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The Victorian Charter of Human Rights and public policy: An exploration of decision-making processes

Work-based Project, Executive Master of Public Administration



Paul Barnes, Ben Cirulis, Alison Parkinson, Luke Twyford, Weif Yee

Executive Summary

The Charter of Human Rights and Responsibilities (the Charter) establishes the basic rights, freedoms and responsibilities of all Victorians. The Charter is established by the *Charter of Human Rights and Responsibilities Act 2006* that requires Victorian state and local government departments, and people delivering services on behalf of the government, to act consistently with the human rights in the Charter. Twenty human rights are protected, in three main ways:

1. Public servants must act in ways that are compatible with human rights and take relevant human rights into account when making decisions.
2. Human rights must be taken into account when Parliament makes new laws.
3. Courts and tribunals must interpret and apply all laws compatibly with human rights.

There is a distinct lack of research about the Charter from an administrative or policy decision-making perspective. This report explores public policy decision-making processes by Victorian government agencies in relation to the Charter. This research supposes that a human rights approach produces positive outcomes, and that a rights-based decision-making process enables public sector employees to make robust decisions, particularly through the balancing of competing rights (London, 2008, p. 70). Consequently, the application of the Charter in public policy decision-making should occur, not only for legal compliance, but for broad social outcomes associated with public value.

This research explores perceptions and use of decision-making tools and frameworks to guide Charter-based public policy decisions in Victorian government agencies. As decisions to limit human rights can undermine trust in government, Victoria Police (VicPol) sponsored this research to examine how government agencies make decisions which impact human rights. Key to building community trust is ensuring decisions are made with integrity; that they have a clear rationale, are non-discriminatory, impartial and publicly available (Crocker, 2020). Specifically, this research has considered:

- if formal and/or informal guiding principles, frameworks, processes or other decision-making tools are used to structure these decision-making processes,
- perceptions of such tools to guide public policy decision-making,
- perceived strengths and weaknesses of such tools in decision-making processes,
- why such tools are, or are not, used to guide these decisions, and
- the perceived enablers and barriers to the use of such tools.

To meet the research objectives, an exploratory approach to primary data collection was used. Targeted, semi-structured interviews were designed to support meaningful engagement with participants on matters most relevant to their experience. To complement primary data collection, existing evidence (secondary data) was examined through a documentary analysis. Triangulation of primary and secondary data has provided rich insights to the research question. Thematic analysis has informed the findings and recommendations of this report, and areas for future consideration.

This research has provided insight into *how* Charter decisions are made, and the experiences and perceptions of the people who make them. It has found evidence that the existing formal decision-making processes relating to the Charter may be leading to more robust decisions, and deeper analysis of competing human rights and rights-holders. The public sector leaders and managers who participated in the research spoke positively about the application of the Charter in their decision-making and encouraged the development and implementation of further decision-making tools, training and other initiatives to further spread and embed a

human rights based decision-making culture in the Victorian public sector. Based on the data collected the research found that:

- Formal decision-making processes are largely limited to cabinet and legislative processes.
- There are low levels of awareness of processes used in other agencies.
- Leaders are confident that their processes are leading to better decisions.
- There is appetite and scope for new tools and processes, but there is a need for careful consideration of the support they might require.
- There are signs of a healthy commitment to and culture of Charter implementation, but the visibility of this commitment and culture needs to increase.
- There are risks associated with the resourcing and specialisation of Charter decision-making.
- There may be some inconsistencies in decision-making processes, and possibly poor practice.
- There is a need for more research on Charter decision-making.

This research has provided important insights into existing decision-making processes, and importantly, the opportunities that exist to strengthen and support them. It has also revealed the extent to which the decision-making processes of agencies, beyond Cabinet and legislative processes, are largely unknown.

Eleven recommendations are made (see Figure 1). These recommendations recognise that positive opportunities exist to further develop the ability of Victorian government agencies to give due consideration to human rights, particularly when decisions about competing rights are required.

The Covid-19 pandemic has created unique challenges for Victoria's government, including additional complexities for the decision-making context of government, particularly in relation to human rights and individual liberties. Now known for imposing the world's longest Covid-19 lockdown (Boaz, 2021), the government should support initiatives that build public trust in public policy decision-making.

With appropriate framing, recommendations from this report should be considered as part of a suite of measures to restore public trust in government more broadly in light of recent criticism related to decision-making and transparency.

Recommendations

1. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) should coordinate the development of new formal tools and processes to support Charter decision-making by Victorian public sector agencies.
2. Consultation with the broader user group should be undertaken to inform the development of tools that are fit for purpose, and the implementation strategies that can best support their uptake and mitigate any unintended consequences.
3. VEOHRC should review existing training and resources and undertake a training-needs analysis to inform the development of training and resources to support the broad and effective uptake of any new tool or process developed to support Charter decision-making.
4. Victorian government agencies should identify and leverage existing Charter 'champions' to support the use of new decision-making tools and processes, and associated initiatives.
5. Victorian government agencies should make new and existing tools and processes for public policy decision-making publicly available to increase transparency, trust and confidence in the process of Charter decision-making, including by outlining on their websites and in annual reports how decision-makers are supported to consider and apply the Charter.
6. Victorian government agencies should introduce new and different ways of reporting the positive outcomes achieved, practically and culturally, in Charter decision-making, to build community trust in the public sector and confidence in the implementation of the Charter, including through the use of vignettes to personalise decision-making and the decision-makers.
7. Victorian government agencies should monitor the allocation of resourcing which supports Charter decision-making, to ensure the maintenance of adequate resourcing.
8. Victorian government agencies should spread responsibility for Charter assessments across more roles and role-types to broaden the distribution of Charter expertise and understanding across agencies.
9. VEOHRC should introduce new channels for the sharing of Charter decision-making experience, practice and outcomes across agencies to support the adoption of best practice and the uptake of new tools, training and resources.
10. VEOHRC should commission research to identify and document best practice to inform broader improvements and understand any discrepancies in Charter decision-making and implementation.
11. VEOHRC should commission research to understand the potential outcomes being achieved through the application of the Charter, with comparative analysis identifying the correlation between application and social outcomes.

Figure 1 Recommendations

About the research team

The Work-Based Project was undertaken as part of the *Executive Master of Public Administration* (EMPA) at the Australia and New Zealand School of Government (ANZSOG). It is a cross-jurisdictional work-based project with public sector employees from Victoria, New South Wales and the Northern Territory. The team members were:

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Alison Parkinson; Department of Customer Service, NSW

Luke Twyford; Department of Territory Families, Housing and Communities, NT

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Contents

Executive Summary	i
Contents	v
List of figures	vi
Glossary of terms and abbreviations	vi
1. Introduction	1
1.1 Research question	1
1.2 Research aim and objectives	1
1.3 Rationale	2
2. Context	4
3. Existing research	6
4. Methodology	8
4.1 Research strategy	8
4.2 Research methods	8
4.3 Data analysis	10
4.4 Interview limitations and mitigation	10
5. Results	11
5.1 Documentary analysis	11
5.2 Interviews	12
5.3 Summary	18
6. Discussion and recommendations	19
7. Conclusion	24
8. References	26
Appendix 1 – Existing research	29
Methodology	29
Results	29
Appendix 2 Participant explanatory statement	39
Appendix 3 Consent form	41
Appendix 4 Documentary analysis process	43
Appendix 5 Undertaking a human rights assessment, Corrections Victoria	46

List of figures

Figure 1 Recommendations	iii
Figure 2 Human rights decision-making in a pandemic	3
Figure 3 Timeline of establishment and implementation of the Charter	4
Figure 4 The 20 rights protected by the Charter	4
Figure 5 Agency decision-making frameworks identified through documentary analysis and interviews	12
Figure 6 Venn diagram showing different combinations of the 4 variable research terms.	29

Glossary of terms and abbreviations

AIP	Approval in Principle
ANZSOG	Australia and New Zealand School of Government
Charter	Victorian Charter of Human Rights and Responsibilities Act 2006
EMPA	Executive Master of Public Administration
HRCC	Victorian Human Rights Consultation Committee
HREC	Human Research Ethics Committee
OGC	Office of the General Counsel
SARC	Scrutiny of Acts and Regulations Committee of the Parliament of Victoria
VicPol	Victoria Police
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VGSO	Victorian Government Solicitor's Office

1. Introduction

1.1 Research question

“How do Victorian government agencies make public policy decisions with respect to the Charter of Human Rights and Responsibilities Act 2006 (the Charter)?”

The Charter of Human Rights and Responsibilities (the Charter) is a Victorian law that sets out the basic rights, freedoms and responsibilities of all people in Victoria. The Charter requires the Victorian government to ensure all proposed statutory provisions consider the impact on human rights, and that all public authorities act in a way compatible with human rights (VEOHRC, 2019). The Charter was implemented to have broad application in public sector decision-making, and the courts have confirmed Charter application is “intended to become a ‘common or garden’ activity for persons working in the public sector” (*Castles v Secretary to the Department of Justice*, 2010 VSC 310, [185]). Under the Charter, decisions can be made to limit human rights in certain circumstances, requiring evidence of reasonableness, necessity, and proportionality (VEOHRC, 2019), however there is no clear decision-making process or criteria to assist government employees meet this requirement.

This research has considered how these decisions are made, and the formal tools and processes that are used. This report first provides an analysis of existing research on the Charter and decision-making, and details the exploratory research methodology applied. It then describes the results of the documentary analysis and interviews, before setting out the findings and evidence-based recommendations.

As the sponsor agency for this research Victoria Police (VicPol) is the primary audience for this report. Secondary audiences include VEOHRC, the Victorian Charter Implementation Group (see section 4.2.2), and Victorian government agencies.

1.2 Research aim and objectives

There is a distinct lack of research on Charter decision-making from a policy perspective. This research addresses this gap through its focus on decision-making processes in Victorian government agencies. To do this, perceptions and use of decision-making frameworks to guide Charter decisions in public policy settings have been examined. Specifically, this research considered:

- if formal and/or informal guiding principles, frameworks, processes or other decision-making tools are used to structure these decision-making processes,
- perceptions of such tools to guide public policy decision-making,
- perceived strengths and weaknesses of such tools in decision-making processes,
- why such tools are, or are not, used to guide these decisions, and
- the perceived enablers and barriers to the use of such tools.

Through this unique focus, and by taking an organisational rather than legal perspective, this report provides evidence to inform recommendations to support public policy decision-making processes. Specifically, this report:

- applies existing literature and research on public policy decision-making to the specific application of the Charter of Human Rights;
- explores how decisions are made within agencies, and what criteria or processes are applied to judge whether the limitation of human rights is reasonable, necessary and proportionate;
- provides a comparative analysis of decision-making processes in Victorian government agencies in relation to human rights;
- provides a reference for future decisions through the analysis that provides insight into the implementation of the Charter; and
- will contribute to improved decision-making and increased trust and confidence in public policy and government decision-making.

1.3 Rationale

Rights-based decision-making processes enable governments to make robust decisions, particularly by balancing competing rights: “a human rights approach offers a framework for pro-active development of policies and programs” (London, 2008, p. 70). VicPol sponsored this research to examine how government agencies make decisions which impact human rights, as limiting human rights can undermine trust in government.

As an agency implementing policies that impact human rights, VicPol receives community feedback about the fairness and proportionality of its decisions and actions. In sponsoring this research VicPol expressed a concern that they are required to make and enforce policies that limit human rights and consequently undermine trust. VicPol therefore commissioned this research to explore how agencies make public policy decisions which impact human rights, and explore perceptions and use of decision-making frameworks to guide these decisions.

A challenge for VicPol in recent years has been the requirement to enforce the limitation of rights under public policy decisions set by the government. One of the drivers for this research is that “public trust...is vital to ensure compliance and maintain law and order through governance by consent, rather than force” (Hufnagel and McCartney, 2017, pp. 1–2). As noted above, consistency in decision-making based on a structured approach builds trust between the government and the public (London, 2008).

The use of the Charter in police decision-making received significant public attention during this research project. The Victorian Government response to the Covid-19 pandemic and subsequent community reaction has brought a new and unexpected focus to human rights in public policy decision-making in Victoria. The real-world impact of these challenges is described in Figure 2 demonstrating the critical importance of Charter decision-making.

Human rights decision-making in a pandemic

In 2020-21, Victorian public sector decision-makers were under immense pressure to balance competing rights whilst adjusting to the political, social and economic pressures arising from the Covid-19 pandemic. Headline issues included the lockdown of public-housing, access to fresh air in hotel quarantine and visitation rights for prisoners in protective quarantine.

At the time of writing Melbourne was the city with the world's longest period of lockdown – residents have endured limits on their freedoms for longer than any other global citizen.

Policing has played a central role in the lockdowns. In March 2020, VicPol established a coronavirus enforcement squad of 500 officers to enforce containment measures (Andrews, 2020). Five days later additional powers were announced for VicPol to issue on-the-spot fines to individuals and businesses not following the Covid-19 restrictions (Neville, 2020).

"During this health pandemic, the government has made critical decisions to protect people's health, lives, safety and livelihood. In doing so, the government has exercised a range of extraordinary powers, and they have had far-ranging limitations on other individual rights, such as our freedom of movement, freedom of association – where and when we can move around, who we can see, how we work and educate – and these decisions have had significant economic and social impacts" (Hilton, 2020, para. 1).

Throughout 2020 and 2021, Victoria experienced growing public protests against these restrictions. On 5 August 2021, 400 people took part in an anti-lockdown protest in Melbourne. Victoria's sixth lockdown began at 8pm that day, and at least 16 fines for breaches of health directions and 15 arrests were made (ABC News, 2021a). On 18 August 2021, 21 police officers were injured in a violent anti-lockdown protest involving 4,000 people. Officers arrested more than 200 people and issued more than \$1 million in fines (Seyfort, 2021). On 21 September 2021, there was another protest with thousands of people marching. Riot police used tear gas and rubber bullets and at least 62 arrests were made (Seyfort and Zagon, 2021). The following day up to 1,000 people converged on the Shrine of Remembrance. Two police officers were injured, more than 200 people were arrested and 300 fines were issued (ABC News, 2021b). Protests and strong police responses continued throughout the week.

On 27 September 2021 frontline health care workers rallied in Melbourne Park. Approximately 30 minutes later 200 VicPol officers arrived and instructed the workers to 'move on'. Many criticised the decision made by VicPol, one man at the park with his children stated; "It is a bit nerve-wracking being in the playground with your kids and seeing 200 cops" (7NEWS Australia, 2021).

Figure 2 Human rights decision-making in a pandemic

2. Context

The journey to the Charter commenced with public consultation in 2004. By May 2006 the Bill had been introduced and it received Royal Assent on 25 July 2006. Following its introduction, the Charter was formally reviewed in 2011 and 2015. This is summarised below in Figure 3.

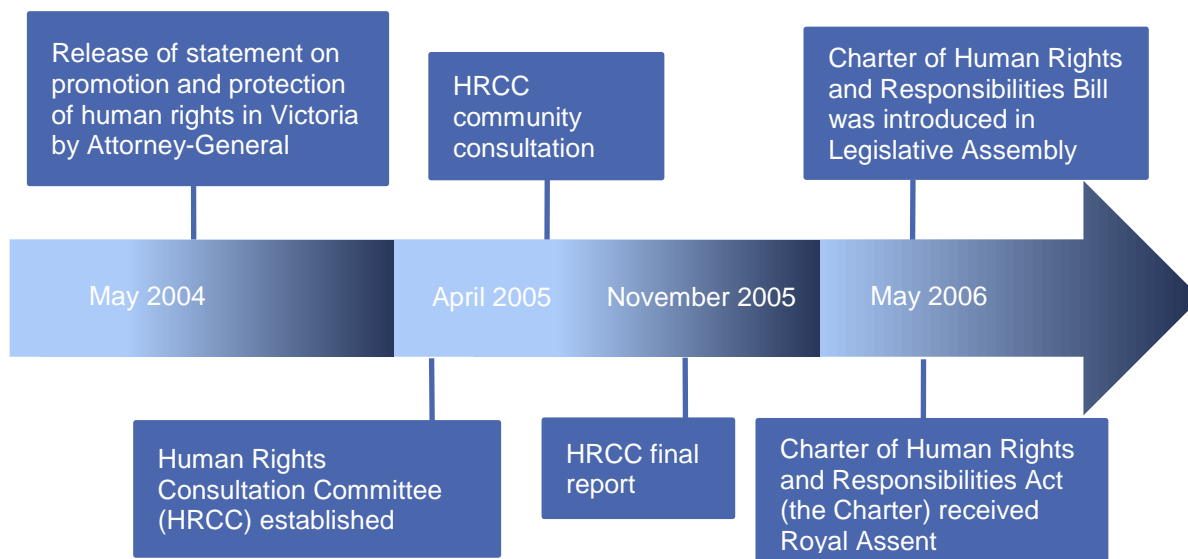


Figure 3 Timeline of establishment and implementation of the Charter

The Charter protects 20 human rights (see Figure 4) in three main ways:

1. Public authorities must act in ways that are compatible with human rights and take relevant human rights into account when making decisions.
2. Human rights must be taken into account when Parliament makes new laws.
3. Courts and tribunals must interpret and apply all laws compatibly with human rights (Scrutiny of Acts and Regulations Committee, 2011).

<ul style="list-style-type: none"> • Right to recognition and equality before the law • Right to life • Right to protection from torture and cruel, inhuman and degrading treatment • Right to freedom from forced work • Right to freedom of movement • Right to privacy and reputation • Right to freedom of thought, conscience, religion and belief • Right to freedom of expression • Right to peaceful assembly and freedom of association • Right to protection of families and children 	<ul style="list-style-type: none"> • Right to take part in public life • Cultural rights • Property rights • Right to liberty and security of the person • Right to humane treatment when deprived of liberty • Rights of children in the criminal process • Right to fair hearing • Rights in criminal proceedings • Right not to be tried or punished more than once • Right to protection from retrospective criminal laws
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Figure 4 The 20 rights protected by the Charter

The Charter provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to relevant human rights (s38).

“section 7(2) provides that a human right may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors.” (Scrutiny of Acts and Regulations Committee, 2011, p. 9).

This sub-clause reflects Parliament’s intention that human rights are not absolute, but must be balanced against each other and against competing public interests. The Charter therefore requires a balance between the protection of human rights and the need to limit them. This places significant pressure on decision-makers to identify, weigh and contrast the impact on (and of) each right. In addition, the Charter lists factors for consideration when assessing whether a right may be limited, including:

- the nature of the right,
- the importance of the purpose of the limitation,
- the nature and extent of the limitation,
- the relationship between the limitation and its purpose, and
- whether there are less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve (Madden, 2006).

This demonstrates Charter decision-making is significant and complex, and points to the importance of the decision-making processes and tools. The intended behavioural impact of the Charter was emphasised by the VEOHRC Commissioner who wrote:

“The Charter is, at its heart, a set of shared principles based on the values of the Victorian community. When government organisations embody human rights in their everyday practices we are promoting standards of behaviour, decision-making and actions that uphold principles essential to a democratic society. The impact of such behaviour should not be underestimated” (VEOHRC, 2019, p. 2).

Decision-making relating to the Charter is therefore critically important, not least in relation to the public policy decision-making that is the subject of this research.

3. Existing research

A review of research concerning public policy decision-making in relation to the Charter was conducted with the process detailed in Appendix 1 – Existing research. A bibliography listing identified publications relevant to the research question, with a short summary of each, is provided in Appendix 1 – Existing research. The review revealed six publications most relevant to the research question, which are discussed below.

On the structure of the Charter and its impact on decision-making, Davidson (2012) compared the model of the Charter with the UK, Canada, and New Zealand. In these jurisdictions, if a decision made by a public servant is found to be compliant with human rights, it does not matter if the impact on them was 'considered' or not. The requirement under the Charter for public servants to give 'proper consideration'¹ to human rights is unique, and is suggested by Davidson to be positive because decisions that include careful consideration of human rights are more likely to influence outcomes positively in court.

Klug (1997) discussed bringing a Bill of Rights into the UK, and specifically the challenge of limiting the power of the executive without limiting implementation of popular reforms. Comparisons between Hong Kong, Sweden, Ireland, New Zealand, and Canada found that: "In practice no government is eager to acknowledge that they have breached their own charter of rights" (p. 237), which may happen when the policy approach is too doctrinaire. This emphasises a need for this research to explore how discretionary decisions are made when considering human rights, within or external to formal frameworks.

Several articles discussed the potential for conflict between competing human rights. Gostin et al. (1997) state that "most policies in some way affect autonomy, privacy, or equality" (p. 56) and Klimczuk (2015) states that all policy decisions are ethical judgements as they result in a positive or negative impact and suggests "policy debates can be more productive by using ethical approaches" (p. 12). While many articles provided frameworks to guide decision-makers in ethical decision-making for general decision-making (Fischer, 1983; Guy, 1990; Ondrová, 2017), health decisions (Kinlaw, Barrett and Levine, 2009; Barugahare *et al.*, 2020), and in pandemic contexts (Mann, 1997; Thompson *et al.*, 2006), little was found specific to human rights, and nothing specific in relation to the unique requirements of the Victorian Charter.

The UK's Equality and Human Rights Commission (2014), have developed a handbook to support public administrators to understand their role and obligations. Numerous case studies, a human-rights flowchart for both policy- and decision-making, and answers to frequently asked questions, particularly conflicting rights such as individual rights and those of public safety, are included. This document seeks to provide consistency in human rights decision-making across government. A similar document for Victorian public administrators was not identified in the existing research but was identified in the documentary analysis (see Results).

¹ As per Bell J, who presided over Patrick's Case (*PJB v Melbourne Health* ('Patrick's Case') [2011] VSC 327): "A consideration by the person who did the act, or made the decision will not be 'proper', however seriously and genuinely it was carried out, if the act or decision is incompatible with human rights in terms of s 7(2)"(n.p.).

Rice et al. (2014) identified no existing tools or measurements for knowledge-use, and attitudes to, human rights or to track their changes over time in Victoria and the ACT and demonstrated that a simple instrument can be developed for this. Their research was based on a similar study of the Canadian Charter that shows that it has not been successful, although notes that the Canadian Charter made more ambitious claims² than the Victorian Charter, intending to broadly improve social equity (Arthurs and Arnold, 2005).

MacKay (2014) investigated organisational culture change within VicPol, from one with a power imbalance in interactions with the community, to one that incorporates human rights, required to comply with the Charter. Notably, the historical hierarchical and role-based nature of police organisations contributed to top-down approaches to community engagement, which enabled a culture of acceptance of public harm during police operations. Her research found that VicPol developed strategies to achieve a positive culture shift towards human rights.

Farmer (2017) presented a case study on the implementation of individual Victorian alcohol banning notices that “challenge both the purpose and specific requirements of the Charter” (p. 167), noting a disconnect between the public’s expectation and the reality of practice. Even though there are clear processes and capability for scrutiny under the Charter, there are no repercussions for non-compliance. As the Charter and its provisions are not enshrined in Victoria’s Constitution, the corrective power of courts is limited. Parliament is still able to “pass laws that are incompatible with the Charter’s requirement to preserve fundamental rights” (p. 168). Farmer claims this happens through deficiencies in the application and oversight of compliance processes and from the public’s perception, the discretion of the government. This work is important as it provides examples where the Charter has not fulfilled its purpose. While the deficiencies appear to be within parliamentary processes, it suggests there is potential for improvement to the quality or consistency of public policy decision-making.

The existing research demonstrates the importance of due consideration of human rights, and the general expectation that this consideration improves decision-making and leads to better outcomes. However, most research concentrates on decision-making and the use of tools and frameworks at an operational level rather than for public policy decision-making. Specific literature relating to Charter decision-making is absent, with neither descriptive nor normative accounts of Charter decision-making identified. Where literature on decision-making exists, it generally addresses a specific problem, agency or setting, and is, as noted above, operational.

The existing research leaves a gap in knowledge regarding government public policy decision-making, specifically in relation to the Charter. Given the complexity and importance of these decisions, as identified by the project sponsor, and supported by the research, exploring this gap is critically important to improve the understanding and processes of public policy decision-making in relation to the Charter in Victoria.

² The Canadian Charter makes detailed claims that it will improve the lives of Canadians including Aboriginal peoples and linguistic and cultural minorities, and that fundamental freedoms and democratic rights would promote and protect a more robust Canadian political culture to name a few.

4. Methodology

4.1 Research strategy

To meet the research objectives, and address the gaps identified in the existing research, an exploratory approach to primary data collection was used. Without a hypothesis to test or data to evaluate, qualitative methods were necessary to understand experiences and perceptions of decision-making processes. Qualitative methods allow exploration of interactions and experiences between individuals, organisations, policies and processes (O’Leary, 2017), allowing deep understanding of the factors which influence the research question.

To complement primary data, existing evidence (secondary data) was examined as part of a documentary analysis.

The experiential and descriptive primary data, triangulated with secondary data, has provided rich insights to the research question. Common and divergent themes were identified in the data to develop the findings and recommendations of this report, and also identified areas for future consideration.

Consistent with requirements for this Work Based Project, all methods used for this research were approved by the ANZSOG Human Research Ethics Committee (HREC).

4.2 Research methods

4.2.1 Primary data: interviews

The exploratory nature of this research justified semi-structured interviews to support engagement with each participant on matters most relevant to their experience. This enabled flexibility to explore interesting and unexpected information shared during the process. The interview framework enabled the research to:

- understand the context of decisions made by the agency, types of impacts on human rights, and how the Charter influences public policy decisions;
- identify if formal/informal processes/procedures/frameworks exist to guide decision-making when there are implications from the Charter;
- establish if agencies are aware of what happens in other agencies, their perceptions of external practice, evidence of networks/relationships/collaboration;
- establish if frameworks are perceived to be used within Victorian government agencies; and
- identify what is important for decision-making processes/procedures/frameworks.

To ensure successful interviews, the specific questions and intent of each question were tested within the team to ensure interviewers had confidence to explore concepts raised by interviewees. The team protocol included an “interview buddy” system with a lead and support interviewer, rehearsals, pre- and post-interview briefings, and methods to share initial interview findings with the broader team and to ensure consistency in the approach to interviews, fidelity to the HREC-approved methodology, and exploration of emergent themes from previous interviews.

The interview process was designed to occur online to accommodate the locations of the research team, participants, and Covid-19 restrictions. Online interviewing enabled use of

integrated recording and transcribing functions. Automated transcriptions were reviewed to ensure accuracy, and to provide an opportunity for team members to become familiar with the data gathered from the interview process.

All interviews were conducted between two team members and one participant, except for one pair of interviewees who requested a joint interview. This was considered the most effective approach to developing trust and rapport, and encouraging sharing of potentially sensitive information.

Importantly, de-identification of data collected and stored was critical to gaining trust of interviewees. Naturally, decisions which limit human rights can be contentious, and if participants or their agencies were identifiable it would likely limit the information and perspectives shared in interviews. Consistent with the process approved by the HREC, all interview data was stored securely, only accessible by the research team, and was de-identified prior to analysis.

4.2.2 Sampling and recruitment strategy

A non-random purposive sampling strategy was necessary to recruit participants with direct experience in Charter decision-making and ensure rich and credible data to inform the research question (O'Leary, 2017). Staff from VEOHRC connected the research team with staff from Victorian government agencies involved in the "Charter Implementation Group". This group, predominantly staff with human resources functions in their departments, is responsible for building awareness of the Charter, and are well connected within their agencies to teams and individuals who are frequent users of the Charter. This group introduced the research team to individuals with experience and expertise in public policy decision-making relevant to the Charter.

Participants were also sought through recommendations of the sponsor agency, and from peers in the EMPA program with relevant networks. Everyone contacted for the purposes of recruitment was sent a participant information sheet (Appendix 2 Participant explanatory statement) and consent form (Appendix 3 Consent form) to provide a consistent source of information and to support informed consent.

From the initial purposive sample, a snowball approach was employed to identify additional potential interviewees based on known networks of participants. This process was repeated as time and resources allowed.

Thirteen interviews were conducted, with 14 participants from seven agencies. Covid-19 was a common theme in interviews, reflective of the pressures facing agencies at the time of the research. There was a high degree of convergence between interviews, as is evident in the strong themes emerging from the interviews identified through thematic analysis. The content of the interviews is described in the results section below.

4.2.3 Secondary data: documentary analysis

A review was conducted to identify and collect available documents relevant to the research question. The focus was on identifying relevant Victorian government documents, documents from other Australian jurisdictions, and academic literature on the research question. In particular, examples were sought of decision-making processes or tools used in relation to human rights, evaluation, review or commentary on decision-making processes and tools, and examples of decision-making practices in Victoria and other Australian jurisdictions. This process is detailed in Appendix 4 Documentary analysis .

4.3 Data analysis

The research objective, qualitative methods, and exploratory nature of this project required thematic analysis to draw meaning from and triangulate all data collected. An iterative and systematic approach was used to facilitate deep exploration of the data to understand the information, allow comparison, and sort the data into categories and themes to enable analysis (O’Leary, 2017). This allowed identification of emerging themes, commonalities and divergence of data.

Following primary data collection, the team discussed initial perceptions, emergent themes, and key findings from the interviews to understand the themes uncovered through this process. These themes were mapped against findings from the existing research and documentary analysis to develop categories and concepts for a thematic analysis framework and enable coding of interview transcripts. This analysis framework provided a foundation to identify commonalities and divergences, as well as emergent themes.

Interview transcripts were analysed independently by two team members to highlight relevant information and identify information and emergent themes not captured in the analysis framework. This process enabled iterative triangulation against secondary data to understand emergent, common and divergent themes across the literature and the lived experience. It also provided an opportunity to record quotes to highlight findings from the data analysis and provide illustrative examples relevant to the research question.

4.4 Interview limitations and mitigation

A purposive approach was necessary to ensure appropriate expertise to inform primary data; without this, relevant data would have been difficult to collect. Non-representative sampling may be considered recruitment bias but was mitigated by subsequent snowball sampling.

Interviewing participants with an interest in human rights could result in bias relating to perceptions of the importance of human rights and associated processes. The recruitment strategy was unable to identify individuals not supportive of human rights-based decision-making. Mitigation strategies for this included providing adequate time for each interview, repeating interview questions and seeking further detail where concerns were raised. However, this has been identified as an area for exploration in future research.

The contentious nature of human rights decision-making could mean that participants were not comfortable to discuss negative experiences or perceptions of decision-making processes, despite deidentification of participants and agencies in the interview process. Mitigation strategies included focussing on interview techniques to encourage discussion of negative experiences where relevant, including open ended questions, non-judgemental responses, and use of strategic pauses (O’Leary, 2017). Despite this, minimal negative experiences or perceptions were shared, but it is difficult to draw meaningful conclusions from this lack of information.

Importantly, this research was conducted in response to a specific organisational request, and therefore is not intended to be generalisable beyond the context of the request. Hence, these identified limitations are not significant to the purpose of this report.

5. Results

This section details the results of the documentary analysis and interviews, which are then discussed below under ‘5.1 Discussion and Recommendations’.

5.1 Documentary analysis

Fifty-six publicly available documents were identified and reviewed according to the analysis process (Appendix 4 Documentary analysis). These included strategic corporate documents, submissions to inquiries, and VEOHRC resources to support Charter implementation. Relevant documents were found from 14 of 46 included agencies, with the majority from VEOHRC (15 documents) and Victorian Legal Aid (11 documents). Only one decision-making tool was identified – a Charter Impact Assessment Table published by the Department of Education and Training. Other key documents included:

- Charter of Human Rights – Guidelines for Legislation and Policy Officers in Victoria (VEOHRC, 2008)
- The Charter of Human Rights and Responsibilities: A guide for Victorian public sector workers (second edition) (VEOHRC, 2019)
- Reports of the Reviews of the Victorian Charter of Human Rights and Responsibilities Act (2011 and 2015)
- The Victorian Government Responses to the Review of the Victorian Charter of Human Rights and Responsibilities Act (2006 and 2015)
- The annual reports of VEOHRC on the operation of the Charter

The annual reports of VEOHRC on the operation of the Charter demonstrate diversity of the subject matter of decisions made relating to the Charter, and in rights engaged, but does not provide insight into how decisions are made. The annual reports document VEOHRC-led government-wide initiatives to support Charter implementation, including online training, a human rights culture indicator framework, and the guidelines and guide noted above. They also highlight legislative and policy developments made expressly to promote human rights, but provide little insight into policy that has impacts on human rights but is not for the express purpose of upholding or promoting them.

The reports of the reviews of the Charter from 2011 and 2015 both confirmed that it has “helped to promote and protect human rights” and the 2015 review concluded that “the Charter is foundational to the work of government and its relationship with the community” (Scrutiny of Acts and Regulations Committee, 2011; Department of Justice, 2015). The reports provided insight into the challenges of Charter operation and implementation, and resulted in clarifications and amendments to address these. They also made recommendations in relation to awareness and culture which were largely supported by the Victorian Government. However these reports do not provide insight into public policy decision-making processes and tools. The insights provided into culture and awareness are of limited currency, given that six years have passed since the most recent review, and that recommendations made to address culture, awareness and other issues have since been implemented.

The remaining documents, although on topics of relevance to the Charter, did not contain examples of decision-making processes or tools nor evaluations, reviews or commentary on decision-making processes.

The lack of specific processes or tools for Charter decision-making uncovered in the documentary analysis, reflected in Figure 5 suggest that formal processes are likely limited to those required by Cabinet and legislative processes, and the templates and guidance provided by VEOHRC.

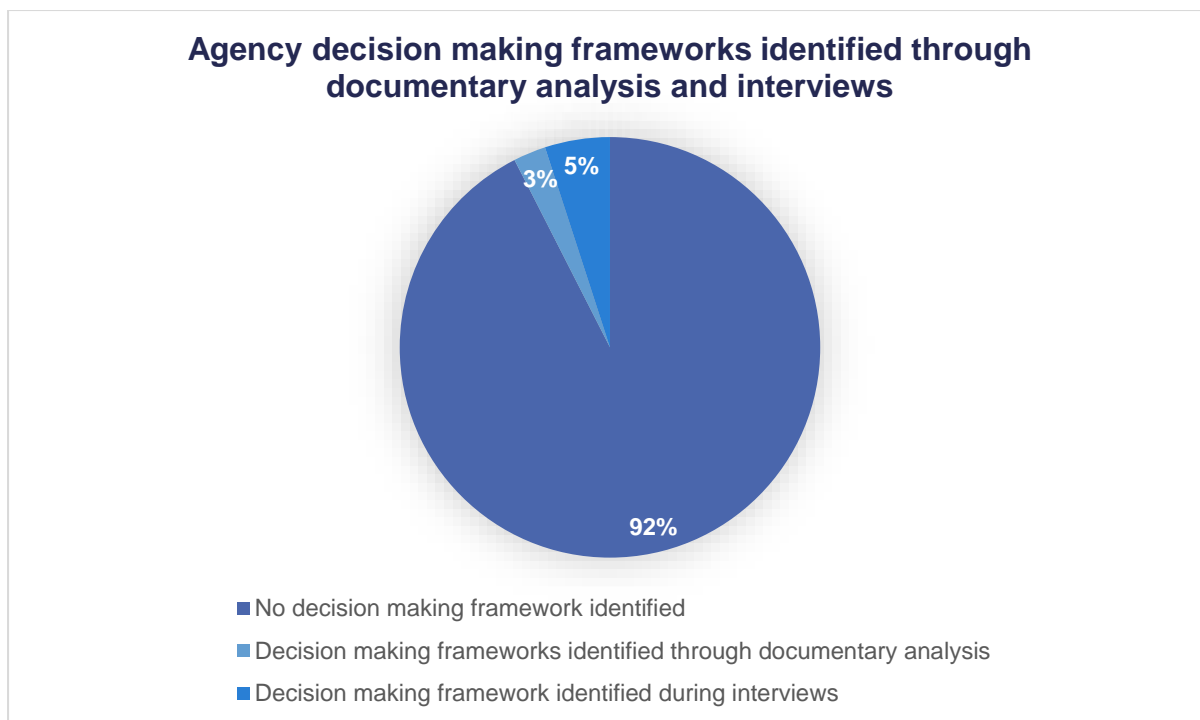


Figure 5 Agency decision-making frameworks identified through documentary analysis and interviews

5.2 Interviews

5.2.1 Experiences of decision-making

The formal processes described in interviews were largely limited to Cabinet and legislative processes, particularly the impact assessment required for new policy proposals³ and Approval in Principle (AIP) Cabinet submissions, and the Statement of Compatibility required for all Bills. Central agencies were described as having a key role in reviewing human rights impacts in Cabinet submissions. Most participants also referred to the SARC report on whether a bill is compatible with the Charter.

³ The templates used for these processes were not obtained, however their existence is known due to the requirements of SARC and Statement of Compatibility processes, and through references in interviews.

“Ideally, we try to front-foot SARC comments, or anticipate SARC comments by front-footing our arguments and try to be as fulsome and complete as possible in the relevant documentation that needs to accompany primary or subordinate legislation. That’s a Statement of Compatibility for a Bill in Parliament and human rights certificate for subordinate legislation under the Subordinate Legislation Act.”
Interview 7

Some participants did describe additional agency-specific processes. These related to the obligation for operational policies, procedures and projects to receive proper consideration of relevant human rights. One participant described a (now superseded) template to assist in the assessment of a policy, procedure, or project proposal for Charter compatibility (detailed in Appendix 4).

Participants from VicPol described ways in which Charter considerations are embedded in operational decision-making. Human rights considerations were also described as being integrated into the VicPol Manual and operation orders. This included a self-test that required the decision-maker to consider how the decision would withstand scrutiny in terms of it being ethical, fair and lawful. This document was not identified during the documentary analysis and is not publicly available, and is considered further in the discussion.

The subject matter of Charter-related public policy decisions appears varied. Participants provided examples relating to corrections, health, policing, and child protection. Many related to Covid-19, particularly the development and enforcement of public health orders and other safety measures. Other examples included policy and legislation relating to self-harm prevention, counter-terrorism, the use of searches on public transport and the policing of demonstrations.

VicPol has been at the forefront of enforcing public policies that raised serious community interest in the correct balancing of rights – both in terms of individual rights against the collective, and the balancing of separate rights an individual holds.

“A particular challenge for us, as it has been throughout the COVID emergency, has been policing public order, and in particular, policing public protest within the context of restrictions that have been posed by the Chief Health Officer around public gatherings”.
Interview 5

“considering and thinking through how we adopt, [...] how we go about applying a proportionate approach around [public gatherings] so that we balance and consider both the right to public protest, the right to freedom of assembly, the right to freedom of speech, the right to freedom of association, with the right to life”
Interview 5.

Considerations that participants said were taken into account in these decisions related to case law, previous agency experiences, the expectation of parliamentary and public scrutiny and the need to balance competing rights and rights-holders.

The decisions discussed engaged a range of rights, demonstrating the diversity in the subject of Charter-related decisions, and the rights and right-holders engaged. The breadth and multiplicity of rights and rights-holders was seen to have implications for the complexity of decision-making and the knowledge and understanding required for Charter assessments, perhaps explaining the degree to which Charter decision-making appears to be specialised.

Several participants stated that Charter implementation required legal training and an understanding of the jurisprudence associated with specific rights.

“There will be cases where, for example, the policy team will need to seek legal advice, because they themselves just can't, just don't know how to do the advice...it's difficult for people who aren't necessarily trained in human rights, because it is incredibly complicated to try.”

Interview 10

Decision-making processes were led by specialist roles in agencies and often informed by external legal and/or human rights advisors (the latter with a legal background). Many participants themselves had legal training and were in centralised legal/policy units. They described leading the assessment of policies and legislation with the potential to limit human rights, and leading and coordinating Cabinet and legislative processes initiated by their own or other agencies. For these participants, Charter assessments were a regular and important part of their work.

“... the Charter is very much part of my bread and butter and regular decision-making on an everyday basis, being the manager of the legal policy team. The Charter is a really cool piece of legislation alongside the Corrections Act in my area.”

Interview 13

However, participants noted that they were not involved in all decisions due to resource constraints or because decisions were made without their involvement when not related to new legislation.

“...However, for those normal day to day administrative decisions, decision-makers, and program areas don't always come to the legal area for support or advice, which is good because we're not resourced to support every single decision made. But at the same time, that does create some gaps in, and perhaps inconsistencies as to whether or not Charter considerations and compliance is [...] prioritised or even thought of by those decision-makers.”

Interview 7

This may suggest that some decisions are made without the appropriate expertise, but also that participants have limited visibility of Charter decision-making in their organisations, as considered further in the discussion.

Seeking legal advice from the Victorian Government Solicitor's Office (VGSO), the Office of the General Counsel (OGC), VEOHRC and from private legal services was a common part of the processes described. Some participants also mentioned that the Human Rights Unit of the Department of Justice was a significant source of advice until it was disbanded.

Although the involvement of internal legal teams appears common, one participant noted that in their agency a decision was made for Charter implementation to be led by the policy unit and not the legal unit, to avoid the Charter being seen through a compliance lens. This is suggestive of the importance of the cultural and organisational context of Charter decision-making, and is considered further in the discussion.

Most participants described consultation as part of decision-making. All decisions relating to significant policies or new or amended legislation are subject to formal consultation through

cross-agency comments on Cabinet documents. However, participants also described consultation initiated to assist them with the Charter assessment and the identification of the best policy option. Some described consultation with front-line staff and clients. Others referred to external consultation with other agencies, stakeholders, clients and community representatives, such as legal advocates in relation to family law and human rights. They spoke positively about the benefits of consulting, in relation to the quality of the decision taken, and the relationship with the group consulted. One participant described co-designing policy responses to the findings of the Royal Commission into Family Violence, listening carefully to those with lived experience.

“...a lot of my policy work I do in codesign with people with lived experience or peak bodies with people with lived experience will tell me 'that won't wash', or 'yes, that's great' or 'no, when you do that, it means this to me'. And it's been really important for us to listen to those sorts of things because those people come with [...] they live the human rights...”

Interview 12

Most participants did not know what processes other agencies followed, outside of Cabinet and legislative processes. Some participants expressed concern that the Charter may not always be given due consideration, because the staff or agency responsible do not understand, or underestimate the degree to which human rights are engaged and/or because they consider the assessment a formality.

“... in many instances, decision-makers view it as a formality or a step that needs to be done rather than seeing the benefit in actually considering the human rights.”

Interview 7

Participants held these concerns despite having cited low visibility of decision-making in other agencies, and in contrast to their confidence regarding decision-making in their own agencies. This is considered further in the discussion.

Participants were confident that the way they make decisions had led to better decisions and better outcomes for their agency, their clients and the community. This included identification of multiple benefits arising from Charter assessments, and Cabinet and legislative processes. One perceived benefit was that the Charter assessment ensured a breadth of factors was considered, and that alternative and less restrictive options were fully considered and explored in policy development.

“It is a public policy weighing up process that considers what's the least restrictive option that impinges on the individual's right. And to undergo that process you've got to identify what the options are depending on whatever the facts and circumstances are. So, it's not a rubber stamping exercise. You have to apply your mind to the substance. So in that case, it certainly did have the effect of improving and making us change the policy.”

Interview 7

Other benefits cited were the input of other agencies through the Cabinet process, and the process of weighing up competing rights and rights-holders, both of which were perceived to lead to better decisions. Participants also stated that the Charter assessment required for legislative processes led to more defensible decisions, and a better recorded rationale.

“... in that legislation's case... we were able to actually point to a whole range of protections and added provisions in the Bill that were included, specifically to address those human rights and equal opportunity issues. So in that case, it certainly did have the effect of improving and making us change the policy.”

Interview 7

Participants also expressed confidence that there are real champions for, and a commitment to, human rights in the Victorian public sector. Several were of the view that Charter implementation had brought focus to it, and that awareness of the Charter is high and embedded, even in agencies that the public may not consider to be supportive of human rights, such as police and corrections.

“I see, especially in the department leaders being put in place that really, really care about human rights and are willing to send back proposals or not approve proposals purely based on issues to do with lack of compatibility with the Charter. I've seen that happen. So I have real faith in the fact that the Charter is being taken seriously...”

Interview 13

Some participants stated that the confidentiality of Cabinet processes means that there is a lack of visibility of their decision-making and particularly of the early elimination of options that may have been incompatible with human rights, resulting in the community underestimating the commitment to the Charter and its implementation. This is further considered in the discussion.

5.2.2 Perceptions of formal processes

Participants were largely supportive of having formal processes for Charter decision-making and nominated a number of likely benefits. Some noted the potential for a formal tool or process to enable more robust and defensible decisions, and to create a better record of the decision-making process and rationale.

“... it certainly sharpens the focus on why you are putting forward a particular recommendation.... particularly if it's something that might be a little controversial or challenging for people. It does provide a more robust basis for that decision or recommendation.”

Interview 2

Others considered that formal tools or processes could improve the quality and consistency of Charter assessments within and across agencies in relation to how they are done, how early in the process they commence, how consistently they occur, and through supporting the structured engagement of relevant stakeholders.

“If everybody understands that that's a step that they're going to go through, then that probably means that it will get brought in at earlier stages... I think also making sure that everybody's formally required to sign off on particular aspects of policy proposals means that you're going to have a greater basis to [...] shape the proposal going up.”

Interview 13

Two participants suggested that the requirement for a Charter assessment should apply to more processes, such as policy briefs.

Participants advised caution regarding the limitations or risks associated with formal tools and processes. Several raised the risk of 'tick and flick' responses, where the tool or process is followed without meaningful engagement in the considered assessment process that the Charter requires.

"If there's a formal requirement, for example, with this operation order process [...] to note, human rights. Then people who don't know what that is, they'll just sort of tick the box or [...] they'll say 'no human rights issues'."

Interview 1

This aligns with legal decisions of the Supreme court that "...proper consideration of human rights should not be a sophisticated legal exercise" and "There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts" (*Castles v Secretary to the Department of Justice*, 2010 VSC 310, [185]).

Several participants raised the risk that creating new processes will create unnecessary 'paperwork' and regulatory burden for those involved in decision-making, and that this could be a barrier to consistent quality engagement with the Charter, particularly if the benefits of the process are not evident, or the staff responsible do not have the time or knowledge required. This risk has been regularly identified as critical to the administrative implementation of rights-based decision-making.

"...The goal is not to create a series of box ticking requirements to add to the already long list... What is required is cultural change, so that human rights questions are central to decision-making." – Graeme Innes, Australia's Human Rights Commissioner speaking at the Forum of Commonwealth Agencies in NSW 2008 (Innes, 2008)

Participants noted that the design and implementation of any new processes would be key to their uptake and success. Reflecting the limitations noted above, it was suggested that processes should avoid being too simplistic or too onerous.

A number of participants spoke to the importance of a requirement to identify less restrictive alternatives and provide a rationale for not pursuing them. Participants also spoke to the importance of processes tailored to the context of the agency, and to the nature of the rights engaged.

There were other one-off suggestions made, including that Charter consideration should be incorporated into a broader process to address other mandatory considerations (such as gender equity and cultural safety), and that Charter consideration should be a requirement of all roles and positions (counter to the views of other participants for the need for tailored and agency-specific processes). However these contradicted other more common suggestions. Where operational contexts were discussed, participants raised the importance of principle rather than rules-based approaches, and discretion.

There was a broad consensus among participants of the need for multiple strategies to support Charter implementation, including in relation to public policy decision-making. Participants raised the importance of training and resources to improve awareness and understanding of the Charter. Some noted that even a good tool or process will be poorly applied if the user does not have the knowledge or understanding required to apply it.

“...I think the majority of people will have heard the term human rights and they might think that they know what that actually means and what that requires, but I don't know that they actually do know that [...] meaningfully [...] and that they actually would go through the process I've just described to actually go: “Do I have a proportionate justification for what I'm about to do?”

Interview 1

Suggestions for implementation included that it be the subject of a mandate from the Victorian Secretaries Board, and that the benefits for agencies and employees are strongly set out in any communications or training.

Some participants differentiated between high-level Charter awareness and deeper understanding of the Charter's application, suggesting that strategies are needed to deepen as well as broaden awareness, as will be explored in the discussion section. There was acknowledgement of the training needs of different roles in the public sector, and of the diversity in how roles intersect with the Charter.

Interestingly, some comments suggested that the current reliance on specialist teams and advisors, could be detrimental to the awareness and engagement of the broader sector.

“So we would say that it shouldn't be the expectation that only the lawyers can do that. We would say the expectation [...] is actually a cultural change that perhaps needs to happen or needs to be championed to proceed more, because the Charter expects that all public servants when making decisions, or when advising the relevant decision-makers to make those decisions, that the Charter be considered.”

Interview 7

5.3 Summary

The interviews and documentary analysis revealed that the subject of decisions varied, but that the pandemic has become a common theme. Throughout each interview it was clear that formal decision-making processes are largely limited to Cabinet and legislative processes, as suggested by the documentary analysis and existing research. There was confidence that these formal processes were leading to better decisions as reflected in some of the limited research on Charter implementation.

There was support from participants for the creation of new formal tools beyond Cabinet and legislative processes, and a view that they should be accompanied by other strategies to assist with the movement of Charter decision-making away from specialists. The design of these new tools and accompanying strategies were seen as key, with consultation and cross-agency awareness emphasised.

6. Discussion and recommendations

This section discusses the results and implications of the research findings, and the recommendations based on the research findings for VicPol, VEOHRC and the broader Victorian public sector.

The lack of formal tools and processes other than Cabinet and legislative processes identified in the existing research, documentary analysis and interviews, coupled with the strong interest of participants in formal tools and processes, indicates that there is an opportunity to improve Charter-based decision-making.

The findings suggest that public sector agencies would benefit from new tools or processes to support Charter decision-making. In doing so, consideration should be given to the perspectives of participants regarding the potential strengths and limitations of such a tool, particularly that it forces the consideration of less restrictive options, and that it be tailored or able to be tailored to the context of the agency and the specific rights engaged, or likely to be engaged.

Recommendation 1: VEOHRC should coordinate the development of new formal tools and processes to support Charter decision-making by Victorian public sector agencies.

Given the sample size was limited and non-representative, the successful design of such tools will rely on further research or consultation to ensure that the needs of the full user group are understood and responded to in the design and implementation of the tools, and to avoid the potential shortcomings identified by participants in the interviews.

Recommendation 2: Consultation with the broader user group should be undertaken to inform the development of tools that are fit for purpose, and the implementation strategies that can best support their uptake and mitigate any unintended consequences.

There was broad consensus from participants that multiple strategies will be needed to support Charter implementation, including in relation to public policy decision-making. VEOHRC's annual reporting on the operation of the Charter suggests that significant training and resources are already available, including online learning, training roadshows, and written resources – as was acknowledged by multiple participants.

Although substantial training and resources are available, the repeated references to the need for training suggest that what is available is not meeting the sector's needs in relation to content, or in relation to when, how and to whom it is delivered. The continued calls for training may also reflect the complexity of Charter decision-making, particularly where there are competing rights and rights-holders, and significant breadth in the considerations and jurisprudence associated with the rights and rights-holders engaged, as noted by participants and supported by existing research.

There is therefore a need to review existing training and resources, their utility and uptake, and undertake a training-needs analysis of the broader user group to inform the development of training and resources that can support the broad and effective uptake of any new tool or process developed to support Charter decision-making.

Recommendation 3: VEOHRC should review existing training and resources and undertake a training-needs analysis to inform the development of training and resources to support the broad and effective uptake of any new tool or process developed to support Charter decision-making.

Participants also spoke to the importance of organisational culture, which reflected the findings of the 2015 review of the Charter (Department of Justice, 2015). Some participants acknowledged the initiatives introduced since this Review, documented in VEOHRC annual reports. However, the repeated references to the need for cultural initiatives suggests that further or different strategies are needed and should be introduced alongside any new decision-making tools or processes.

The interview results suggest that there are real champions for human rights across Victorian agencies, and that awareness of the Charter is high and embedded in some sectors. Interview participants spoke confidently about how human rights balancing was occurring in decision-making, even in the rapid decisions required by Covid-19. It was apparent that human rights were given serious consideration in the assessment of public policy.

The views of participants were reflected in the documentary analysis results. For example, survey results published in VEOHRC reports demonstrate strong levels of agreement that their workgroup values human rights, and that their organisation encourages them to act in ways consistent with human rights. The reports of the 2011 and 2015 Reviews also suggest that overall the Charter has been implemented and is operating as intended. It is also notable that only one Bill deemed incompatible with human rights has passed into legislation (Farmer, 2017).

Although this research has not evaluated the quality of decision-making or the level of commitment to human rights, the emergent theme of genuine commitment and real champions is relevant to the design and implementation of any new processes or tools. It provides insight into the attitude of at least some future users, and suggests there are champions who can and should be leveraged to encourage the use of any new tools and to contribute to the broader cultural change that participants have called for, the need for which was identified in the 2015 Review of the Charter.

Recommendation 4: Victorian government agencies should identify and leverage existing Charter 'champions' to support the use of new decision-making tools and processes, and associated initiatives.

Although it was out of scope of this research, the findings also suggest that the robust consideration of human rights through Charter decision-making is not visible to or well-understood by the community and external stakeholders. Some factors behind this may be inevitable. For example, Cabinet confidentiality and the difficulty of communicating what does *not* happen rather than what does, are difficult to overcome. The SARC has noted that government agencies may face further barriers to sharing details of Charter implementation where decisions relate to ongoing and enforceable legal obligations, or have the potential for reputational risk (SARC, 2011).

However, some factors may be within agency control. For example, the few formal decision-making processes and tools identified through this research were not available publicly (with the exception of the Department of Education and Training Charter Impact Assessment Table). Given the importance of transparency to community trust, and the potential for greater understanding of decision-making processes to increase confidence in the government's commitment to human rights, the tools and processes that do exist should be made publicly available, as should any new tools or processes. This aligns with the recent orders to the Department of Health to publicly release briefings which informed the decision to impose a curfew on metropolitan Melbourne (Murray-Atfield, 2021). This will help the community to understand decision-making processes, and how the Charter is considered in public policy decision-making.

Recommendation 5: Victorian government agencies should make new and existing tools and processes for public policy decision-making publicly available to increase transparency, trust and confidence in the process of Charter decision-making, including by outlining on their websites and in annual reports how decision-makers are supported to consider and apply the Charter.

There is also scope to improve public reporting on Charter decision-making. While VEOHRC reports on Charter operation, this is perhaps not widely read by, nor appealing to, a broad audience. Further, while this reporting demonstrates Charter impact through legal cases and legislation, it does not communicate the passion or seriousness with which some decision-makers apply the Charter, nor the outcomes that are achieved and avoided as a result of Charter assessments, particularly where those assessments relate to public policy and legislation that do not have the express intent of promoting human rights. This indicates that there is a significant opportunity to build public trust in Charter decision-making. In the current climate of significant community concern regarding human rights, and dramatic public demonstrations against and in contravention of public health orders, this should be a priority. The Victorian Government should find new and different ways of reporting on the practical and cultural outcomes achieved through Charter decision-making, and their commitment to human rights.

Recommendation 6: Victorian government agencies should introduce new and different ways of reporting the positive outcomes achieved, practically and culturally, in Charter decision-making, to build community trust in the public sector and confidence in the implementation of the Charter, including through the use of vignettes to personalise decision-making and the decision-makers.

This research has demonstrated that decision-making capability in relation to human rights varies. Influencing factors include job function, experience and interest in the topic. This means that the ability of agencies to implement these recommendations may vary. To address this, the recommendations which reference training and capacity building are crucial, and must be undertaken by an organisation with skills and capacity to deliver training on this topic. VEOHRC has limited resources for such activities, and despite their core function being “to protect and promote human rights in Victoria” (VEOHRC, 2021), this function is now largely public facing. Additional funding and resources would be necessary for VEOHRC to respond to the recommendations of this report.

The disbanding of the Department of Justice Human Rights Unit, which was a significant source of advice across government on legislation, Statements of Compatibility and human rights certificates for regulations, points to the need to protect and increase resourcing. The 2015 Review found that this Unit was inadequately resourced (Department of Justice, 2015). Its subsequent disbanding reduced the support available to agencies for Charter decision-making. Given this, the Victorian Government, but particularly VGSO, the OGC and VEOHRC, should evaluate current resourcing for Charter decision-making, and ensure that adequate resourcing to allow due consideration of human rights, that the Charter demands, is in place.

Recommendation 7: Victorian government agencies should monitor the allocation of resourcing which supports Charter decision-making, to ensure the maintenance of adequate resourcing.

The reliance on internal and external specialists raises questions regarding the extent to which awareness and understanding of the Charter is spread across roles and agencies. Consideration should be given to changes to roles and responsibilities for Charter assessments to build and spread expertise and understanding, particularly in generalist roles. The new tools and training recommended above would also help to broaden and deepen understanding, and thus reduce dependency on what could become scarce resources. Spreading responsibility for Charter consideration to more roles would help to further deepen and embed a culture of human rights, as called for in the 2015 Review.

Recommendation 8: Victorian government agencies should spread responsibility for Charter assessments across more roles and role-types to broaden the distribution of Charter expertise and understanding across agencies.

No conclusion can be drawn from this research as to whether there are inconsistencies and/or poor decision-making processes. The existing research and documentary analysis did not provide insights into agency-specific processes, nor did they indicate whether there is consistency between agencies.

Although the Reviews of the Charter identified the need for training and cultural change there is little evidence of current practice and culture relating to the Charter as there has been no further evaluation. Whilst some participants cited concerns at the processes in other agencies they also claimed not to know how decisions are made in other agencies, limiting the weight that should be given to these concerns. This does however indicate a need for greater sharing across agencies. This would have the potential to improve consistency, build confidence, increase sharing and ultimately achieve better quality decisions. Initiatives and channels for this could be introduced concurrently with any new tools, training and resources, to increase uptake and provide opportunities for reflective learning and the sharing of knowledge and experience.

Recommendation 9: VEOHRC should introduce new channels for the sharing of Charter decision-making experience, practice and outcomes across agencies to support the adoption of best practice and the uptake of new tools, training and resources.

Although the concerns should be treated with caution, there was significant evidence from the interviews of the perceived complexity of balancing competing rights and responsibilities. The possibility of divergence in practice and familiarity with Charter decision-making should not be discounted. The recent finding that the lockdown of public housing towers violated Victorian human rights laws (Ombudsman, 2020) suggests that there may indeed be some divergence in practice and outcomes.

The training-needs analysis and further consultation recommended above should provide more insight into existing divergence, and inform the development of new tools and training to improve it. However, there may be benefit in further research to understand any discrepancies in Charter decision-making and implementation, and to identify and document best practice with a view to informing improvements across the sector. The results of such research may provide opportunities for Victorian government agencies to communicate better, to report on the positive outcomes that are being achieved, and to preserve the genuine commitment and passion for human rights.

Recommendation 10: VEOHRC should commission research to identify and document best practice to inform broader improvements, and understand any discrepancies in Charter decision-making and implementation.

Recommendation 11: VEOHRC should commission research to understand the potential outcomes being achieved through the application of the Charter, with comparative analysis identifying the correlation between application and social outcomes.

7. Conclusion

The introduction of the Charter brought with it new and significant requirements for Victorian public policy decision-making. To date there has been a lack of academic attention given to how these important decisions are made. This research has provided insight into the processes for these decisions, and the experiences and perceptions of the people who make them. It has found evidence that existing formal decision-making processes may be leading to more robust decisions through deeper analysis of the competing human rights and rights-holders. The public sector leaders and managers who participated in this research spoke positively about the application of the Charter in their decision-making and encouraged the development and implementation of further decision-making tools, training and other initiatives to further spread and embed a human rights based decision-making culture in the Victorian government.

This report makes several recommendations for the Victorian government. The intent of these recommendations is to improve the quality and transparency of government decisions, and the capability of decision-makers in VicPol and more broadly. These activities directly impact policing practice because of the role of VicPol to “serve the ... community and uphold the law so as to promote a safe, secure and orderly society” (Victoria Police, no date).

The key to building community trust is ensuring decisions are made with integrity; that they have a clear rationale, are non-discriminatory, impartial and publicly available (Crocker, 2020). For the community, the presence of a trusted police organisation is achieved when the community trusts that the police act lawfully and fairly, and human rights are protected as far as possible when decisions are made to restrict liberties. This report’s recommendations align with VicPol’s values of respect, leadership, professionalism, support integrity, safety and flexibility. They specifically support VicPol in its pursuit of integrity, defined as “acting with honour, being fair and respectful of both the law and human rights” (Victoria Police, no date).

Successful uptake of these recommendations requires consideration of the factors that will influence implementation, commonly conceptualised through the strategic triangle (Moore, 1995, p. 22). Acknowledgement of the value of a proposal, the legitimacy and support for the decision-makers, and the capability of the actors is necessary to ensure recommendations are meaningful and attractive to decision-makers, in order to be impactful. With Victoria’s next state election due in November 2022 (Victorian Electoral Commission, no date), the public service will be focussed on ensuring election commitments have been fulfilled. Any new initiatives between now and the election will need strong justification and a clear benefit to gain support at this stage of the election cycle, all of which this report provides. Several recommendations seek action from all agencies with regards to resourcing, reporting and processes in relation to decision-making. Noting that the Victorian Government’s fiscal objective is to achieve an operating cash surplus before the end of the forward estimates (from a forecast deficit in 2021/22 of \$13.1 billion (Victorian Parliamentary Budget Office, 2021)), any expenditure requests unrelated to election commitments are unlikely to be funded. Accordingly, the recommendations of this report are largely no or low-cost.

Covid-19 has created unique challenges for governments. Now known for imposing the world’s longest lockdown (Boaz, 2021), the Victorian Government is in need of initiatives that build trust in public policy decision-making. This aligns with recent orders to the Department of Health to publicly release briefings which informed the decision to impose a curfew on metropolitan Melbourne (Murray-Atfield, 2021). While there are beneficial existing processes and resources that support Charter decision-making, more work is needed to further develop the ability of Victorian government agencies to give due consideration to human rights, particularly when decisions about competing rights are required.

With appropriate framing, recommendations from this report should be considered as part of a suite of measures to restore public trust in government organisations more broadly in light of recent criticism related to decision-making and transparency, and the complexity that Covid-19 has added to public policy decision-making, particularly in relation to human rights.

This research has made a significant contribution to addressing this need, and its recommendations should guide the Victorian government in the re-opening and recovery phase of the pandemic and into the future.

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Appendix 1 – Existing research

Methodology

This appendix describes the process used to conduct the review to understand what research exists concerning public policy decision-making processes specifically in relation to the Charter.

As the question is delving into public policy decision making, the literature review was predominantly focussed on academic literature such as books and journal articles. For this reason, Google Scholar was used as the search tool. The main keywords of [“human rights” government OR “public administration”] combined with different search terms were used to identify literature most relevant to the research objective. A summary of the search terms is represented graphically below in Figure 6.

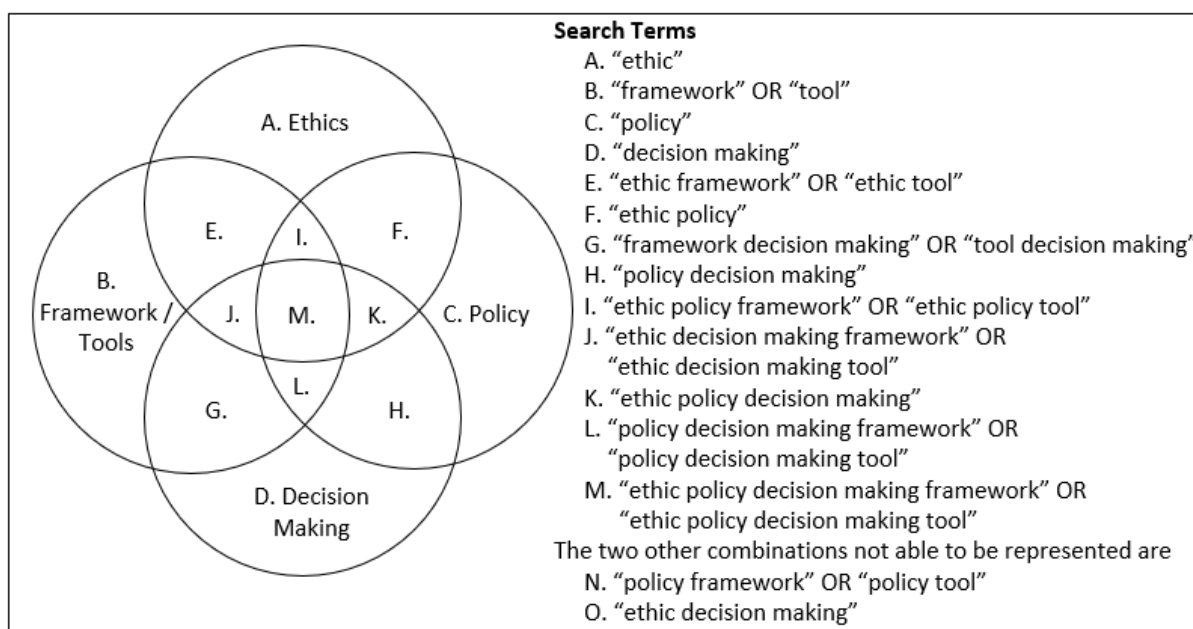


Figure 6 Venn diagram showing different combinations of the 4 variable research terms.

While the research question is constrained to the Victorian Government and agencies, the search endeavoured to also identify processes and frameworks in use by other comparable jurisdictions.

For each search term, the first 50 matching articles (totalling a total 750 texts searched) were analysed for relevance, content and quality appropriate to the research objective. Those that were considered appropriate were compiled in a list with the abstract – the list is reproduced in Results below with a shortened abstract.

Results

Due to the few texts that were considered directly relevant to the research question, a complete list of research results is included below. Those texts that were identified in the research, but not used specifically in the report, have been provided with a full citation. Where the text has been used in the report, citations have been included in the references list.

Alcabes, P. and Williams, A. B. (2002) 'Human rights and the ethic of care: a framework for health research and practice', *Yale journal of health policy, law, and ethics*, 2(2), pp. 229–254.

Examines how an ethics-based approach to caring and responsibility can guide clinical research in a manner that is consistent with human rights and justice in the face of global disparities.

Alvez, J., Duarte, S. and Timney, M. (2008) 'Human Rights Theory as a Means for Incorporating Social Equity into the Public Administration Curriculum', *Journal of Public Affairs Education*, 14(1), pp. 51–66.

States that social equity should be a primary focus for public administrators, however this has made slow progress. It is suggested that human rights theory can produce a basis for education in social equity incorporating ethical decision-making models.

Bakker, S. et al. (2009) 'Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)', *Journal of Human Rights Practice*, 1(3), pp. 436–458.

Examines Human Rights Impact Assessment effectiveness. It is noted that there is copious theory, but not many practical examples of its use. A case study is conducted on an assessment instrument used by Aim for Human Rights, and the results extrapolated to understand potential benefits to promoting human rights.

Baldwin-Ragaven, L., London, L. and De Gruchy, J. (1999) *An Ambulance of the Wrong Colour: Health Professionals, Human Rights and Ethics in South Africa*. Juta and Company Ltd.

Studies ethical problems (abuses during Apartheid in an environment lacking a human rights culture) in the South African ambulance service and provides five core objectives for professional accountability in protecting human rights. Also notes that while Apartheid has gone, abuse is still occurring in prisons, the military etc.

Barton, D. and Tait, S. (2008) 'Human rights and cultural change in policing', in *Australasian Human Rights and Policing Conference*. Australasian Human Rights and Policing Conference, Office of Police Integrity Victoria. Available at: https://www.ibac.vic.gov.au/docs/default-source/research-documents/opi/human-rights-and-cultural-change-in-policing-ahrpc2008-paper---dec-2008.pdf?sfvrsn=5e536175_10.

Examines how the Charter may improve the relationship between citizens and the Victorian Police due to the potential for improved decision-making and capability to provide a defence by countering "any suggestion of arbitrary or unfair exercise of discretion" (p7).

Barugahare et al (2020)

Review of responses to COVID-19 and recommended "ethical criteria" for evaluating public health programs. Suggests six ethical criteria for evaluating public health policies, programs, and responses. A case study from a Ugandan response to the COVID-19 pandemic is used.

Birgden, A. and Cucolo, H. (2011) 'The treatment of sex offenders: evidence, ethics, and human rights', *Sexual abuse: a journal of research and treatment*, 23(3), pp. 295–313.

Discusses the conflict between community protection and offender rights in relation to sex offenders. With community protection being given a mandate, treatment for offenders is based on management rather than treatment which violates offender rights for reasons of ineffectiveness and being unethical. The conclusion states that treatment from a human rights perspective is more likely to result in effective and ethical community-offender balance.

Brady, F. N. (2003) "“publics” administration and the ethics of particularity', *Public administration review*, 63(5), pp. 525–534.

Explores ethics, especially as it applies to the life of the public servant. It finds that "exceptional cases are not administrative problems; rather they provide a reality check for public administrators who suppose rules, plans, and programs to be their primary orientation toward the management of public concerns".

Carpenter, M. (2019) *Intersex Human Rights Australia*. Available at: <https://ihra.org.au/35611/response-to-the-victorian-paper-on-the-health-and-wellbeing-of-people-with-intersex-variations/> (Accessed: 24 October 2021).

The report commends the Victorian government, for developing a paper on the health and wellbeing of people with intersex variations where other Australian jurisdictions have not done so. There are numerous references to the Charter and its specific references to people with intersex variations. There are also issues raised regarding use of crokerCurahyperbole and lack of evidence in some claims (for example in relation to transparency of clinical practices and implementation) within the report.

Ciğeroğlu-Öztepe, M. and Kulaç, O. (2019) 'Ethical decision-making in Turkish public administration and policy', *Public Administration Issues*,(5), pp. 62–78.

Assesses Turkey's steps towards generating an ethical system for public administration with recommendations for improvements to combat corruption and unethical behaviours. Includes a review of relevant literature and models regarding ethical decision-making in public administration.

Croker (2020)

Links the trust of the public to the integrity of decision-making. Croker links integrity to the decisions made in relation to human rights and shows how the Charter places legal obligations to do just that on all parts of government.

Curran, L. (2008) 'Human Rights in Australia—Their Relevance to the Vulnerable and Marginalised', *Alternative Law Journal*, 33(2), pp. 70–74.

Investigates the limitations of a legalistic approach to human rights for vulnerable and marginalised communities.

<p>Davidson (2012)</p> <p>Analyses obligations placed on agencies by the ACT and Charter, and the potential of courts to scrutinise agencies' decisions where failure to comply with the obligations can be shown. Several court cases are reviewed to determine the stance of the courts concluding that decisions made by agencies that include careful consideration of human rights are likely to influence the outcome.</p>
<p>Donnelly, J. and Howard, R. E. (1988) 'Assessing National Human Rights Performance: A Theoretical Framework', <i>Human Rights Quarterly</i>, 10(2), pp. 214–248.</p> <p>Discusses the complexities of the International Human Rights covenants. A theoretical framework is provided to assess and compare a state's human rights performance. Additionally, a set of ten essential rights that cover almost all other rights is also provided.</p>
<p>Equality and Human Rights Commission (2014)</p> <p>A comprehensive handbook that supports public administrators understand their role in relation to human rights. It provides information on what obligations public authorities have under the Human Rights Act, and how human rights are relevant to various roles.</p> <p>It was produced to promote and enforce the laws that protect rights to fairness, dignity, and respect.</p>
<p>Essex, R. (2019) 'Do codes of ethics and position statements help guide ethical decision-making in Australian immigration detention centres?', <i>BMC medical ethics</i>, 20(1), p. 52.</p> <p>Analysis of codes of ethics and other options to support ethical decision-making in immigration centres.</p>
<p>Evoy, B. (2008) An examination of the ethical decision-making processes used in decisions to fund, reduce or cease funding tailored health services. University of British Columbia. doi: 10.14288/1.0066877.</p> <p>Interviews 24 public health administrators from British Columbia who report that they use "a series of governance and bioethical principles" to consider issues and to determine if formal or informal processes need to be used in their decision-making. Evoy introduces a "Recognition-Primed Decision Model". It aligned well with informal decision situations but there was less alignment with formal decision situations. It concludes by providing a list of seven practice recommendations.</p>
<p>Farmer (2017)</p> <p>Presents a case study on the implementation of Victorian alcohol banning notices, noting a disconnect between the public's expectation and the reality of practice. This provides an example of where, from the public's perception, the discretion of the government overlooked the Charter.</p>

<p>Fischer (1983)</p> <p>Notes the neglect of ethics and normative discourse in public organisational decision-making and how the search for a solution has recently turned to ethics (amongst others). An organisational decision-making framework is put forward that incorporates facts, organisational values, and ethics.</p>
<p>Follesdal, A. (2007) 'Ethical Investment and Human Rights: A Norwegian Case', <i>Nordisk Tidsskrift for Menneskerettigheter</i>, 25(4), pp. 420–433.</p> <p>Discusses the ethical guidelines (for Socially Responsible Investment) published by the Norwegian Government for their Norwegian Government pension fund. While the guidelines are used to select which companies to invest in, the guidelines have a strong link with human rights principles.</p>
<p>Ford, R. C. and Richardson, W. D. (1994) 'Ethical decision-making: A review of the empirical literature', <i>Journal of Business Ethics: JBE</i>; Dordrecht, 13(3), pp. 205–222.</p> <p>Assesses variables that influence ethical beliefs and decision-making and categorises into those unique to the decision-maker, and those influenced by the situation. The review finds a 'distressingly' small number of empirical studies, indicating a greater need to learn more in this area (noted from 1994).</p>
<p>Gill, N. S. (2019) 'Human rights framework: An ethical imperative for psychiatry', <i>The Australian and New Zealand journal of psychiatry</i>, 53(1), pp. 8–10.</p> <p>Discusses the intersection of human rights and mental health, noting it is "imperative for the profession of psychiatry to adopt human rights discourse into its training, practice and language" to result in changes to practice. Some content relating to how legislating human rights can change mental health practice.</p>
<p>Gostin et al. (1997)</p> <p>Provides a 7-step framework, a "human rights impact assessment", for assessing AIDS policies from a human rights perspective.</p>
<p>Gruskin, S. (2004) What are health and human rights?, <i>The Lancet</i>. doi: 10.1016/S0140-6736(03)15399-8.</p> <p>Letter to the Lancet raising concerns that the paper is confusing Human Rights with Ethics and Social Justice.</p>
<p>Gruskin, S. and Dickens, B. (2006) 'Human rights and ethics in public health', <i>American journal of public health</i>, 96(11), pp. 1903–1905.</p> <p>Comments on the close linkage between Human rights and ethics in health care in both concept and operation. Notes that 'public health professionals can contribute to the application</p>

<p>of each, and find value in each, but may do so in different ways and through different means of observance, action, and enforcement'.</p>
<p>Guy (1990)</p> <p>Provides an ethical framework and applies them to everyday ethical challenges. Ten core values are used to reach solutions that maximise value.</p>
<p>Hilton (2020)</p> <p>Notes the significant expansion of state powers and their limitations on human rights. The commission looks at high-risk environments such as prisons and lists six principles as a foundation for monitoring: necessary & proportionate, time-bound, lawful, transparent, scrutinised, and building in additional safeguards and supports.</p>
<p>Hopkins, T. (2007) 'Policing in an Era of Human Rights', <i>Alternative Law Journal</i>, 32(4), pp. 224–228.</p> <p>Looks at past policing practices and uses the (then new) ACT to expose those practices as either unlawful or having no legal basis while breaching a human right.</p>
<p>Hufnagel and McCartney (2017)</p> <p>Examines international police cooperation and highlights the importance of both trust and clear legal rules to avoid a 'slippery slope into justifications of human rights abuses' (p3).</p> <p>It is well established that 'public trust in the state is vital to ensure compliance and maintain law and order through governance by consent, rather than force' (p1-2).</p>
<p>Jackson, J. and Gau, J. M. (2016) 'Carving Up Concepts? Differentiating Between Trust and Legitimacy in Public Attitudes Towards Legal Authority', in Shockley, E. et al. (eds) <i>Interdisciplinary Perspectives on Trust: Towards Theoretical and Methodological Integration</i>. Cham: Springer International Publishing, pp. 49–69.</p> <p>Looks into compliance of citizens (to do things the state needs them to do such as paying taxes and refraining from robbing banks) through legitimacy and governance by consent rather than through coercion and the threat of force. 'Proponents of this perspective insist that citizens will voluntarily submit to the authority of the government and its representatives when they believe it is the right thing to do'. 'An orderly society requires that all citizens act in ways that are best for the group even when those actions are perhaps not in a given citizen's individual self-interest'.</p>
<p>Kampmark, B. (2021) Human rights and lockdown challenges in Melbourne. Available at: https://www.themandarin.com.au/153119-human-rights-and-lockdown-challenges-in-melbourne/?utm_source=Premium&utm_medium=email&utm_source=newsletter (Accessed: 12 April 2021).</p>

<p>Discusses the legal action for human rights violations by the Victorian State Government brought on by residents in lockdown.</p>
<p>Kinlaw, K., Barrett, D. H. and Levine, R. J. (2009) 'Ethical guidelines in pandemic influenza: recommendations of the Ethics Subcommittee of the Advisory Committee of the Director, Centers for Disease Control and Prevention', <i>Disaster medicine and public health preparedness</i>, 3 Suppl 2, pp. S185–92.</p> <p>Provides a foundation for decision-making in preparing for, and responding to, pandemic influenza. Lists 9 general ethical considerations that can be used when attending to "particular ethical issues in Pandemic Influenza Planning".</p>
<p>Klimczuk (2015)</p> <p>States that all decisions made in public policy are ethical judgements as they either result in a positive or negative impact on society. He notes that "policy debates can be more productive by using ethical approaches". There are three main approaches, key principles, and an overlay of ethical decision-making on the policy cycle provided.</p>
<p>Klug (1997)</p> <p>Discussion about bringing a Bill of Rights into the UK: specifically, the challenge of limiting the power of the executive, without limiting implementation of popular reforms which have no human rights answer. Comparisons are made in the approaches by Hong Kong, Sweden, Ireland, New Zealand, and Canada. She states: "In practice no government is eager to acknowledge that they have breached their own charter of rights" (p. 237), such as might happen when the policy approach is too doctrinaire.</p>
<p>Loe, T. W., Ferreli, L. and Mansfield, P. (2000) 'A Review of Empirical Studies Assessing Ethical decision-making in Business', <i>Dordrecht</i>, 25(3), pp. 185–204.</p> <p>Similar to Ford and Richardson, however, there is now a multitude of empirical studies available. They find numerous variables that can influence ethical choice and clear distinction between individual and organisational processes influencing ethical decision-making. Also finds that ethics-based articles are confined to only a few journals suggesting a need to further integrate ethics issues into other areas of research.</p>
<p>Loyens, K. and Maesschalck, J. (2010) 'Toward a Theoretical Framework for Ethical decision-making of Street-Level Bureaucracy: Existing Models Reconsidered', <i>Administration & society</i>, 42(1), pp. 66–100.</p> <p>Some normative models were developed for the private and public sectors. However, there is scarce research on their application in the public sector.</p>

<p>MacKay (2014)</p> <p>Investigates organisational culture change within VicPol, from one with a power imbalance in interactions with the community, to one that incorporates human rights, required to comply with the Charter. Notably, the historical hierarchical and role-based nature of police organisations contributed to top-down approaches to community engagement, which enabled a culture of acceptance of public harm during police operations. Her research found that VicPol developed strategies to achieve a positive culture shift towards human rights.</p>
<p>Mann (1997)</p> <p>Early paper on the need for an ethics framework of health following the AIDS pandemic and the human rights responsibilities of physicians.</p>
<p>Markwick, A. et al. (2019) 'Experiences of racism among Aboriginal and Torres Strait Islander adults living in the Australian state of Victoria: a cross-sectional population-based study', BMC public health, 19(1), p. 309.</p> <p>Uses Victorian Population Health Surveys to investigate whether racism, independent of social determinants and lifestyle risk factors, can explain the health and socioeconomic gaps between Indigenous and non-Indigenous Victorians.</p>
<p>McCullough, M. (2020) 'Ethical decision-making in a pandemic: where are the voices of vulnerable people?', BMJ, 369, p. m2406.</p> <p>Discusses the use of the UK Government's ethical decision-making framework in relation to COVID-19 for adult care. Based upon the number of deaths being experienced, there is some reservation about whether the framework is being used, and states that the UK government is not following its own ethical principles outlined in its covid-19</p>
<p>Naylor, B. (2014) 'Human Rights and Respect in Prisons: The Prisoners' Perspective Human Rights in Closed Environments', Law in Context: A Socio-Legal Journal, 31, pp. 84–124.</p> <p>Researches how the human rights of respect and recognition of human dignity may be embodied in the prison environment. Interviews regarding key rights are conducted with people held in Victorian and West Australian prisons, but not with public administrators.</p>
<p>Neyroud, P. and Beckley, A. (2001) Policing, Ethics and Human Rights. Routledge.</p> <p>Introduces key issues encompassing ethics in policing, providing a case for a modern 'ethical policing' approach. The English and Wales Human Rights Act 1998 will drive these changes.</p>
<p>O'Brien, L. and Bethavas, E. (2013) 'The Victorian Charter of Human Rights and its impact on the nursing profession', February, p. 25.</p> <p>Discusses how the Victorian Charter of human rights can improve decision-making of nurses.</p>

<p>O'Brien, W. and Fitz-Gibbon, K. (2018) 'Can Human Rights Standards Counter Australia's Punitive Youth Justice Practices?', <i>The International Journal of Children's Rights</i>, 26(2), pp. 197–227.</p> <p>Identifies discrepancies between Australia's human rights legal obligations and "the doctrine and operation of domestic criminal law as it applies to children in conflict with the law". It recommends adherence to global standards to guide reform.</p>
<p>Okkonen, I. and Takala, T. (2019) 'Managers' Moral Struggle: A Case Study on Ethical Dilemmas and Ethical Decision-making in the Context of Immigration', <i>Ethics and Social Welfare</i>, 13(4), pp. 392–408.</p> <p>Explores the moral intensity of ethical issues faced by Finnish managers at reception centres for asylum seekers. Reviews decision-making models and categorises ethical dilemmas into seven groups.</p>
<p>Ondrová (2017)</p> <p>Includes specific models for ethical decision-making in public administration with a focus of public participation in governing public affairs.</p>
<p>Rice et al. (2014)</p> <p>Identifies that nothing exists to measure knowledge use and attitudes to human rights and track their changes over time in Victoria and the ACT. It is demonstrated that a simple and meaningful instrument can be devised to do so.</p>
<p>Solomon, R. (2017) 'The Social Construction of Human Rights Legislation: Interpreting Victoria's Statutes through Their Limitations', <i>Deakin Law Review</i>, 22(1), pp. 27–52.</p> <p>This paper has criticism of the Charter. Looks at the limitations imposed by the Charter and the ACT and their differences. Among others, there is a lack of an independent cause of action for remedies through litigation, and the inability of individuals to claim damages for a breach of the Charter even though this appears in the NZ Bill of Rights Act (1990) upon which it was modelled. Solomon notes: "These Acts are, of course, not above the interference of interests and the rights which they seek to promote, and the effectiveness of such legislation remains 'contingent upon the discretion of government'" (p51)</p>
<p>Stazyk, E. C. and Davis, R. S. (2015) 'Taking the "high road": Does public service motivation alter ethical decision-making processes?', <i>Public administration</i>, 93(3), pp. 627–645.</p> <p>Interviewed 1400 managers in United States' municipal governments to understand their tendencies towards ethical obligations and potential to capitalise on Public Service Management and to "encourage specific ethical decision standards".</p>

Stewart, D. W. (1991) 'Theoretical foundations of ethics in public administration: approaches to understanding moral action', *Administration & society*, 23(3), p. 357.

Suggests that moral philosophy can guide public administrators to make correct intuitive judgements about right and wrong in relation to mental health promotion and advocacy. The works of several philosophers are referenced.

Thompson et al. (2006)

The SARS experience is used to present an ethical framework for pandemic influenza planning. This paper has gone a step further by working with clinical, organisational, and public health ethics and validated results via a stakeholder engagement process. Pros and cons of the proposed framework are discussed as well as its robustness.

van Wart, M. (1996) 'The Sources of Ethical decision-making for Individuals in the Public Sector', *Public administration review*, 56(6), pp. 525–533.

Discusses the new code of the American Society for Public Administration, noting it is based on five principles. The code provides an authoritative framework for practitioners.

Victorian Equal Opportunity and Human Rights Commission (2020) 2019 Report on the operation of the Charter of Human Rights and Responsibilities. State of Victoria. Available at: <https://www.humanrights.vic.gov.au/resources/2019-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities-nov-2020/> (Accessed: 9 October 2021).

Focusses on “systemic racism and Aboriginal deaths in custody, treaty and self-determination, gender equality and diversity, and racial and religious tolerance” as key issues from the year. Of note was that in 2019 the first successful prosecution of serious vilification was upheld by the courts.

Weller, P. (2012) *New Law and Ethics in Mental Health Advance Directives : The Convention on the Rights of Persons with Disabilities and the Right to Choose*. London, UNITED KINGDOM: Taylor & Francis Group.

Makes comparisons of mental health law from Canada, Australia, New Zealand, and the United Kingdom and how policies, influenced by the Conventions on the Rights of Persons with Disabilities (CRPD), are moving towards recognition of positive rights.

Williams, G. (2007) 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope', *Melbourne University Law Review* 880, 30(3), pp. 880–905.

The article is a reflection based on personal experience and perspective, from someone who chaired the Human Rights Consultation Committee who made the recommendation for adopting the Charter. Explores the background and processes leading up to the Charter's enactment as well as how it has changed the law.

Appendix 2 Participant explanatory statement

ANZSOG

Application for Ethical Approval of a Research Project Involving Humans

Participant explanatory statement

[Work-Based Project WBP20](#)

Project title: Public policy decision-making processes in relation to the Victorian Charter of Human Rights

Interview invitation

You are invited to participate in a research study into how Victorian government agencies make public policy decisions with respect to the *Charter of Human Rights and Responsibilities Act 2006* (Victoria) (the Charter).

The Work-Based Project (WBP) is being undertaken by students currently enrolled in the *Executive Master of Public Administration* (EMPA) at the Australia and New Zealand School of Government (ANZSOG). It is a cross-jurisdictional work-based project. Research project members are:

Wei-Fong Yee Department of Health, Victoria

Ben Cirulis Department of Planning, Industry and Environment, NSW

Alison Parkinson Department of Customer Service, NSW

Luke Twyford Department of Territory Families, Housing and Communities, NT

Paul Barnes Fire and Rescue, NSW

The Project Advisor is Michael Macauley, Professor of Public Administration at the School of Government, Victoria University of Wellington.

This statement is for participants who agree to be interviewed as part of the above research work-based project. It is to be read in conjunction with the attached consent form.

1. What is the purpose of this study?

The purpose of this study is to test how Victorian government agency's experiences and perceptions of formal and informal public policy decision making processes regarding the Charter of Human Rights and Responsibilities Act 2006 (VIC 2006) (the Charter). Our research will provide an analysis of public policy decision making processes across Victorian government agencies in relation to human rights, thus providing a reference for future decisions, and may inform the development of a formal decision making framework.

In accordance with the Charter, the Victorian government must ensure that all proposed statutory provisions consider the impact on human rights, and that all public authorities act in a way that is compatible with human rights. However, decisions can be made to limit human rights in certain circumstances if it is reasonable, necessary and proportionate. Yet, the Charter and supporting resources do not provide a process or criteria for determining when these circumstances are met, nor what is reasonable, necessary, and proportionate. Formalised decision making processes may help to guide these decisions, however, their use and perceived value is currently unknown.

2. Why have I been invited to participate in this study?

You are eligible to participate in this study because you have been identified as an employee of a Victorian public sector agency, with direct or indirect exposure to and/or understanding of public policy decision making processes with respect to the Charter in Victorian public sector agencies.

3. What does this study involve?

A semi-structured interview will be undertaken with a small number of participants. These interviews will be undertaken by the research team over the telephone or using video-conferencing software. The team will document these discussions through transcripts which will be provided to you, as a participant, to review and confirm.

It is important that you understand that your involvement in this study is voluntary. While we would be pleased to have you participate, we respect your right to decline. If you decide to discontinue participation at any time, you may do so without providing an explanation. All information will be treated in a confidential manner and your name will not be used in any publication arising out of this research unless you specifically authorise this on the consent form.

All of the research will be kept secure by the researchers until the conclusion of the project. The information will then be securely archived in accordance with applicable laws and standards.

Participants will receive a final report subject to the approval of the sponsoring agency.

4. Are there any possible benefits from participating in this study?

A report on this research will be completed and an executive summary of the key findings will be made available to you on request. The findings of this project may lead to further research by the sponsoring agency.

5. What if I have any questions about this research?

If you would like to discuss any aspect of this study, please feel free to contact:

Luke Twyford

on 0427 621 626 or luke.twyford@nt.gov.au

The ethical aspects of this research have been approved by the ANZSOG Human Research Ethics Committee (HREC).

If you have any concerns or complaints about the conduct of this study, you should contact the ANZSOG HREC at the following:

The Secretary -

HREC

ANZSOG

PO Box 230

Carlton VIC 3053

Tel: +61 3 8344 1963

Email: HRECsecretary@anzsog.edu.au

The Secretary is the person nominated to receive complaints from research participants. You will need to quote ANZSOG *Work-Based Project*, WBP20 Team 9.

Thank you for taking the time to consider this study. If you wish to take part in it, please sign the attached consent form. This Explanatory Statement is for you to keep.

Appendix 3 Consent form

ANZSOG

Application for Ethical Approval of a Research Project Involving Humans

Consent form for interviewees

Work-Based Project WBP20

Project title: Public policy decision-making processes in relation to the Victorian Charter of Human Rights

This consent form is for participants who agree to participate in interviews as part of the above research project. It is to be read with the attached Explanatory Statement.

Researcher's statement

The Work-Based Project is part of the core curriculum of the *Executive Master of Public Administration* (EMPA) of the Australia and New Zealand School of Government (ANZSOG). This project will explore how Victorian government agencies make public policy decisions with respect to the *Charter of Human Rights and Responsibilities Act 2006* (Victoria) (the Charter). It is sponsored by Victoria Police and could be used by Victoria Police to inform the development of policy options in this area in the future. The project is detailed further in the Explanatory Statement.

We are asking you to participate in an interview to discuss your experiences and understanding of public policy decision making processes with respect to the Charter in Victorian public sector agencies.

The interviews will be conducted from June 2021 to September 2021 and will take approximately one hour to complete.

The interview is for the purpose of this project only.

The information you provide in your interview (and in the final report) will be strictly confidential.

Interviewee statement

I hereby consent to participate in an interview on public policy decision making processes with respect to the Charter in Victorian public sector agencies. I have read the Explanatory Statement on the nature of the project and the interview arrangements.

In providing my consent, I note that:

- I have read the project Explanatory Statement.
- I understand that the interview is for the purposes of this research project only.
- Participation is voluntary and that I can withdraw at any time and for any reason.
- The interview will be conducted at a workplace or another mutually agreed location, or via video conference.
- The interview may be recorded to assist the project team with note taking. Should a recording be made, a copy will be provided on request, together with the transcript. The digital audio/video files will be kept as part of the research material in a secure location for up to 5 years.
- Subject to the approval of the sponsoring organisation, I will be provided with a copy of the final report.
- I agree to be personally identified in the report: YES/NO
- The research team member/s will periodically ask me to confirm during the interview that my statements have been accurately understood and interpreted.

The Victorian Charter of Human Rights and public policy: an exploration of decision-making processes

- The research team member/s will take notes and I will be provided with a copy of the interview notes and have an opportunity to review and confirm these.
- I agree, and have the permission to agree, to my organisation being identified in the report: YES/NO
- These arrangements have been approved by the ANZSOG Human Research Ethics Committee (HREC).

I, _____ *please print your full name*

of _____ *please identify your position title/ organisation*

consent to participating in an interview to assist with the *Work-based Project*.

Signed _____ date / /2021

Appendix 4 Documentary analysis process

This appendix describes the process used to conduct the documentary analysis.

An agreed search and analysis protocol was used, with the test for relevance being the potential for inclusion of any examples of decision-making processes or tools in relation to human rights generally or the Charter specifically; evaluations, reviews or commentary on decision-making processes or tools, or examples of decision-making practices.

Sampling strategy

Inclusion criteria:

- Publications authored, published or distributed by Victorian government, public sector agencies or institutional websites
- Text-based publications
- Including but not limited to: policies, reports, evaluations, reviews, processes, submissions, annual reports
- Publicly available
- Published on Internet
- In English

Agencies searched

These agencies were identified by reviewing a full list of Victorian public sector agencies and identifying those with high or medium relevance to human rights. They were:

- Accident Compensation Conciliation Service
- Ambulance Victoria
- Commission for Better Regulation
- Commission for Children and Young People
- Court Services Victoria
- Dental Health Services Victoria
- Department of Education and Training
- Department of Environment, Land, Water and Planning
- Department of Health and Human Services
- Department of Jobs, Precincts and Regions
- Department of Justice and Community Safety (includes non-executive and non-forensic staff at the Institute of Forensic Medicine)
- Department of Premier and Cabinet
- Department of Transport
- Department of Treasury and Finance
- Departments of the Parliament
- Development Victoria
- Environment Protection Authority
- Family Safety Victoria
- Family Violence Prevention Agency (Respect Victoria)
- Independent Broad-based Anti-Corruption Commission
- Infrastructure Victoria
- Mental Health Reform Victoria
- Office of Public Prosecutions
- Office of the Chief Parliamentary Counsel
- Office of the Legal Services Commissioner
- Office of the Ombudsman Victoria

- Office of the Victorian Electoral Commissioner
- Office of the Victorian Information Commissioner
- Service Victoria
- Victoria Legal Aid
- Victoria Police
- Victoria State Emergency Service
- Victorian Agency for Health Information
- Victorian Auditor-General's Office
- Victorian Commission for Gambling and Liquor Regulation
- Victorian Equal Opportunity and Human Rights Commission
- Victorian Government Solicitor's Office
- Victorian Health Promotion Foundation
- Victorian Public Sector Commission
- Victorian WorkCover Authority

This was supplemented by a scan for submissions relating to human rights from or about Victorian agencies published on the following websites:

- Parliamentary websites of NSW, ACT, SA, TAS, NT, QLD, WA
- Human Rights Commission (or equivalent) of NSW, ACT, SA, TAS, NT, QLD, WA

Search protocol

1. Review of general publications and resources pages and subpages relating to:
 - a) 'Publications'
 - b) 'Reports'
 - c) 'About us'
 - d) 'Policies'
 - e) 'Resources'
 - f) 'Submissions'
2. Word search functionality or google page-specific search for following terms (as separate searches):
 - a) 'Human rights'
 - b) 'Human rights charter'
 - c) 'decision making'
 - d) 'ethics'
 - e) 'rights'

Data collection / organisation

Any relevant texts identified were logged with name, date, source and assigned a reviewer from the project team.

Data review and analysis

Each document was reviewed for:

1. Content reviews

Identification of any:

- a) Examples of decision-making processes or tools in relation to human rights generally or the Charter specifically
- b) Evaluations, reviews or commentary on decision-making processes or tools
- c) Examples of decision-making practices

2. Credibility assessment

Credibility to be assessed based on:

- a) Host site
- b) Authoring/ publishing agency
- c) Author credentials (individual or institutional)
- d) Evidence cited / not cited
- e) Interest of authoring/publishing agency or

3. Authenticity assessment

Authenticity to be assessed based on:

- a) Domain name
- b) Presentation and identifying marks

4. Latent content analysis

Consideration of background information/context including

- a) Motive for production
- b) Source of production
- c) Political and social context
- d) Potential bias of authoring or publishing agency

5. Content analysis:

- a) Analysis of any relevant content identified at step one (i.e. 1a – c)

Appendix 5 Undertaking a human rights assessment, Corrections Victoria

Human Rights Assessment

Corrections Victoria



Introduction

This information is to assist the assessment of a policy, procedure, or project proposal for compatibility with the Victorian Charter of Human Rights.

The assessment is part of any policy, procedure, or project proposal that is submitted to the Corrections Victoria Executive Management Team for approval.

Why do we need to assess policies and procedures for compatibility with the Charter?

A key purpose of the Charter is to ensure that the public authorities take human rights into account when making laws and decisions, and when providing services. Section 38 of the Charter states that we are required to give 'proper consideration to a relevant human right' when making decisions.

- This 'consideration' is not just about compliance; it is also about a commitment to human rights.
- 'Decisions' includes the approval of policies, procedures and project proposals.

Corrections Victoria has produced a Charter Assessment Record template to assist the assessment process. The completed template should be attached to submissions to the Executive Management Team.

Completing the template

The template and a worked example are available on JNet. The access path is:

JNet > Corrections > How we work > Human Rights Charter > What do we need to know?

There are two sections to complete on the Impact Assessment template. These are:

- the Authorisation
- the Human Rights Assessment Table

An explanation of each section follows.

<p>Authorisation</p>	<p>The assessment requires authorisation by the relevant Director. This confirms the conclusion reached.</p>
<p>Assessment Table</p>	<p>The table lists the 20 Charter Rights. An explanation of each is provided on pages 3-5 of this document.</p> <ul style="list-style-type: none"> ● Identify whether the policy/procedure limits any of the Rights. If they are, mark 'Yes' beside the relevant Right. ● Where it is identified that a Right is limited, the Analysis/Comment column should be completed. ● This column requires us to refer to five criteria to consider whether the limitation is justified. The criteria are listed below in Further Information. ● The Analysis/Comment column can also be used to refer to Corrections legislation or regulations that explicitly justify the policy/initiative being assessed.

Further information

- A policy/procedure/project may limit a right but be justified in accordance with s7. If so, the policy/procedure is compatible. If it not justified it is not compatible.
- More than one Right may be engaged by a proposal or initiative.
- Section 7 of the Charter outlines five criteria that need to be satisfied to justify a limitation to a Right. These are shown below. A brief response to each of the criteria needs to be compiled for your analysis.
 1. **The nature of the right** – How significant is the Right? (Some rights are considered to be more fundamental or absolute, for example, protection from torture. Most rights are qualified).
 2. **The importance of the purpose of the limitation** – What is the limitation on the Right trying to achieve?
 3. **The nature and extent of the limitation** – How much is it a limitation on the Right? Is the limitation severe, or is its impact minimal in the scheme of things?
 4. **The relationship between the limitation and its purpose** – Does the limitation do what it is trying to do?
 5. **Any less restrictive means reasonable available to achieve the purpose that the limitation seeks to achieve** – Could the limitation on the Right be reduced while still achieving the objective of the policy? Is there any other way of achieving that objective?
- Any recommendations for changes to a policy or procedure to ensure capability to the Human Rights Charter proceed through the standard process for approvals in your Directorate. (Refer to line management for further information on this process).
- The content of some policies and procedures is almost directly from legislation or regulation. For example, Standard 46 on Prisoner Monies relies heavily on Corrections Regulations 1998, regulations 23-28. The Charter analysis of legislation and regulations has been conducted; this means that Policy Officers do not need to proceed with further analysis in such cases. However, we do need to refer to the relevant section of legislation of regulations in the Analysis/Comment column.

What rights and freedoms are protected under the Charter?

Recognition and equality before the law

- People have the right to recognition before the law.
- People have the right to enjoy their human rights without discrimination.
- People have the right to equality before the law and equal protection of the law without discrimination.
- Measures taken to assist people who are disadvantaged because of discrimination will not constitute unlawful discrimination under the Charter.

Right to life

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

Protection from torture and cruel, inhuman or degrading treatment

- A person must not be tortured, treated or punished in a cruel, inhuman or degrading way, or subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

Freedom from forced work

- A person must not be held in slavery or servitude.
- A person must not be made to perform forced or compulsory labour other than work or service as a result of a court order; during emergency situations; or as part of normal civil obligations.

Freedom of movement

- People have the right to enter and leave Victoria, to move freely within it and to freely choose their place of residence.

Privacy and reputation

- A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with and the right not to have his or her reputation unlawfully attacked.

Freedom of thought, conscience, religion and belief

- People have the right to freedom of thought, conscience and religion. This includes the freedom to choose a religion or belief, and the freedom to demonstrate the religion individually or as part of a community and in public or private.
- A person must not be coerced or restrained in a way that limits his or her freedom to choose a religion or to demonstrate the religion.

Freedom of expression

- People have the right to hold opinions without interference.
- People have the right to freedom of expression which includes the right to seek, receive and impart information and ideas except when lawful restrictions are reasonably necessary to respect the rights and reputation of others or for the protection of national security, public order, public health or public morality.

Peaceful assembly and freedom of association

- People have the right to assemble peacefully.
- People have the right to freely associate with others and to form and join trade unions.

Protection of families and children

- Families, as the fundamental group unit of society, are entitled to be protected by society and the State.
- Children have the right to such protection as is in their best interests, without discrimination.

Taking part in public life

- Every person has the right to take part in public affairs.
- Every eligible person has the right to vote and be elected and to have access to the Victorian public service and public office.

Cultural rights

- People with a particular cultural, religious, racial or linguistic background have the right to enjoy their culture, declare and practise their religion and use their language. Aboriginal people have the right to enjoy their identity and culture. They have the right to maintain their language, kinship ties and spiritual and material relationship with the land, waters and other resources to which they have a connection under traditional laws and customs.

Property rights

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

Right to liberty and security

- Every person has the right to liberty and security.
- A person must not be subjected to arbitrary arrest or detention.
- A person must not be deprived of his or her liberty, except on grounds established by law, and in accordance with procedures established by law.
- A person arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and be promptly informed about any proceedings to be brought against him or her.
- A person arrested or detained on a criminal charge must be promptly brought before a court and tried within a reasonable time after arrest or detention. If not, that person must be released.
- A person awaiting trial must not be automatically detained in custody. His or her release may be subject to guarantees to appear for trial or for any other stage of the judicial proceeding.
- Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of the detention. The court must make a decision on the application without delay and order the release of the person if it finds that the detention is unlawful.
- A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

Humane treatment when deprived of liberty

- Persons deprived of liberty must be treated with humanity and with respect for their inherent human dignity.
- An accused person who has been detained must be segregated from those convicted of offences, except where reasonably necessary.
- An accused person detained must be treated in a way appropriate for a person not convicted.
-

Children in the criminal process

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

Fair hearing

- A person has the right to have criminal charges and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- A court or tribunal may exclude the media and the public from all or part of a hearing if permitted to do so by a law other than the Charter.
- All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless this is not in the best interests of a child or is permitted by a law other than the Charter.

Rights in criminal proceeding

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

- Any person convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher court in accordance with law.

Right not to be tried or punished more than once

- A person must not be tried or punished again for an offence for which he or she has already been finally convicted or acquitted.

Retrospective criminal laws

- A person must not be found guilty of a criminal offence because of conduct that was lawful at the time.
- A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence at the time it was committed.
- If a penalty for an offence is reduced after a person committed the offence, that person must be eligible for the reduced penalty.
- The trial and punishment of any person for any act or omission which was an offence under international law at the time it was committed, is not affected by the section.

References

Human Rights Unit, Department of Justice. (2007). *Draft Guidelines for Legislation and Policy Officers in Victoria*.

Victorian Equal Opportunity and Human Rights Commission. (2007). *The Charter of Human Rights and Responsibilities: Protection of Freedoms and Rights for everyone in Victoria*.