

The Victorian Equal Opportunity and Human Rights Commission intervention power under the Charter of Human Rights and Responsibilities

When will the Commission intervene?

The purpose of this document is to explain how the Commission powers to intervene in Charter matters before courts and tribunals will be exercised and what factors will influence whether or not it intervenes.

A. Background

The role of the Commission

The Victorian Charter of Human Rights and Responsibilities Act 2006 (the Charter) provides the Victorian Equal Opportunity and Human Rights Commission (the Commission) with the following functions:

- Reporting annually on the operation of the Charter, declarations of inconsistent interpretation and override declarations.
- Educating about human rights and the Charter.
- Intervening in court or tribunal matters that raise Charter issues.
- Reviewing public authority's programs and practices, when required, to determine their compatibility with human rights.
- Providing advice to the Attorney-General on the operation of the Charter and, when required, reviewing the effect of statutory provisions and the common law on human rights.

Use of the Charter in courts and tribunals

The Charter is relevant to the work of Victorian courts and tribunals in two main ways. Firstly, the Charter will affect the interpretation of Victorian statute law and secondly it may give rise to relief or remedy in limited situations discussed below.

Division 3 of Part 3 of the Charter provides for how the Charter will affect the interpretation of laws in Victoria. Section 32 of the Charter says:

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
- (3) This section does not affect the validity of—
 - (a) an Act or provision of an Act that is incompatible with a human right; or
 - (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

In addition, under section 39 the Charter may provide additional grounds of relief or remedy in legal proceedings:

- (1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the

ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

- (2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right–
 - (a) to seek judicial review under the Administrative Law Act 1978 or under Order 56 of Chapter I of the Rules of the Supreme Court; and
 - (b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.
- (3) A person is not entitled to be awarded any damages because of a breach of this Charter.
- (4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

The Commission's right to intervene

The Charter provides the Commission with the right to intervene in legal proceedings initiated by other parties. The Attorney-General also has this power.

Section 40 of the Charter provides that:

The Commission may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter.

The breadth of this power was acknowledged in the Explanatory Memorandum to the Charter:

Clause 40 establishes the Commission's unqualified right to intervene in proceedings involving the Charter... Whether the Commission exercises the right to intervene is a matter for its discretion. (p 28-9)

Section 35 of the Charter provides that:

- (1) A party to a proceeding must give notice in the prescribed form to the Attorney-General and the Commission if -
 - (a) in the case of a Supreme Court or County Court proceeding, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or
 - (b) in any case, a question is referred to the Supreme Court under section 33.

Further, subsection 36(3) of the Charter provides that:

If the Supreme Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission.

Subsection 36(4) of the Charter provides that:

The Supreme Court must not make a declaration of inconsistent interpretation unless the Court is satisfied that –

- (a) Notice in the prescribed form has been given to the Attorney-General and the Commission under sub-section (3); and
- (b) A reasonable opportunity has been given to the Attorney-General and the Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.

There is no need for the Commission to demonstrate any link between the intervention it intends to undertake and its other functions. Section 41 of the Charter specifies that the Commission's functions extend to 'any other function conferred under this Charter', which includes the broad intervention functions outlined above.

In addition, unlike other pieces of legislation providing statutory intervention rights, the Charter does not include a provision for costs orders against the Commission where it exercises its rights under section 36 or section 40.¹ Ultimately, of course, this remains a matter for determination by the courts.

The Commission will not ordinarily seek a costs order against a party in a proceeding in which the Commission has intervened.

¹ Subsection 73(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides the Attorney-General with a right to intervene whilst section 110 specifies that the Attorney-General may have costs orders made against him. Section 427 of the *Co-operatives Act 1996* (Vic) provides the Registrar with a statutory right to intervene and specifies that it "has all the rights, duties *and liabilities*" of other parties to the proceedings (emphasis added).

B. Intervention guidelines

1. The Commission may intervene in proceedings involving a question of law that relates to the application of the Charter or the interpretation of a statutory provision in accordance with the Charter, or where the Supreme Court is considering making a declaration of inconsistent interpretation.
2. The Commission will consider intervening in proceedings where:
 - a. The Charter issues are significant and not peripheral to the proceedings;
 - b. The orders that could be made in the proceedings may significantly affect the Charter rights of persons who are not parties to the proceedings;
 - c. The proceedings may have significant implications for the ongoing interpretation or operation of the statutory provision being interpreted in light of the Charter; and/or
 - d. The proceedings may have significant implications for the ongoing application, implementation and/or operation of the Charter.
3. Factors that the Commission considers relevant to its consideration of whether a matter falls within paragraph 2 of these guidelines generally include (but are not limited to):
 - a. Whether the Commission would be likely to be granted leave to intervene in the absence of its statutory right, i.e.
 - i. Does the Commission propose to present arguments or facts that the other parties will not be canvassing?
 - ii. Will the Commission's involvement contribute to the decision maker reaching an informed decision?²
 - b. Whether the case involves a new or unsettled area of the law.
 - c. Whether the case would clarify a disputed interpretation of the law.
 - d. Whether the case has significant ramifications beyond the parties to the proceedings.
 - e. Whether any party has requested the Commission to intervene and whether any party would or does oppose intervention.
 - f. Whether any other person or organisation is seeking leave to intervene.
 - g. Whether the Attorney-General proposes to exercise his or her statutory right to intervene and the position that the Attorney-General intends to take.
 - h. The likely impact of the Commission's intervention on the individuals involved in the litigation.³

² *Levy v Victoria* (1997) 189 CLR 579 per Brennan CJ at 603.

- i. Whether the issue is an intermediate one or will result in a final determination.
 - j. The resource or other administrative implications of the Commission joining the litigation in the context of all its other functions.
 - k. Any broader strategic issues relating to the role, function or reputation of the Commission.
 - l. Whether the case involves issues that are a strategic priority of the Commission.
 - m. Whether the parties have legal representation.
4. Whilst the Commission's intervention may in fact benefit specific individuals or groups, the Commission's role is to advocate for the Charter and its underlying principles.
 5. The Commission's interventions will generally focus on questions of law, policy and issues of broader public interest rather than detailed arguments about the facts of a particular case, except to the extent that those facts are relevant to systemic issues or a broader class of persons than is otherwise represented.
 6. Through its intervention, the Commission aims to advocate for interpretations of the Charter that fulfil the Charter's founding principles, as set out in its Preamble:

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles-

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

³ The Commission is mindful that in promoting human rights it cannot make intervention decisions without considering the impact of its activities on the individuals involved. This will require a consideration of the social, cultural and political context of the intervention and any other impact that intervention may have on the parties.

7. The Commission may initiate an appeal in proceedings where it has intervened in a proceedings. Factors that the Commission considers relevant to its consideration of whether to initiate an appeal generally include:
 - a. the factors outlined in paragraph 3 above; and
 - b. the merits of the appeal.
8. The Commissioner or a delegate of the Commissioner can make a decision about whether or not to intervene in proceedings.

C. Review protocol

These guidelines will be subject to regular review. We invite your feedback about these guidelines and the use of our functions more generally.

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