

Complying with the Charter of Human Rights and Responsibilities Act 2006

A Community Legal Centre Guide



Federation of
Community Legal Centres
VICTORIA

OCTOBER 2008

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Part 1: About the Human Rights Charter

Why do I need to know about the Charter?.....	2
How is the Charter relevant to CLCs?.....	3
Human rights included in the Charter	3
How do human rights work in practice?.....	5
The Charter and other laws.....	5

Part 2: Human Rights Compliance Tools

Human rights compliance tools	6
Charter Flowchart: Human rights and decision-making in CLCs.....	7
How the flowchart works	8
Charter Checklist: General measures for implementation.....	11

Part 3: Key Charter human rights for CLC managers and coordinators

Right to a fair hearing.....	12
Right to recognition and equality before the law	13
Key issues for CLCs to consider in ensuring the right to a fair hearing and equality	13
Examples: Human rights issues in CLC service delivery	15
Human rights resources.....	18
Tool: Decision impact template	20

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This publication has been supported by a grant from the Victoria Law Foundation.



Complying with the Charter of Human Rights and Responsibilities Act 2006: A Community Legal Centre Guide

The guide is to help managers and coordinators of community legal centres (CLCs) comply with the rights and obligations contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). CLCs will be able to use the information and checklists in the guide to review existing policies and procedures to ensure human rights are considered in all aspects of CLC operation and service delivery. While the Charter is clearly relevant to CLC client advocacy and policy work, this guide focuses on the discrete area of ensuring that CLC operations and services comply with the Charter.

Part 1 of the guide provides information about the Charter and its relevance to CLCs. Part 2 explains how the Charter can be used in decision-making. Part 3 provides guidance on key human rights relevant to CLCs and provides some CLC case studies applying the Charter. It also includes information on resources where CLCs can find further information about human rights and the Charter.

Part 1: About the Human Rights Charter

Why do I need to know about the Charter?

The Charter came into full operation in Victoria on 1 January 2008. The Charter sets out certain rights and freedoms of people in Victoria as well as responsibilities of Victorian public authorities to act consistently with human rights. To this end, the Charter establishes the following mechanisms:

1. Prior to introduction into Parliament, bills must be assessed for their compatibility with the human rights contained within the Charter. A Statement of Compatibility must be tabled with the bill when it is introduced.
2. All legislation, including subordinate legislation, must be considered by the Parliament's Scrutiny of Acts and Regulations Committee, which reports on whether the legislation is compatible with human rights.
3. Public authorities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process.
4. So far as possible, courts and tribunals must interpret and apply legislation consistently with human Rights. Courts can consider relevant international, regional and comparative domestic jurisprudence in this process.
5. The Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with human rights and issue a Declaration of Inconsistent Interpretation. The Government must respond to the Declaration within six months but is not compelled to amend the legislation.
6. The Victorian Equal Opportunity and Human Rights Commission has responsibility for monitoring and reporting on the implementation and operation of the Victorian Charter and also for conducting community education regarding the Charter.

Public authorities are defined in section 4 of the Charter. They include Victorian Government Departments, local councils, Victoria Police and certain entities exercising functions of a public nature. The Charter does not apply to the Federal Government or federal laws.

The Charter does not create an independent cause of action to pursue a public authority for a breach of the Charter. However, if a person has an existing cause of action against a public authority, breach of the Charter may be a further ground in that claim.

How is the Charter relevant to CLCs?

Human rights have been part of the work of CLCs for many years, however the work of CLCs has not always been recognised as ‘human rights’ work. The Charter now requires Victorian public authorities to consider and apply human rights. Accordingly, the Charter has significant potential to address disadvantage and promote better laws, policies and actions. Clearly, it is vital for CLCs to understand the Charter and to use it, where appropriate, in their advice, casework, education and law reform activities.

The focus of this guide however, is not on CLCs using the Charter to advocate on behalf of their clients. The Federation of Community Legal Centres and other organisations will continue to provide training and resources to assist CLCs in this regard.

The focus of this guide is on ensuring that CLCs comply with the Charter in their service delivery to clients. It is designed to help CLCs themselves become Charter compliant.

The Charter creates significant obligations for public authorities. Section 4 of the Charter defines public authorities. The Federation has received advice that community legal centres are unlikely to be considered ‘public authorities’. This would mean that CLCs are not required by law to comply with the Charter. The Federation recommends that each CLC consider obtaining legal advice on whether their particular centre would be considered a public authority.

Despite this legal advice, the Federation believes that CLCs should act as if they are legally bound by the Charter. Adherence to human rights is consistent with the ethos and practice of CLCs. Charter compliance will promote better and more human-focused CLC services and policies. It will set an example for government and other service providers. It is also possible that in the future, the government may require compliance with the Charter as part of contract and funding arrangements.

CLCs can lead the field by being human rights compliant. This guide will help CLCs achieve this. The Charter can be used as a framework that assists CLCs to develop standards of service and supports decision-making.

To maximise the prospect of Charter compliance, we recommend that centres integrate human rights policies into existing organisational policies such as casework guidelines, disability action plans, Service Standards & Performance Indicators (SSPI) policies and Risk Management policies.

Human rights included in the Charter

The human rights included in the Charter are based on rights outlined in the *International Covenant of Civil and Political Rights*.

The Charter does not cover all human rights. Human rights that are recognised by other laws in Australia continue to operate alongside the Charter. For example, human rights that Australia commits to by signing

international treaties may be implemented by other federal and state legislation, which operate alongside the Charter. Some human rights in the Australian Constitution, such as the freedom from discrimination based on which state you live in, are not affected by the Charter. There are also internationally recognised human rights that are not protected in Australia, including many social and economic rights.

Part 2 of the Charter protects the following rights, centred around the principles of freedom, respect, equality and dignity:

<p>Freedom</p> <ul style="list-style-type: none"> • Freedom from forced work • Freedom of movement • Freedom of thought, conscience, religion and belief • Freedom of expression • Right to peaceful assembly and freedom of association • Property rights • Right to liberty and security of person • Fair hearing • Rights in criminal proceedings • Right not to be tried and punished more than once • Protection from retrospective criminal laws 	<p>Respect</p> <ul style="list-style-type: none"> • Right to life • Protection of families and children • Cultural rights, including recognition that Aboriginal people hold distinct cultural rights
<p>Equality</p> <ul style="list-style-type: none"> • Recognition and equality before the law • Entitlement to participate in public life (including voting) 	<p>Dignity</p> <ul style="list-style-type: none"> • Prohibition on torture and cruel, inhuman or degrading treatment • Protection of privacy and reputation • Humane treatment when deprived of liberty • Appropriate treatment of children in the criminal process

The rights under the Charter are not absolute. The Charter permits limitations on human rights. Limits on human rights must be justifiable in a free and democratic society based on human dignity, freedom and equality. The limitation must be reasonable, taking into account all of the following factors:

- 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
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

An example of a permitted limitation on a human right under the Charter would be limiting a person's liberty by imprisoning them in accordance with a sentence lawfully imposed by a court.

Some of the rights contained in the Charter also have additional particular limitations or qualifications. These include:

- recognition and equality before the law (section 8);

- freedom from forced work (section 11); and
- freedom of expression (section 15).

More information about the content of each of the Charter rights can be found in the information referred to in the Resources section.

The Charter and other laws

All Victorian laws must be interpreted compatibly with the human rights contained in the Charter. Section 32(1) of the Charter requires that as far as it is possible to do so consistently with its purpose, legislation should be interpreted in a way that is compatible with human rights. CLCs should ensure that in complying with their existing obligations under other laws, their actions are compatible with the Charter.

CLCs will notice overlap in some of the rights in the Charter and other legal obligations. For example, CLCs must comply with state and federal laws that prohibit discrimination and section 8 of the Charter also recognises a right to equality and non-discrimination. Similarly, CLCs may have obligations under state and federal privacy laws (or their service agreement) and section 13 of the Charter also recognises a person's right not to have their privacy unlawfully or arbitrarily interfered with.

The Charter states that existing human rights protections are not limited by the Charter. Section 5 of the Charter states that:

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

How do human rights work in practice?

One way of putting human rights into practice is to adopt a human rights based approach to decision-making. This approach is based on a belief that human rights should have an impact beyond court rooms and can inform the way we operate as organisations. The principles of human rights based approaches are:

1. Putting human rights at the centre of policy and planning
Use the principles of human rights – freedom, respect, equality and dignity as part of your planning.
2. Ensuring accountability
Identify who has responsibility for assessing the impact of decisions and policies on human rights.
3. Empowerment, participation and involvement
Ensure that people affected by decisions are involved in all stages of the decision-making process.
4. Adherence to the principles of non-discrimination and attention to vulnerable or marginalised groups
Policies and decisions should consider the impacts on vulnerable and marginalised groups.

These principles should underpin each CLC's approach to human rights.

Part 2: Human Rights Compliance Tools

This section provides a flowchart and checklist to help CLCs apply the Charter to their policies and decisions. CLCs are already experienced in implementing human rights. These tools are designed to help CLCs explore to what extent human rights in the Charter:

- are already taken care of in existing practices and processes;
- may be incorporated into or embedded in existing practices and processes; or
- may offer a complementary framework that can operate alongside existing procedures.

Foundations of the process

Developing a human rights culture is an important foundation of this process. It is important that people are consulted about decisions that affect them. Speaking to other people within your CLC or other organisations will help you to become aware of any unforeseen implications and may provide a different perspective on your work.

Consulting and communicating these decisions helps make CLCs more accountable. It also encourages participation in the decisions of the CLCs which can empower staff, clients and the wider community.

Throughout the decision-making process, consider

- Who has been consulted about the policy/decision?
- Who must agree to the policy/decision before it is finalised?
- What information and training will people receive to ensure the policy/decision works?

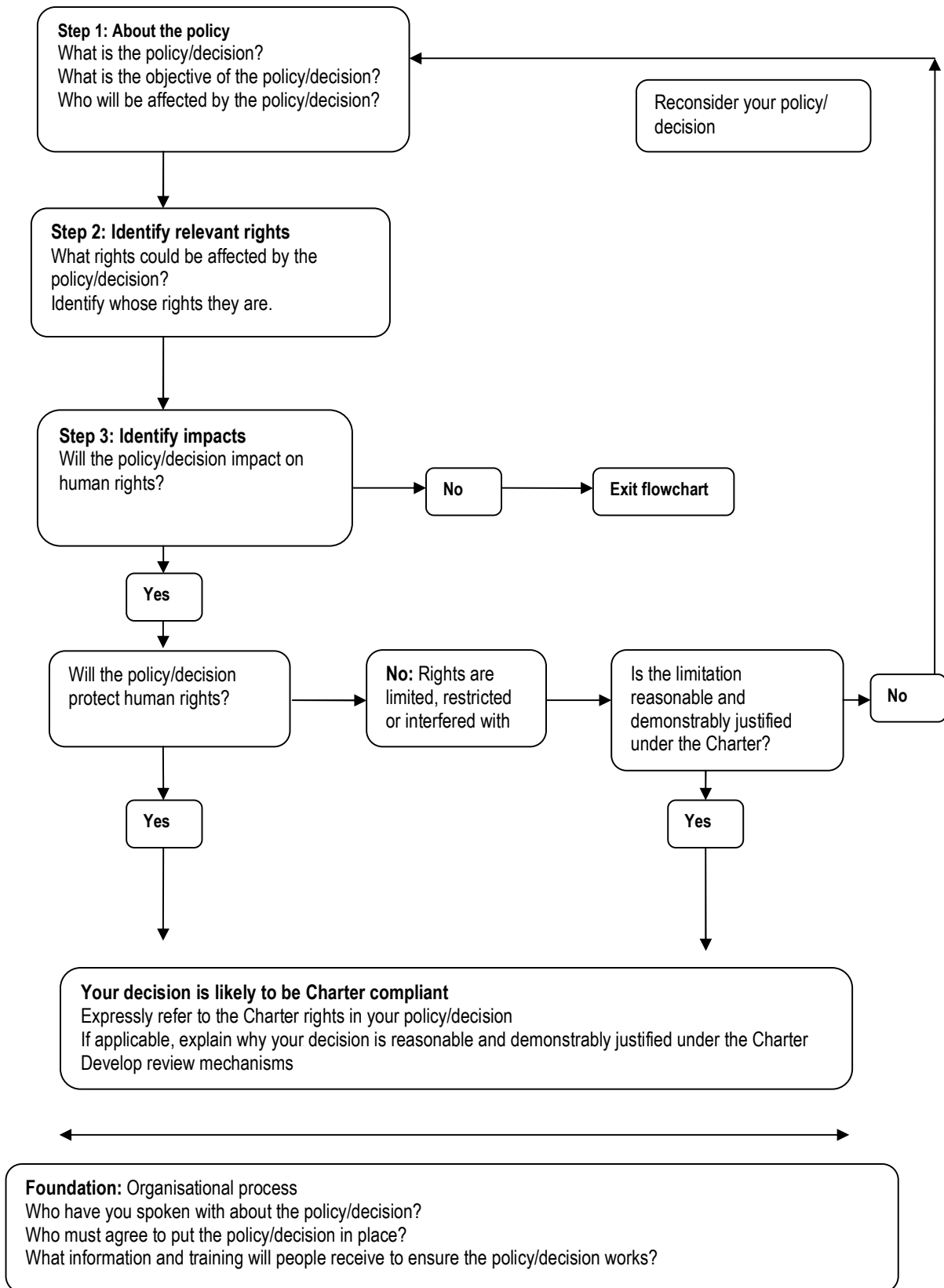
Compliance tools

The first tool in this guide is the Charter Flowchart. This is a step by step process to help CLCs assess whether a policy or decision is Charter compliant. Instructions on using the flowchart are set out in the following pages.

A Decision Impact Template is attached as an appendix to the guide. The template is designed to assist CLCs to use the flowchart for each of the twenty rights in the Charter, and to record the application of the flowchart to each of those rights.

The final tool is a Charter Checklist which lists six general overview questions for CLCs to ensure overall Charter compliance.

Charter Flowchart: Human rights and decision-making in CLCs



How the flowchart works

Below is an example used to explain the decision-making process.

Step 1: About the policy

What is the policy/decision? What is the objective of the policy/decision?

These questions are intended to ensure that you have all the necessary information to assess whether the Charter is relevant to the policy/decision.

Example

A CLC is funded to offer an Intervention Order Program at a nearby court. The program will provide free legal advice to people seeking intervention orders against perpetrators of family violence.

Who will be affected by the policy/decision?

Look at what the policy/decision is intending to achieve and think about the people who are likely to be affected by it. This question should be answered broadly.

Example

The people affected by the decision to implement the program:

- Applicants
- Defendants to the proceeding
- Family, including children of both parties
- CLC and court staff

Step 2: Identify relevant rights

What rights could be affected by the policy/decision? Identify whose rights they are.

This step requires you to consider all the rights contained in the Charter and consider whether your policy/decision could affect any of those rights. It is possible that a number of rights will be relevant. The Charter rights are listed above and more information on each right is available through the Resources section.

Consider who could claim protection from those rights. It is possible that two people could claim the same right, or that different rights might seem to conflict.

Example

Rights that could arise:

- Recognition and equality before the law (section 8)
- Right to liberty and security of person (section 21)
- Right to a fair hearing (section 24)
- Protection of families and children (section 17)
- Freedom of movement (section 12)
- Protection from torture and cruel, inhuman and degrading treatment (section 10)
- Right to life (section 9)

Step 3: Identify impacts

Will the policy or decision impact on human rights?

This step requires you to consider the impact of your decision. It is important to note both whether the decision will protect or restrict rights.

Look at who might claim a right using your answer to Step 2 above. It is possible that one person's right will be restricted in order to protect another person's rights, or the rights of the wider community. If there is a restriction on rights, it is necessary to consider the steps outlined further below.

If you decide that the policy/decision you are making does not affect a person's human rights, there is no need to continue down the checklist. However, it is important to remember:

- other obligations you may have to a person (under other laws or guidelines); and
- things change. It may be necessary to reassess the policy/decision if the situation changes. The Charter is a 'living document' and it will be applied according to evolving standards. Review the policy/decision periodically.

If the policy/decision does affect a human right, consider whether it protects or limits, interferes with or restricts the human right.

Example

The Intervention Order program prioritises services to intervention order applicants. Respondents requiring legal assistance, the overriding majority of whom are men, will normally not be assisted by the program.

The program potentially impacts on a person's right to equal protection of the law and equal and effective protection against discrimination (section 8(3)). The policy of not assisting respondents potentially constitutes indirect discrimination on the grounds of sex as the vast majority of respondents are men. Note here that the definition of discrimination in the Charter has the same meaning as in section 6 of the Equal Opportunity Act 1995 (Vic).

The program also potentially impacts on a respondent's right to a fair hearing (section 24).

What to do if the policy/decision protects human rights?

If the policy or decision you have made will protect human rights, make this clear. Include a reference to the Charter in any official documents, and communicate the relevance of the Charter to all involved.

This stage can also be an opportunity to identify any actions that could be taken to better protect human rights. Consider practical suggestions to improve your practice.

- Expressly refer to the Charter in your policy/decision where appropriate
- Remember that things can change. Review your policies regularly.
- The Charter is a 'living document' and it will be applied according to evolving standards.

What to do if the policy/decision limits, restricts or interferes with human rights?

If the policy or decision limits, restricts or interferes with human rights, you must ask whether the limitation is reasonable and demonstrably justified under the Charter.

The Charter permits limitations on human rights (section 7). Limits on human rights must be justified in a free and democratic society based on human dignity, freedom and equality. The limitation must be reasonable, taking into account all of the following factors:

- 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
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

This means that CLCs cannot restrict someone's rights without a good reason.

Questions that can help you to determine if a restriction is reasonable are:

- Is there a law or regulation that supports the limitation?
- Is the purpose of the limitation important?
- Is the limitation connected to the purpose you are trying to achieve?
- Is the limitation proportionate to the purpose you are trying to achieve?
- Is the limitation a reasonable solution to the problem?
- Consider the values the Charter seeks to enshrine: a free and democratic society based on human dignity, equality and freedom.

Example

The purpose of limiting the Intervention Order program to applicants is to address the need for specialised services for victims of family violence. This is an important purpose, and the limitation is connected to the purpose of the program.

The program also provides that where Victoria Legal Aid is already assisting the applicant, the CLC service may assist a respondent. This policy aims to ensure that both parties have representation and consequently, a fair hearing.

The Charter also limits or qualifies some human rights. Section 8(4) of the Charter provides that 'measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination'. This provision supports the decision to offer specialised applicant programs.

Accordingly, the eligibility policy is likely to be Charter compliant.

If, after using the questions above, the restriction, limitation or interference with a right is reasonable and demonstrably justified, the policy or decision will be Charter compliant.

If the restriction, limitation or interference with a right is NOT reasonable and demonstrably justified, it will not be Charter compliant and you must reconsider your policy or decision.

Charter Checklist – General measures for implementation

To ensure compliance with the Charter, CLCs should ensure that they can answer ‘yes’ to the following questions:

Have you reviewed your policies and procedures to assess if they are compatible with human rights?
Are the general principles of the Charter – freedom, respect, equality and dignity – considered in your policies and procedures?

Have you interpreted your current legal obligations (non-Charter laws) in a way that is compatible with the Charter?

Have specific steps been taken to include human rights in all your decision-making?

Have you taken steps to ensure that any necessary information or training is provided about the decision?

Have you developed a procedure for monitoring and evaluating the protection of human rights?

Key Charter human rights for CLC managers and coordinators

Right to a fair hearing

One of the most significant Charter rights for the operation of CLCs is the right to a fair hearing in section 24 of the Charter. The key provision is section 24(1) which provides:

A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 24 creates a positive right to a fair hearing. To date there has been little guidance on what section 24 of the Charter means in practice. However, section 24(1) is modelled on Article 14(1) of the *International Covenant on Civil and Political Rights*. Commentary on this right establishes that the minimum elements of a right to fair hearing include:

- equal access to courts;
- equality before the courts;
- legal advice and representation in certain cases;
- procedural fairness;
- a trial without undue delay;
- a competent, independent and impartial tribunal;
- a public hearing; and
- free assistance of an interpreter in certain cases.

Aspects of a fair hearing particularly relevant to the service delivery of CLCs include:

Equal access to the courts

This element requires the legal system to be set up in a way that does not exclude people from the court. The right of access is not absolute: minors, bankrupts, litigants with cases without merit and people who do not bring their cases within a limitation periods may be denied a right of access.

Equality before the courts requires that parties to a proceeding not be discriminated against. Equal access and equality of procedural rights are also part of this right.

Legal advice and representation

The availability of legal advice and representation can determine whether a person has access to a fair trial. The Charter provides a right to legal representation in criminal proceedings (see below) and makes particular reference to eligibility for assistance under the *Legal Aid Act 1978*. There is no express corresponding right for civil matters.

Under international human rights jurisprudence, the right to a fair hearing does not impose a direct obligation on the state to provide free legal assistance in civil matters. It does, however, require the state to make the court system accessible to everyone, which may itself entail the provision of free legal assistance, particularly in complex cases.

Accordingly, drawing on international law, a Victorian court might find that free legal representation is required to ensure a fair hearing if a case is particularly complex or serious or where the denial of legal assistance would put one party at a considerable disadvantage or render them effectively incapable of bringing the proceeding.

Delay

A delay in legal proceedings that cannot be justified by the complexity of the case or the behaviour of the parties is not compatible with the right to fair hearing. The Charter provides a right to a hearing without undue delay (section 25(2)(c)).

Interpreters

The Charter provides the following rights of access to interpreters and other assistance in **criminal** matters:

- a right to the free assistance of an interpreter where a person cannot understand or communicate in English: section 25(2)(h) and
- free provision of assistance and specialised communication tools and technology where a person has communication or speech difficulties: section 25(2)(i).

The Charter does not provide an equivalent right in civil matters. However, in exceptional cases, free assistance of an interpreter may be required to ensure that parties have equal access to the courts. In the UK (where a similar right to a fair hearing exists in their human rights legislation) public authorities are advised to provide a free interpreter for any person subject to a government decision-making process.

Right to recognition and equality before the law

The right to freedom from discrimination and equality before the law is particularly relevant to the work and goals of CLCs. Under section 8 of the Charter, every person has the right to be recognised before the law and to enjoy their human rights without discrimination.

Section 8(3) provides that:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

Section 8(4) states further that:

Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

The Charter adopts the same definition of discrimination as is contained in the *Equal Opportunity Act 1995*. In that Act, discrimination includes direct and indirect discrimination. Under the *Equal Opportunity Act*, certain measures will not be discriminatory, such as measures to meet a particular group's special needs or to prevent or reduce their disadvantage (section 82).

CLCs who comply with anti-discrimination laws are likely to be in compliance with the Charter.

Key issues for CLCs to consider in ensuring the right to a fair hearing and the right to equality

The key issues facing CLCs in ensuring compliance with the Charter are likely to involve access to services, both in terms of who the CLC will assist and how services are provided. In most cases, CLC policies will already comply with the Charter as they should have been structured in a common sense way to promote accessibility and address disadvantage.

Obviously, the Charter does not create extra resources for CLCs. Resources are finite. This is particularly so in the case of under-resourced CLCs. The Charter recognises that human rights under the Charter are not absolute. Resource constraints can be relevant in assessing whether a limitation on human rights is justified under the Charter. If CLCs are not funded adequately to provide proper representation and interpreter services

for clients, ensuring that rights are not limited may be beyond their control in some cases.

However, CLCs are allocated public resources and make decisions about how to spend those resources and conduct their services. Charter compliance requires CLCs to take human rights into account in making these decisions and formulating policies. CLCs should have regard to human rights and in particular rights to a fair hearing and equality. Where policies potentially limit rights, the limitation must be justified under the Charter. For any interference or limitation on rights to be justified, including on the grounds of lack of resources, the limitation must be lawful, necessary and proportionate.

Relevant issues for CLC's to consider in this regard include:

Does your CLC's access policy provide equal access? If not, why not? Who does it prioritise in service delivery and why?

What measures are in place to ensure that all members of the community (including persons with disabilities or from culturally or linguistically diverse backgrounds) can access your service?

Is information available in community languages?

Can people with mobility impairments access your service?

Can you provide information via telephone?

Do your opening hours promote access to your service?

Does your centre have access to a free interpreter service?

Do you have criteria to determine who can access the interpreter services?

Is an interpreter always provided, when needed, in criminal matters?

Is an interpreter provided, where needed, in civil matters?

Do you have a procedure for review of the use and demand of the interpreter service? (eg is an interpreter for the language you request always available?)

The examples in the following section should assist CLCs to apply this decision-making framework to practical CLC scenarios.

Examples: Human rights issues in CLC service delivery

The examples below identify areas of CLC service delivery where human rights issues might arise. As there is little case law to date on the Victorian Charter, the approach to the examples has been drawn from United Kingdom and European interpretations of their human rights legislation and treaties. The examples are not determinative but are an example of how CLCs might ensure they operate consistently with the Charter.

Limited funding vs high demand

Scenario: A CLC provides advice and casework services to the local community. Each week, people are turned away because there are not enough staff and resources to cope with demand. The CLC has no further funding. What are its responsibilities under the Charter?

Charter obligations: The Charter does not provide an absolute right to legal advice or representation. In criminal law proceedings, the Charter outlines certain rights regarding assistance to legal aid (section 25). There is no absolute right to legal representation in civil matters, but the right to a fair hearing (section 24) may require it, for example if a case is particularly complex or serious or where the denial of legal assistance would put one party at a considerable disadvantage or render them effectively incapable of bringing the proceeding.

Possible response: The Charter is relevant to the CLC's intake guidelines. The guidelines should be compatible with human rights as far as possible. For example, a person with mental illness in a complex civil matter with potentially serious consequences, may have a right to legal representation under the Charter. If the CLC does not provide representation, it needs to be able to justify why that limitation on the person's rights is reasonable under the Charter.

Inadequate resources to meet the demand may be a legitimate justification for limiting the right, provided that the CLC has actively considered human rights in its intake procedures and structured them accordingly. Similarly, lack of expertise in a particular area of law, the availability of other assistance (legal aid, pro bono, or, if the client can afford it, a private lawyer) or prioritisation of other areas of disadvantage may be legitimate justifications for limiting that person's right.

As a general rule in structuring intake procedures, CLCs should consider prioritising the most disadvantaged clients or clients who have nowhere else to go for assistance. CLCs should also actively consider if there are alternative ways to ensure human rights are protected, such as through alternative opening hours or telephone advice services, other forms of assistance (help with self representation) or more flexible intake guidelines.

Threatening and abusive client

Scenario: A man attends a CLC night service seeking legal assistance after being arrested and charged with a crime. When he is advised he will have to wait for up to an hour, he becomes abusive and threatens CLC staff.

Charter obligations: This situation raises potentially competing human rights under the Charter. Staff, volunteers and other clients have rights to liberty and security of person (section 21) while the abusive client has a right to a fair hearing which may include a right to representation for his criminal matter through legal aid or another service (section 24).

Possible response: A CLC needs to take into account, and balance, the different Charter rights. Charter rights are not absolute. Justifiable limitations are permitted. The need to protect the safety of staff and other clients can clearly justify limiting a client's rights, depending on the circumstances of the abuse and threatening behaviour. The CLC may decide that the threat to other clients and staff is sufficient to warrant refusing to assist the abusive client. Alternatively, if safety can be reasonably assured, the CLC may be able to assist him and, depending on whether he qualifies under the legal aid guidelines, provide a referral or potentially advice and representation.

Interaction with other laws

Scenario: A woman contacts a CLC. She cannot attend the centre because she has a mobility impairment. She says that her human rights will be breached if the centre does not organise a home visit.

Charter obligations: The Charter provides a right to recognition and equality before the law (section 8) including effective protection against discrimination. The Charter also recognises a right to a fair hearing (section 24). This right does not provide an absolute right to legal assistance. However, legal assistance may be essential to ensuring a fair trial, for example in complex cases.

Possible response: Compliance with anti-discrimination laws is likely to ensure compliance with the Charter human right to non-discrimination. The CLC should consider if its service accessibility policy complies with anti-discrimination laws, and in particular whether it unlawfully discriminates against people with a disability. The CLC could consider providing advice via phone or via home visits to ensure its services are more accessible. In assessing whether the client's right to a fair hearing requires the provision of legal representation, the CLC would need to assess the nature of the matter (refer to the first example above).

Prioritising demand

Scenario: A CLC assisted a woman to obtain an intervention order against her husband. A year later, the CLC assists her to respond to a letter from her husband's private lawyer seeking greater time with their children. The woman is employed and earns around \$45,000 a year. The husband rings the CLC and complains that the woman is being helped when she can afford to pay for a private lawyer.

Charter obligations: The Charter provides a right to recognition and equality before the law (section 8) including effective protection against discrimination. However, 'measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination' (section 8(4)).

The Charter also provides a right to a fair hearing (section 24). This does not provide an absolute right to legal assistance, however, free legal assistance may be essential to ensuring a fair trial, for example in complex cases where the client cannot otherwise access a lawyer.

Possible response: The response to this scenario depends on the reason the CLC is assisting the woman. The CLC's intake guidelines should be applied consistently and should be compatible with human rights.

Assisting a client who can afford a private lawyer will not of itself breach the Charter. However, if a different client, who was disadvantaged and could not afford a lawyer, sought assistance from the CLC and was refused help due to resource constraints, the fact that the CLC was helping clients who could afford a lawyer might be

relevant in determining whether there was a justifiable limitation on that disadvantaged client's right to a fair hearing.

The CLC might be prioritising assistance to women suffering relationship breakdown or family violence. A policy that assists groups who are disadvantaged because of discrimination is unlikely to breach the Charter right to non-discrimination. Prioritising resources towards the service needs of a particular vulnerable group may also be a legitimate justification to denying assistance, and potentially limiting the right to a fair trial, of other client groups.

This scenario highlights the importance of good decision-making processes in establishing case work guidelines with sensible and flexible criteria for determining eligibility for assistance. Eligibility criteria should be applied consistently and fairly (see further the final example below).

Availability of interpreters

Scenario: A client attends a CLC seeking legal advice but is unable to explain his legal problem due to language difficulties.

Charter obligations: In criminal proceedings, the Charter provides a right to have the free assistance of an interpreter if a person cannot speak or understand English. In civil matters, there is no specific Charter right regarding interpreters. However, the right to a fair trial has been interpreted to include the right to free assistance of an interpreter in certain cases. For example, the right to a fair trial may require a free interpreter where a party could not participate in the proceedings on equal terms without an interpreter and cannot afford one.

Possible response: The CLC should have procedures facilitating access to free interpreter services. If the CLC cannot provide an interpreter due to lack of funding or government services, or due to a lack of availability of interpreters in the particular language, this may be a legitimate justification for limiting the client's right to a fair hearing, provided the CLC had considered other human rights compliant options (pro bono interpreter, adjournment of court case until an interpreter can be found etc).

Casework guidelines

Scenario: A client who cannot afford a lawyer and who has a mild intellectual disability seeks assistance from a CLC with a probate matter which appears to have merit. The CLC's casework guidelines state that it won't assist with probate matters other than providing a referral.

Charter obligations: The Charter does not provide an absolute right to legal assistance (section 24). However, it may require free legal assistance to be provided where it is needed to ensure a fair trial, for example in complex cases or where the denial of legal assistance would put one party at a considerable disadvantage or render them effectively incapable of bringing the proceeding.

Possible response: If the CLC doesn't provide advice or representation for the client, it potentially limits the client's right to a fair hearing. Accordingly, the CLC would need to show why the limitation is justified. Legitimate justifications may include that the CLC has prioritised other areas of law, lack of resources or expertise or the availability of other assistance (eg: "no win no charge" lawyers).

As a general rule, CLCs should avoid blanket or inflexible policies that fail to take into account a person's individual circumstances. A human rights compliant intake policy might state that the CLC can normally only provide referral assistance with probate matters but in exceptional circumstances can provide advice or representation. Exceptional circumstances might include the fact that no other assistance is available to the client, the matter has merit, the client cannot effectively self-represent and the CLC has capacity and expertise to take the matter on.

Human rights resources

About human rights

- *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- Explanatory memorandum for *Charter of Human Rights and Responsibilities Act*, available from Department of Justice: www.justice.vic.gov.au
- Human Rights Law Resource Centre, *Human Rights Law Resource Manual*, Chapter 5 – The Victorian Charter of Human Rights and Responsibilities (2007): www.hrlrc.org.au
- Public Interest Advocacy Centre, *Protecting Human Rights in Australia* (2004): www.piac.asn.au/publications/hrkit.html
- British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2006): www.bihhr.org
- International Covenant on Civil and Political Rights: www.unhchr.ch/html/menu3/b/a_ccpr.htm
- International Covenant on Economic and Social Rights: www.unhchr.ch/html/menu3/b/a_ceschr.htm

Toolkits

- Department of Constitutional Affairs, *Human Rights: Human Lives – A handbook for public authorities* (2006) available from www.justice.gov.uk/docs/hr-handbook-public-authorities.pdf
- Jenny Watson and Mitchell Woolf, *Human Rights Act Toolkit* (LAG London) (2002).

Case law

- Human Rights Law Resource Centre, Case law database: www.hrlrc.org.au
- European Court of Human Rights, HUDOC database, containing decisions from the European Court of Human Rights, the European Commission of Human Rights and the Committee of Ministers: www.echr.coe.int/ECHR
- International Centre for the Legal Protection of Human Rights, International and Commonwealth Case law database: www.interights.org

Useful websites and organisations

- Human Rights Law Resource Centre: www.hrlrc.org.au
- Department of Justice: www.justice.vic.gov.au Home > Your Rights > Human Rights > Human Rights Charter
- Victorian Equal Opportunity and Human Rights Commission: www.humanrightscommission.vic.gov.au
- Parliament of Australia, Human Rights guide: www.aph.gov.au/library/intguide/law/civlaw.htm
- British Institute of Human Rights: www.bihhr.org

Tool: Decision impact template

Human right in the Charter	Part of the policy that impacts on the right	Consideration of compatibility	Other
8. Recognition and equality before the law			
9. Right to life			
10. Protection from torture & cruel, inhuman/degrading treatment			
11. Freedom from forced work			
12. Freedom of movement			
13. Privacy and reputation			
14. Freedom of thought, conscience, religion and belief			
15. Freedom of expression			
16. Peaceful assembly and freedom of association			
17. Protection of families and children			
18. Right to take part in public life			
19. Cultural rights			
20. Property rights			
21. Right to liberty and security of person			

Human right in the Charter	Part of the policy that impacts on the right	Consideration of compatibility	Other
22. Humane treatment when deprived of liberty			
23. Rights of children in the criminal process			
24. Right to a fair hearing			
25. Rights in criminal proceedings			
25(1) Right to be presumed innocent			
25(2) Minimum guarantees in criminal proceedings			
25(3) Rights of children in criminal proceedings			
25(4) Right to review of conviction and sentence			
26. Right not to be tried or punished more than once			
27. Retrospective criminal laws			