context of housing, the right to adequate housing does not equate to an obligation to provide every Victorian with a home. The obligation is to take steps to ensure the “progressive realisation” of those rights, within the maximum of available resources.<sup>154</sup>

The obligation to “respect” a right is broken down into an obligation to protect, respect and fulfil that right. The VEOHRC Occasional Paper on Economic, Social and Cultural Rights provides a helpful typology of this break down in relation to right to adequate housing:

- ▶ obligation to protect – a State or its agents cannot evict or deny a person from access to their home arbitrarily or unlawfully. For example, laws must be passed to protect people in public housing;

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<sup>151</sup> National Human Rights Committee, *Report of the National Human Rights Consultation Committee* (September 2009), [15.1]. See also Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – Consulting with Victorians about Economic, Social and Cultural Rights and the Charter* (March 2011), 4 (**VEOHRC ESC Report**), which found that among the interviewed group: “there is very strong support for the inclusion of economic, social and cultural rights in the Charter”; and “[a]mong those with an experience of disadvantage, this view [i.e. the support for inclusion of economic, social and cultural rights in the Charter] was strongly informed by their experiences” (at 5).

<sup>152</sup> HPLC NHRC Consumer Report, above n 17, 24.

<sup>153</sup> VEOHRC ESC Report, above n 151, 26.

<sup>154</sup> ICESCR, above n 147, art 2.

- ▶ obligation to respect – a State must take reasonable measures to ensure that private individuals (i.e. non-State actors) do not evict or deny a person access to their home arbitrarily or unlawfully. For example, a State must adopt residential tenancy legislation; and
- ▶ obligation to fulfil – the State must take reasonable measures to ensure that individuals have access to appropriate housing. For example, a State must take steps to ensure the provision of public housing for those without sufficient resources.<sup>155</sup>

When broken down into this framework, it becomes clear that the obligation imposed on States to implement economic and social rights is “heavily qualified and dependent on resources”.<sup>156</sup> Indeed, for most Victorians, economic and social rights are already more than adequately fulfilled.<sup>157</sup> However, to the extent that they are not, the formal legal protection of these rights will help foster a fair and just society with increased equality and lower levels of disadvantage.

The HPLC therefore recommends that economic and social rights are included in the Charter on the same footing as the current protections of civil and political rights i.e. so that:

- ▶ any new legislation would have to be accompanied by a Statement of Compatibility that considers both sets of rights;
- ▶ public authorities would have obligations to act compatibly with, and give proper consideration to, both sets of rights; and
- ▶ courts would have to, so far as possible, interpret legislation compatibly with both sets of rights.

While the notion of “progressive realisation” would not be expressly referred to, this would not mean that economic and social rights must be implemented immediately because section 7(2) would be an effective mechanism for placing limitations on economic and social rights (as well as civil and political rights), to the extent that such limitation is reasonable and justifiable.<sup>158</sup> As is currently the case in relation to existing Charter rights, whether or not a limitation on economic and social rights is reasonable or justifiable will depend on: the nature of the right; the importance and purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and the purpose; and any less restrictive means reasonably available to achieve the stated purpose.<sup>159</sup> As Dr John Tobin notes: “In practice, this would mean that the availability of resources would be taken into account when assessing the reasonableness of any failure on the part of the State to secure a right to adequate housing”.<sup>160</sup>

The HPLC also recommends that economic and social rights should be justiciable, so that courts can enforce them if needed. As has been the case with civil and political rights, the greatest impact of enforceable protections of economic and social rights will be at the stages of developing laws and making decisions within government. The role for the courts will be important, but minimal.

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<sup>155</sup> Dr John Tobin, Victorian Equal Opportunity and Human Rights Commission, *Occasional Paper: Economic, Social and Cultural Rights and the Charter of Human Rights and Responsibilities – A Framework for Discussion* (2010), 5.

<sup>156</sup> *Ibid.*

<sup>157</sup> See, eg, VEOHRC ESC Report, above n 151, 19–20, which notes that “very few participants drawn from the general community felt that they had personal experience of any rights, let alone economic, social and cultural rights, being breached in any substantive way”. The report goes on to quote one participant whose perceptions had shifted after experiencing disadvantage: “Before [commencing work at a school for disadvantaged teenagers] I thought I knew or understood what people are like, now all of a sudden I’ve been faced with a family of four kids that live in a tent in someone else’s backyard because they don’t have accommodation and their only food is what we are supplying at lunch time. So it is real, it does happen, and up until then I was like, yeah, it might happen but not in my own backyard”.

<sup>158</sup> See Tobin, above 155, 12–13: this model is “Model 1: Treat economic, social and cultural rights the same as civil and political rights (the identical treatment model)”.

<sup>159</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).

<sup>160</sup> Tobin, above 155, 13.

On this point, we will briefly address the issue of justiciability of economic and social rights. In relation to a number of common concerns about justiciable economic and social rights, the HPLC notes:

- ▶ a dialogue model of human rights ensures that it is the Parliament, not the court, that has the final say on legislation, and therefore on questions of resource allocation;<sup>161</sup>
- ▶ the obligation to review “the actions of the relevant authorities against the standards that have been set down by the legislature is a traditional judicial role”;<sup>162</sup> and
- ▶ it is possible to give courts a role that “does not unduly transgress on political decisions about allocation of resources”.<sup>163</sup> One way of doing this is to include a “reasonableness” test in the legislation so that the role of courts is confined to deciding whether measures were reasonable within available resources (i.e. so that courts are not making decisions regarding the allocation of public money).<sup>164</sup> In South Africa, where economic, social and cultural rights are protected in a Bill of Rights, this test has been applied in the following ways:
  - where reasonable measures are found not to have been taken to protect economic, social and cultural rights, “[t]he precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive”;<sup>165</sup> and
  - a court considering reasonableness will not enquire into whether “other desirable or favourable measures could have been adopted, or whether public money could have been better spent”.<sup>166</sup>

While the framing of economic and social rights in legislation would need to be carefully done,<sup>167</sup> the HPLC submits that the inclusion of these rights in the Charter will lead to better decision-making and stronger protections for vulnerable Victorians. Doing so would not lead to a flood of litigation or place unfeasible fiscal obligations on Government, but would play an important role in strengthening equality and reducing disadvantage.

## 7.2 Independent cause of action and damages

The current limitation on a person’s ability to commence legal proceedings for non-compliance with the Charter (under section 39) creates confusion and unnecessary complexity. In some ways, this detracts from the ability of the Charter to provide just and timely remedies for infringements of rights.

The provision that a person may seek relief or remedy on a ground of unlawfulness under the Charter only if “otherwise than because of [the] Charter, a person may seek any relief or remedy in respect of an action or decision of a public authority on the ground that the act or decision was unlawful” has created confusion around the Charter’s application in practice.

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<sup>161</sup> Ibid, 10.

<sup>162</sup> Ibid.

<sup>163</sup> Peter Hanks QC, Debbie Mortimer SC, Associate Professor Kristen Walker and Graeme Hill, *Proposed Commonwealth Human Rights Act: Justiciability of Economic and Social Rights – Memorandum of Advice* (8 December 2009), 10 (available at: <http://www.hrlrc.org.au/files/Advice-on-Constitutionality-and-Justiciability-of-ESC-Rights.pdf>).

<sup>164</sup> The South African Bill of Rights protects the right to housing, health care, food, water and social security. The State is required to take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of those rights” (ss 26 and 27).

<sup>165</sup> *The Republic of South Africa v Grootboom* 2001 (1) SA 46, [41].

<sup>166</sup> Ibid.

<sup>167</sup> See Peter Hanks QC et al, above n 163, [27] and [33.1]. See also VEOHRC ESC Report, above n 151, 24, referring to the request by a “handful” of participants in the consultations for “a clear definition of the proposed economic, social and cultural rights – specifically, a clear articulation of the minimum standard for each right.”

The HPLC's case work has not included any matters where the limitation under section 39 has prevented a person raising a Charter argument, because there has always been a cause of action that the Charter argument could be "piggybacked" off. Commonly, this is an application for a possession order at VCAT, as in the case study below.

### Young man allowed to repay debt, remain in property and start university

Abdi was a young man who was born in Somalia. He left Somalia for Kenya in the early 1990s to escape the war. He lived in a refugee camp for about eight years before coming to Australia as a refugee.

Abdi had been working casually to save money so that he could travel to Kenya. He did not understand that he was supposed to inform the Office of Housing that he was working casually. When it became clear that Abdi had been working, the OOH recalculated his rent, leaving him with over \$1000 in arrears.

Abdi then travelled to Kenya for about two months and he fell further behind in his rent during this time.

Abdi attempted to repay his debt to the OOH, but he owed other amounts for infringements and utilities and said that, if his rent payments were not paid via Centrepay, it was difficult for him to know how to allocate his limited money.

The HPLC and Abdi's support worker made a number of requests for Abdi to be placed on a local agreement (a formal recognition that his fortnightly payment to the OOH was made up of his rent, plus a payment toward his arrears). This agreement would have allowed Abdi to make his payments to the OOH via Centrepay, which would have removed the confusing administrative difficulties of trying to allocate meagre funds to competing sources.

The OOH refused each of these requests and issued Abdi with a Notice to Vacate for rental arrears (under section 246 of the *Residential Tenancies Act 1997* (Vic)); and applied to VCAT for a possession order.

As the matter was brought before VCAT subject to the relevant RTA provisions, the HPLC presented Charter-based arguments at VCAT, asserting that section 330(1)(a)(i) of the RTA provides that VCAT must make a possession order where an NTV has been given and the landlord was "entitled" to give the Notice to Vacate. It was submitted that the DOH was not "entitled" to issue the NTV because they had not given proper consideration to Abdi's section 13 rights as required by section 38(1) of the Charter.

At the hearing, it was also explained to VCAT that Abdi now had the support of a housing worker who had referred him to a financial counsellor and was assisting him to better manage his money and meet his financial commitments. The housing support worker was also providing Abdi with food vouchers so that more of his \$460 per fortnight could be paid to the OOH.

Abdi explained to VCAT that he had applied to go to university to study and was looking forward to having this stability in his life. He said "I will not be able to attend if I do not have a home. If I am evicted from the property I will be homeless. I have no family in Victoria and I do not know where I could go".

VCAT dismissed the application for possession and Abdi entered into a Local Agreement with the OOH to pay his rent and make regular payments toward the arrears.

As a result of the lack of clarity in section 39, however, questions have arisen about VCAT's jurisdiction to hear Charter arguments.

Public authorities have argued that the effect of section 39 does more than require another cause of action to exist. The lack of clarity in section 39 was a basis for the arguments in *Director of Housing v Sudi*<sup>168</sup> (**Sudi**). Referring to VCAT's finding that the consequence of unlawfulness under section 38(1) of the Charter was that the DOH's application for possession was invalid, counsel for the DOH stated:

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<sup>168</sup> *Director of Housing v Sudi* [2010] VCAT 328.

This approach finds no support in the provisions of the Charter ... The only consequence of unlawfulness that is referred to in the Charter is that referred to in s 39(1): a person who is otherwise able to seek a relief or remedy in respect of an act or decision of a public authority on the ground of unlawfulness is also able to seek that relief or remedy on a ground of unlawfulness arising because of the Charter.<sup>169</sup>

In *Sudi*, Bell J noted that if VCAT did not have jurisdiction to consider Charter issues, the tenant would need to proceed to the Supreme Court by way of judicial review and “[f]rom the point of view of ensuring equal access to justice, which is an important value and purpose of the Charter, this would be a bad outcome.”<sup>170</sup>

International jurisprudence clearly favours the ability to litigate human rights issues at first instance and such an approach provides major benefits for access to justice by disadvantaged and vulnerable tenants.<sup>171</sup> In the HPLC’s view, the *Sudi* decision adopts the sensible position that affected people should have ability to raise human rights issues before “first instance” decision makers.

On appeal, however, a major issue was the jurisdiction of VCAT to hear matters under the Charter.<sup>172</sup> Until the Court of Appeal delivers its reasons in *Sudi*, there is some confusion as to VCAT’s jurisdiction to hear these arguments.

Such confusion slows down the implementation of human rights consistent policies and practices, because of a lack of clarity about the consequences of not doing so. It also means that Victorians do not always have access to an effective remedy for a breach of their human rights.

The HPLC therefore strongly recommends that section 39 should be clarified to identify those actions in which Charter arguments may be made. Under the *Human Rights Act 2004 (ACT)*, where a person claims that a public authority has contravened its obligations, the person may “rely on the person’s rights under this Act in other legal proceedings”.<sup>173</sup> This is an appropriate, and clear, expression of the rights of affected people to enforce their legal and human rights under the Charter.

While most Victorians’ human rights are complied with most of the time, when they are not, it makes sense that a person would have access to a remedy for the non-compliance – there should be a free-standing cause of action for breaches of rights protected by the Charter.

Further, in the event that a breach of a person’s human rights is found to have occurred, the courts should have the discretion to award an appropriate remedy, including damages if necessary. The HPLC notes that in the United Kingdom where the Human Rights Act includes a power to award damages for a breach, damages are rarely awarded, with judicial review and declaratory and injunctive relief frequently providing an effective remedy.<sup>174</sup>

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<sup>169</sup> *Director of Housing v Sudi*, Nos SAPCI 2010 0051 and SAPCI 2010 0052, Applicant’s Outline of Submissions (10 May 2010), [23] (**Sudi Submissions**). See also Jeremy Gans, “The Charter’s Irremediable Remedies Provision” (2009) 33 *Melbourne University Law Review* 105.

<sup>170</sup> [2010] VCAT 328, [143].

<sup>171</sup> See eg *Connors v UK* (2005) 40 EHRR 9; and *Kay v UK* [2010] ECHR 1322; *Manchester City Council v Pinnock* [2011] UKSC 6, where the Supreme Court referred to the issue of delay in litigating human rights issues and to “the presumption that possession claims against demoted tenants could be procedurally derailed if tenants could raise public law points in the course of the possession proceedings.” The court was unequivocal in its response to these concerns, stating: “We do not consider that this presumption is correct. Indeed, the ability of a tenant to delay possession proceedings by raising a public law point would be greater if such points had to be taken in separate proceedings in the High Court” [87].

<sup>172</sup> *Sudi Submissions*, above n 169, [12]–[16].

<sup>173</sup> *Human Rights Act 2004 (ACT)* s 40C(2)(b).

<sup>174</sup> *Human Rights Act 1998 (UK)*, s 8. In the UK, between 2000 – 2006, there were only three cases under the Human Rights Act which resulted in the payment of compensation. See UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006).

Essentially, failure to include an independent cause of action and available remedies sends a strange message that a breach of the Charter is not an offence. Amending this provision will remove the confusion and ensure effective enforcement in the event of non-compliance with Charter obligations.

### 7.3 Monitoring public authorities' human rights compliance

Annual reporting by public authorities on steps taken to guarantee Charter compliance would effectively incorporate human rights into the day-to-day operations of public authorities. It would also improve the accountability of public authorities and would help to identify systemic human rights issues in Victoria.<sup>175</sup> Where systemic concerns are identified, the Victorian Equal Opportunity and Human Rights Commission should be given an own motion power to investigate Charter compliance within an agency or sector.

In the ACT, the Commission has the power to audit human rights compliance.<sup>176</sup> This has proven to be a useful function in terms of finding workable solutions to human rights compliance issues.<sup>177</sup> In many cases, the Commission will have seen a similar situation before, so this function would provide an efficient and effective way of developing robust strategies for human rights compliant service delivery.

An auditing and reporting requirement would also have a preventative function in that problems could be identified before they reached the point of dispute or resulted in litigation.

Given that the community sector is already the subject of multiple service standards, codes of conduct and accreditation processes (see part 5.4 above), the HPLC recommends that reporting on Charter compliance for functional public authorities is incorporated into existing accreditation and reporting requirements.<sup>178</sup> This is consistent with the process of building human rights compliance into the standard processes and practices of organisations – it is not an additional set of obligations but rather part of the day-to-day operation of public authorities.

### 7.4 Ongoing education, training and resources

While the HPLC recognises that the SARC Guidelines state that the focus on strengthening the Charter should not be on funding or resources, we feel that it is important to point out that more education and training is needed for front line staff in organisations that are bound by the Charter to promote understanding and compliance.

The HPLC notes that, in terms of assessing the costs of the Charter, our position is that much of the work in implementing Charter compliance has already been done. This is the case in relation to core public authorities at institutional or managerial levels i.e. where greatest expenditure is required.

That said, in the Charter-based training sessions that the HPLC has delivered (see part 4.4), workers have commented that service providers require better knowledge of their obligations under the Charter; and that

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<sup>175</sup> See Victorian Council of Social Service, *Using the Charter in Policy and Practice: Ways in Which the Community Sector are Responding to the Victorian Charter of Rights and Responsibilities* (July 2008), 18, which notes that during the December 2007 – February 2008 survey process, one organisation (Action on Disability within Ethnic Communities) commented that the lack of auditing had led to implementation of the Charter inadvertently becoming less of a priority than other new legislation at the time (including the *Child, Youth and Families Act 2005* (Vic) and the *Multicultural Victoria Act 2004* (Vic)).

<sup>176</sup> *Human Rights Act 2004* (ACT) s 41(1).

<sup>177</sup> See, eg, ACT Human Rights Commission, *Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation* (July 2007).

<sup>178</sup> *Ibid*, 20, which refers to suggestions from the community sector about effective implementation of the Charter, including the suggestions that: "auditing could be built into current protocols for accreditation agencies, rather than creating a new auditing system".

advocates need more training to better understand how to use the Charter in a practical way.<sup>179</sup> One comment at a regional Homelessness Networkers meeting was that further training and resources regarding the Charter would lead to the Charter being more effectively incorporated into standard practice of service providers, so that advocates did not need to resort to the Charter when a situation becomes adversarial or use it only as a “problem solving” device.<sup>180</sup>

Another regional worker stated: “on the ground workers need training and it needs to become a suggestion during supervision”.<sup>181</sup> This reiterates that better training and resources across organisations, in particular for front line workers, will further strengthen the operation of the Charter and its impact on the delivery of services.

While the HPLC has undoubtedly witnessed changes in the quality and transparency of service provision to our clients since the Charter’s introduction, institutional change takes time, and practical, compliance-focussed training is important to strengthening the Charter’s ability to deliver fair outcomes for Victorians.<sup>182</sup>

It is only through education and training that the Charter obligations will become fully entrenched in Victoria. While we have come a long way, the full benefit of the Charter will be seen only with the ongoing commitment of Government (including through support and funding) to the protection human rights and, consequently, to the delivery of high quality public services and fair outcomes for Victorians.

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<sup>179</sup> Refer to part 4.4 above for information about Charter-based training delivered by the HPLC. Written responses were provided at the Homelessness Network Meetings for the Loddon Mallee (31 March 2011) and Southern (13 April 2011) regions, including to the question: “what suggestions do you have for how the Charter could work better?”.

<sup>180</sup> Hume Region Homelessness Networkers Meeting (4 April 2011), comment in forum

<sup>181</sup> Written comment from LOMA Annual Forum (31 March 2011).

<sup>182</sup> See, eg, Victorian Council of Social Service, *Audit and Needs Analysis: Human Rights Education and Training* (2008).

## Annexure A: Table – summary of HPLC Charter case studies

Case study	Page number in HPLC submission	Case study name	Total number of people who avoided eviction	Total number of children who avoided eviction	Summary of outcome
NEGOTIATED OUTCOMES					
<b><i>Eviction avoided</i></b>					
1	10	Young man given second chance at (smaller) housing	1	-	Public housing – transfer of tenancy (facing eviction). Young man suffering from grief and fragile mental health moved into a smaller unit.
2	17	Family of seven avoid homelessness through negotiation.	7	5	Public housing – transfer of tenancy (facing eviction). Family was allowed to remain in a public housing property they had previously been permitted to sub-let.
3	13	Young woman given a chance to find longer-term housing.	1	-	THM – Notice to Vacate. Young woman permitted to stay in transitional housing until suitable long-term accommodation available.
4	16	Alternative property for elderly carer.	1	-	Public housing – transfer of tenancy (facing eviction). Elderly man avoided eviction and was offered an alternative property that met his medical needs after his mother (the tenant) passed away.
5	13	Housing support provided to an elderly man.	1	-	THM – Notice to Vacate (facing eviction). NTV withdrawn and support worker arranged to assist with finding long term accommodation.
6	11	Eviction of man and daughter prevented	2	-	Public housing – transfer of tenancy (facing

Case study	Page number in HPLC submission	Case study name	Total number of people who avoided eviction	Total number of children who avoided eviction	Summary of outcome
		after partner and mother passed away.			eviction). Tenancy agreement transferred into a man and his daughter's name after their partner and mother passed away.
<b>Alternative housing outcomes</b>					
7	18	Mediated outcome buys young man more time.	-	-	Social housing – eviction. Young man vacated community run boarding house, but negotiated more time to find alternative accommodation.
8	19	Vulnerable senior given transfer priority.	-	-	Public housing – property transfer. Elderly woman's request for alternative public housing property expedited.
<b>Charter raised and outcome unchanged</b>					
9	26	Man offered emergency accommodation and required to move on.	-	-	Local council – move-on notice and property confiscation. Rights had been considered; time had been given and offers of housing and other support services.
10	26	Lengthy wait for property transfer couldn't be avoided.	-	-	Public housing – property transfer. Rights had been considered, but simply no public housing properties available in the area.
11	27	Alleged assault not established – obligations of Victoria Police considered.	-	-	OPI complaint – alleged assault by a police officer. The matter was decided on the evidence, which could not establish the events alleged. Charter provided a framework for communicating the complaint and ensuring accountability and transparency in Victoria Police processes.

Case study	Page number in HPLC submission	Case study name	Total number of people who avoided eviction	Total number of children who avoided eviction	Summary of outcome
<b>Total evictions avoided through negotiation</b>			<b>13</b>	<b>5</b>	<b>13 people avoided eviction into homelessness through negotiated outcomes using the Charter</b>
VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL DECISIONS					
<i>Eviction avoided</i>					
12	37	Teenage daughters allowed to stay in home while father overseas and unwell.	11	7	Public housing – arrears (facing eviction). Local Agreement entered. Family avoided eviction.
13	38	Information needed for a fair hearing.	4	2	Public housing – compliance (facing eviction). VCAT adjourned the matter so DOH could provide evidence. DOH withdrew application for possession.
14	39	Eviction of parents and newborn twins prevented and housing support provided.	4	2	Public housing – arrears (facing eviction). VCAT made orders by consent that the possession order be set aside and the warrant cancelled. Client ordered to pay a lump sum and enter into a Local Agreement.
15	60	Young man allowed to repay debt, remain in property and start university.	1	-	Public housing – arrears (facing eviction). VCAT dismissed the application for possession and client entered into a Local Agreement with the OOH to repay arrears.
16	40	Young man avoids being evicted for consequences of stress-induced breakdown.	1	-	Social housing – compliance (facing eviction). VCAT dismissed application for possession order.
17	41	Mother and three children avoid eviction	4	3	Public housing – compliance (facing eviction).

Case study	Page number in HPLC submission	Case study name	Total number of people who avoided eviction	Total number of children who avoided eviction	Summary of outcome
		and attempt to relocate to avoid conflict.			Application for possession order for breach of compliance order not made. Matter adjourned for six months and attempts made to arrange a property transfer.
18	42	Guardian older sister and three younger siblings allowed to stay in home.	4	2	Public housing – arrears (facing eviction). VCAT ordered \$10 per week repayment of arrears.
<b>Alternative housing outcome</b>					
19	40	One year compliance order for mother and children.	-	-	Public housing – compliance. One year compliance order made, rather than longer.
<b>Charter considered and outcome unchanged</b>					
20	28	Charter obligations weighed against imperatives of managing public housing – single mother evicted.	-	-	Public housing – transfer of tenancy (facing eviction). VCAT held DOH had fulfilled their Charter obligations and the client and her daughter were evicted.
<b>Total evictions avoided through a VCAT decision</b>			<b>29</b>	<b>16</b>	<b>29 people avoided eviction into homelessness through VCAT outcomes using the Charter</b>
<b>TOTAL EVICTIONS AVOIDED THROUGH CHARTER-BASED ADVOCACY</b>			<b>42</b>	<b>21</b>	<b>42 PEOPLE, INCLUDING 21 CHILDREN, AVOIDED HOMELESSNESS AS A RESULT OF CHARTER-BASED ADVOCACY</b>

## Annexure B: Diagram – hypothetical consumer relationship with service providers

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People experiencing homelessness may be experiencing a range of complex issues, which require them to seek support from a number of different service providers. Although no two cases are the same, this Annexure provides a diagrammatical depiction of a hypothetical consumer's interaction with four support providers:

- ▶ a mental healthcare provider;
- ▶ the OOH;
- ▶ a transitional housing provider; and
- ▶ a community housing provider.

The diagram demonstrates some of the legislation, standards, codes and policies which ensure that the hypothetical consumer receives an adequate level of service. The diagram extracts the most relevant regulatory instruments and demonstrates that a hypothetical consumer may receive services that are subject to at least 5 pieces of legislation (not including the Charter) and 18 standards, codes and policies.<sup>183</sup> The diagram also demonstrates the number complaints and appeals mechanisms which are available to the hypothetical consumer if an adequate level of service is not provided.

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<sup>183</sup> We have not included all regulations which have a direct or indirect impact on service delivery available to persons experiencing homelessness, such as the *Public Administration Act 2004* (Vic), the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the *Victorian Civil and Administrative Tribunal Rules 2008* (Vic), the *Administrative Law Act 1978* (Vic), the *Freedom of Information Act 1982* (Vic) and the *Freedom of Information Regulations 2009* (Vic).



**CONSUMER**

**Mental Healthcare Provider  
(Mental Health Care)**

**Office of Housing  
(Public Housing)**

**Transitional Housing  
Provider**

**Community Housing  
Provider**

**THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 (VIC)**

*Mental Health Act 1986 (Vic)* (note: exposure of Draft *Mental health Bill 2010 (Vic)*)  
 National standards for mental health services (2010)  
 Implementation guidelines for the national standards for mental health services  
 National Practice Standards for the Mental Health Workforce  
 Chief Psychiatrist's Guidelines  
 Department of Health and Victoria Police Protocol for Mental Health – September 2010  
 Royal Australian and New Zealand College of Psychiatrists Code of Ethics

*Housing Act 1983 (Vic)*  
*Residential Tenancies Act 1997 (V0c)*  
 Public Housing Consumer Services Charter

*Supported Accommodation Assistance Act 1994 (Cth)*  
*Privacy Act 1999 (Cth)*  
*Residential Tenancies Act 1997 (V0c)*  
 Homelessness Assistance Service Standards  
 Consumer Charter for community-managed housing and homelessness services  
 Homelessness Assistance Program Guidelines and Conditions of Funding

*Housing Act 1983 (Vic)*  
*Residential Tenancies Act 1997 (V0c)*  
 National Community Housing Standards 2010

Program Management Circulars  
 Patient rights booklets

Public Housing Policy and Procedures  
 Manuals

Homelessness Assistance Programs  
 Guidelines  
 Opening Doors Service Coordination Guide  
 Opening Doors Practice Guide

Internal Policy and Procedures Manual

