



Protecting human rights for Victorians
who have a mental illness using
Victoria's Human Rights Charter:

Your advocacy guide



AIM OF THIS GUIDE:

This guide aims to help Victorians who have a mental illness to protect their human rights under Victoria's Charter of Human Rights and Responsibilities.

Who is the guide for?

The guide is designed to help people experiencing mental illness and the organisations that work with them to advocate for their human rights. This guide is designed to help identify when the Charter might be able to help protect the human rights of people with mental illness and how to get further help.

The guide is focused on human rights that are specific to people with mental illness. The Charter does not apply outside Victoria.



What are human rights?

Human rights are rules that governments around the world have promised to comply with that seek to ensure that everyone one of us, no matter who we are or where we are, can live a decent, dignified life.

Human rights reflect values like freedom, respect, equality and dignity.

Respect for human rights helps to keep our society fair, just and equal.

Human rights have a long history going back centuries to documents like the Magna Carta, the American Bill of Rights and more recently the United Nations Declaration of Human Rights.

While Australia has promised to comply with many key international human rights treaties, people can't enforce these treaties directly under Australian law.

Unlike every other Western democracy, Australia has no *national* Human Rights Charter or Bill of Rights that comprehensively protects our human rights in Australian law. Instead, there is an incomplete patchwork of laws, like anti-discrimination laws, that protect rights.

However, at the state level, Victoria has protected key human rights in law through the Charter. The Australian Capital Territory is the only other state or territory with a Human Rights Charter.

Rights protected in Victoria's Human Rights Charter

The Charter protects twenty fundamental human rights. The rights which are most relevant in the mental health context are:

- The right to recognition, equality and non-discrimination.
- The right to protection from cruel, inhuman or degrading treatment.
- The right not to be subjected to medical treatment without full, free and informed consent.
- The right to freedom of movement.
- The right not to have privacy, family or home arbitrarily interfered with.
- The right of every child to have protection as is in their best interests.
- The right to protection of families.
- The right to liberty and security.
- The right to humane treatment when deprived of liberty.
- The right to a fair hearing.

Unfortunately, the Charter does not protect economic and social rights like the right to food, housing, health and education.



How does Victoria's Human Rights Charter protect rights?

The Charter is designed to protect and promote the human rights of Victorians when dealing with the Victorian Government. It also promotes transparency in the way the Victorian Government and Parliament deal with human rights.

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The Charter requires Victorian public authorities, including government departments, public servants, local councils, Victoria Police and other agencies, to:

- properly consider human rights when making laws, developing policies, delivering services and making decisions; and
- act compatibly with human rights.

The Charter requires that new laws must be *assessed in Parliament* against human rights standards. In some circumstances, the Victorian Parliament can expressly choose to override human rights.

In some circumstances, the Victorian Government can lawfully *limit or restrict human rights*. It can only do this if it has a good reason for restricting the right and it does it in a reasonable way that is justified in a free and democratic society.

If the Victorian Government doesn't act compatibly with human rights or properly consider human rights, the Charter gives people the ability to *take action in the courts*. You can't take direct legal action for a breach of the Charter but you can raise the Charter breach if you have another legal action available. In this way, the Charter can help to stop or change the way the government acts, but you can't get compensation for a Charter breach. Courts also can't invalidate laws that breach human rights.

Courts are required to *interpret laws consistently with human rights*.

You can raise human rights issues directly with the relevant Victorian Government agency and you can *complain to the Victorian Ombudsman* if a government agency breaches the Charter.

The Charter doesn't apply to the Federal Government or other state and territory governments.

The Charter applies to public authorities including some private companies and community organisations

The Charter applies to public authorities in Victoria. Public authorities include Victorian Government agencies and officials such as government departments, public servants, local councils, Victoria Police and other government bodies like VicRoads and WorkSafe. Courts and tribunals have to comply with the Charter in some circumstances. The Charter also applies to some private and community bodies when they are doing certain things for the government. For example, a private prison company, a community housing provider and a private company delivering public transport may all be public authorities required to comply with the Charter. When in doubt, seek advice.

In a mental health context, the Mental Health Tribunal and public mental health services designated by the Mental Health Act are public authorities and must comply with the Charter at all times.



Examples showing how the Charter protects human rights

This guide provides examples of different ways the Charter has been used to protect the rights of people with mental illness. These examples are intended to help you to think about how the Charter might help protect the rights of people with mental illness in different circumstances.

1. Compulsory mental health treatment

In Victoria, the Mental Health Act 2014 provides for the compulsory mental health treatment of people diagnosed with a severe mental illness, either detained in a hospital on an 'inpatient treatment order', or in the community on a 'community treatment order'. The legislation gives police and medical authorities coercive powers in certain circumstances including the power to apprehend people, detain them and administer compulsory treatment. The exercise of these powers involves serious human rights issues.

The Mental Health Act outlines the steps that must be taken before a person can be subjected to compulsory mental health treatment and the safeguards around the process. The Charter can be used to strengthen these safeguards and help to ensure a fairer process.

The guide deals with three common areas where human rights issues arise in the mental health context:

- Compulsory mental health treatment;
- Restrictions on decision-making capacity; and
- Discrimination.

EXAMPLE:

Failure to review treatment order within reasonable time is a breach of a right to a fair hearing: [Kracke v Mental Health Review Board \(Victorian Civil and Administrative Tribunal, 2009\)](#)

This case relates to the compulsory treatment regime under the former Mental Health Act 1986 but many of the principles outlined in the case remain relevant. The Mental Health Review Board (as it then was) ordered that Mr Kracke be subjected to compulsory medical treatment. However the time periods for reviewing that treatment under the legislation were not complied with, mainly because of administrative failures. Mr Kracke argued that the failure to comply with the treatment reviews on time meant that the compulsory treatment orders were invalid.

The Victorian Civil and Administrative Tribunal decided that the treatment orders were not made invalid by the failure to review them.

The Tribunal decided that the treatment was a reasonable restriction on Mr Kracke's Charter rights, including his right not to be subject to medical treatment without his full, free and informed consent. This was because the compulsory treatment regime includes safeguards aimed at ensuring that limitations on Charter rights are reasonable and proportionate.

However the Tribunal declared that the failure to review the treatment orders within a reasonable time breached Mr Kracke's right to a fair hearing. This led to better processes to ensure that treatment orders were reviewed in a timely way. The 1986 Act has now been replaced and the current Mental Health Act 2014 has clear expiry dates for orders for compulsory treatment to better protect human rights.

1. Compulsory mental health treatment continued

EXAMPLE:

Charter helps to stop compulsory treatment after absence of mental health symptoms: WCH v Mental Health Tribunal (Victorian Civil and Administrative Tribunal, 2016)

A person, known as WCH, had been continuously subject to community treatment orders for 17 years even though he had not exhibited symptoms of mental illness for the last 16 of those. WCH's psychiatrist said that WCH continued to have an underlying illness and his lack of symptoms was due to the effect of the medication he was being forced to take. The psychiatrist argued that WCH continued to need treatment to prevent a serious deterioration in his mental health. An independent expert gave evidence that it would be unusual for a person with an underlying illness to have gone so long without a relapse or any breakthrough symptoms, even while under treatment, and therefore that there was a possibility that WCH did not have an underlying illness and that his mental health would not seriously deteriorate in the absence of treatment. The Victorian Civil and Administrative Tribunal decided that a Charter consistent interpretation of mental health legislation meant that continued compulsory treatment was not justified.

EXAMPLE:

Treatment in the community rather than in hospital is more consistent with the cultural rights of an Aboriginal woman: AQH (Victorian Mental Health Tribunal, 2017)

An Aboriginal woman, AQH, was subject to compulsory mental health treatment in hospital. She had a strong connection with her Aboriginal identity and wanted to return home to receive treatment through her GP and with a community psychiatric service that had a good understanding of Aboriginal culture. Although the Mental Health Tribunal made an order for compulsory treatment, it considered AQH's Aboriginal cultural rights under the Charter and decided that a community rather than an inpatient treatment order was less restrictive of her rights and appropriate in the circumstances. The Tribunal acknowledged that discharge from hospital may risk worsening AQH's mental health but decided that the risks were not sufficiently serious or imminent to justify the restriction of an inpatient treatment order. The Tribunal had regard to the high rate of Aboriginal imprisonment, AQH's preferences for treatment in the community and decided that community treatment was also consistent with the 'dignity of risk' principle in the Mental Health Act.

EXAMPLE:

Restrictions on liberty and movement overturned: Antunovic v Dawson (Supreme Court of Victoria 2010)

This case also relates to the compulsory treatment provisions under the former Mental Health Act 1986. Zeljka Antunovic had a mental illness and was subjected to a community treatment order and was living at a community care unit. The community treatment order did not specify that she had to live at the community care unit but the authorised psychiatrist instructed her that while she was free to leave the unit during the day, she had to sleep there at night. Ms Antunovic wanted to live with her mother and so she challenged the instructions using a number of legal arguments including that her rights to liberty and freedom of movement under the Charter were being breached. The court ruled that because the community treatment order did not require her to stay at the unit, it was not lawful for the psychiatrist to order her to stay there. Accordingly, the court ordered her release. While the case was not ultimately decided under the Charter arguments, the court confirmed that it would breach her right to freedom of movement under the Charter to instruct her to stay in the unit without lawful justification.

Unlike the former 1986 Act, the current Mental Health Act 2014 has no provision for a community treatment order to be made with a 'residence condition' attached to it. Some other legal authority, such as a guardianship order with accommodation powers, is the only way a person on a community treatment order could be lawfully detained at a residence in the community.



1. Compulsory mental health treatment continued

EXAMPLE:

Restrictions on communication overturned: Victoria Legal Aid case study

Victoria Legal Aid helped a man who was an inpatient whose authorised psychiatrist determined that he was making nuisance calls to government agencies including 000. The psychiatrist ordered that the man be limited to one phone call a day including to his lawyers and ordered that his calls be monitored to determine whether they were causing nuisance. Victoria Legal Aid advocated to the psychiatrist that this restriction unjustifiably limited the man's freedom of expression. In response, the psychiatrist agreed to lift the ban on contacting his lawyers and put in place a review period after which the ban on calling other agencies would be reviewed.

EXAMPLE:

Limits on arrest, entry, search, restraint and seclusion

The Mental Health Act gives police and mental health authorities a range of coercive powers in certain situations to arrest, enter premises, sedate, search, restrain and seclude people to prevent serious harm. There are safeguards built into the legislation to ensure the powers are used only when necessary. For example, restraint powers can only be used after less restrictive options have been tried or considered. The Charter provides additional avenues to protect rights in these situations as it protects rights to liberty, freedom of movement and humane treatment when detained. It requires that the police and authorised officers must act compatibly with and properly consider human rights when exercising these coercive powers. It also supports a narrow interpretation of the circumstances when the coercive powers can be used.

EXAMPLE:

Ensuring hearings are fair

The Mental Health Tribunal conducts hearings to decide whether or not to order medical treatment. It is critical that these hearings are held fairly. The Charter can be relied on to support this as it protects the right to a fair hearing.

The Charter can help to ensure that hearings take place without unreasonable delay, that the person with mental illness is allowed to attend and speak at the hearing, that they can access an interpreter if required, that they have access to any documents relevant to the Tribunal's decision and that the proceedings be conducted in a way that is fair taking into account the person's mental illness, particularly if they do not have legal representation.

The Charter can also be relied on to make sure that people with mental illness are either not administered sedating medication or electroconvulsive therapy in advance of the hearing, or to push for an adjournment if it is administered, to ensure that the person isn't unfairly prejudiced when the hearing takes place.



2. Restrictions on decision-making capacity

People living with mental health issues ordinarily retain the same rights to make decisions in relation to their life, finances and legal affairs as other members of the community. However guardianship and administration legislation provides that in some circumstances, when a person is determined not to have ‘capacity’ to make certain decisions, a substitute decision-maker can be appointed to make decisions for the person.

A guardianship order gives a person (the guardian) specified powers to make decisions in relation to a person’s lifestyle, for example: where a person lives, what medical treatment they receive, the work they do, and the people they associate with. An administration order gives a person (the administrator) powers to make decisions about the person’s financial affairs. Guardianship and administration orders can only be made where:

- The person has a disability including mental illness;
- Because of the disability, the person cannot make reasonable decisions about their person or circumstances (guardianship) or their financial affairs (administration); and
- There is a need for an order.

Both guardianship and administration orders seriously restrict human rights, including rights to equality, privacy, property, freedom of movement and freedom of association.

EXAMPLE:

Order appointing an administrator overturned – [PJB v Melbourne Health \(Victorian Supreme Court 2011\)](#)

Patrick had a long-term mental illness and had been an inpatient in a hospital for many years. He owned a house and wanted to live independently in the community although there was evidence that this wish was unrealistic. The hospital applied for an administration order and the Victorian Civil and Administrative Tribunal made the order knowing that the administrator would probably sell Patrick’s home. Patrick appealed the ruling to the Supreme Court arguing that it breached his Charter rights. The Supreme Court agreed and cancelled the administrator appointment. The Supreme Court decided that making an administration order was not the least restrictive option available and that insufficient evidence had been put forward to justify such a serious restriction on rights as Patrick was not mismanaging his money or the home and there was no crisis in terms of his health or accommodation.



3. Discrimination

The Charter provides that all persons have the right to equality and freedom from discrimination. Discrimination is defined by reference to the Equal Opportunity Act and includes being treated unfavourably due to a particular attribute, including disability. Disability includes a 'psychological disorder', and 'behaviour that is a symptom or manifestation of a disability'. This means that public authorities must not treat a person unfavourably because they have a mental illness or because of behaviour that is a symptom of mental illness. The Charter rights to equality and freedom from discrimination supplement the protection given by the Equal Opportunity Act.

EXAMPLE:
Council breached equality right by banning man with mental illness from attending any council property Slattery v Manningham City Council (Victorian Civil & Administrative Tribunal 2013)

Mr Slattery was diagnosed with bipolar disorder, attention deficit hyperactive disorder and post-traumatic stress disorder in 1996. He had a stroke in 2001, which caused an acquired brain injury. Mr Slattery was then diagnosed with a hearing impairment in 2004.

Mr Slattery had made thousands of written and verbal complaints to Manningham City Council that were critical of Councillors and Council employees. Some of Mr Slattery's correspondence alleged corruption and much of it contained inappropriate language. The Council responded by banning Mr Slattery from attending any building whatsoever that was owned, occupied or managed by the Council and restricted his ability to communicate with the Council.

Mr Slattery argued that he had been discriminated against under the Equal Opportunity Act because of his disabilities and that his rights under the Charter had also been breached. The Victorian Civil and Administrative Tribunal ruled that Mr Slattery's behaviour was to a significant extent a symptom of his disability and the ban on him was discriminatory and breached his right to equality under the Charter. This was on the basis that Mr Slattery's disability was a substantial reason for his treatment and there were less restrictive means reasonably available to the Council to manage Mr Slattery's behaviour.



Taking action

Individuals, lawyers, advocates and organisations can use the Charter in a range of ways to advance housing rights.

You can *engage* with the Victorian Government, the Parliament and law reform bodies when laws and policies are being developed to push for better laws and policies that comply with human rights.

You can also use the Charter to *advocate* for individual clients to stop action that would breach their human rights.

In some circumstances, the Charter can be used in *legal action* to stop or change government action that breaches human rights.

Below is a flowchart with some suggested steps for taking action using the Charter and some information on where to get legal help.

Flowchart for taking human rights action

STEP 1
Identify the policy, act or decision

Identify what is being done that you want stopped or changed.

Identify who is being affected.

Identify who made the policy, act or decision – is it a Victorian public authority?

The Human Rights Charter applies to Victorian public authorities which include government bodies, public servants, local councils and some private companies and community organisations that perform functions for government.

STEP 2
Identify the restriction on human rights

Identify the human rights that are being restricted by the policy, act or decision.

Is the restriction for a good reason?

If so, is it being done in the least restrictive way?

The Victorian Government can restrict human rights but only for a good reason and then only if done in the least restrictive way.

STEP 3
Raise the issue with the Victorian public authority

Gather the information you need to raise the issue.

Identify the change you want to achieve.

Raise the issue with the public authority.

It's normally best to first raise the issue directly with the relevant public authority in a constructive way that seeks to resolve the issue.

STEP 4
Take further action

Consider expert legal advice

Consider contacting any relevant regulatory body

Consider escalating the complaint in the public authority

Consider a complaint to the Victorian Ombudsman



Getting help

There are a number of ways to get legal help about human rights issues and advice about options.

Victoria Legal Aid has a free legal helpline. Call 1300 792 387. www.legalaid.vic.gov.au

The Mental Health Legal Centre provides free legal help to anyone who has experienced mental illness in Victoria where their legal problem relates to their mental illness. Call 1800 555 887. www.mhlc.org.au

Independent mental health advocacy – free non-legal advocacy for people who are receiving compulsory mental health treatment to make decisions and have as much say as possible about their assessment, treatment and recovery. Call: 1300 947 920. www.imha.vic.gov.au

The Human Rights Law Centre may be able to provide advice to lawyers and advocates on helping their clients with human rights issues. Call 8636 4450. www.hrlc.org.au

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The guide is not legal advice

This guide provides general information only and is not legal advice. When in doubt, seek legal advice about your specific situation.

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