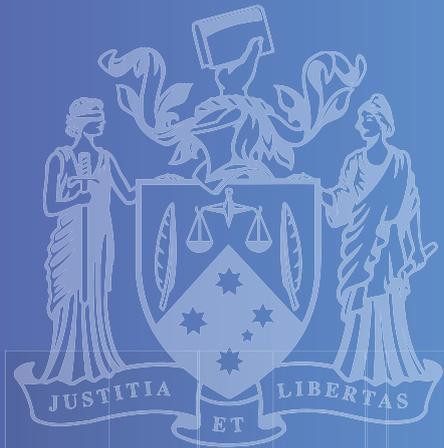




ASSESSING THE IMPACT OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ON LEGAL PRACTICE



2 | ASSESSING THE IMPACT OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ON LEGAL PRACTICE

CONTENTS

- 3 Background and aim
- 3 Executive Summary
- 4 Methodology
- 5 Respondents
- 6 Constraints
- 7 **Questionnaire findings**
- 7 **Question 1:** Has the Charter been relevant to your advice or to otherwise resolving matters for your clients or organisation?
- 8 Question 1(a): If the Charter has been relevant, which right or Charter procedure was relevant?
- 10 Question 1(b): If the Charter has been relevant, in what context did the right or Charter procedure arise?
- 12 Question 1(c): If the Charter has been relevant, how was the Charter relevant?
- 13 **Question 2:** What is your overall impression of the Charter?
- 13 Question 2(a): Whether you consider the Charter to be of benefit to your clients or organisation, if so, how?
- 15 Question 2(b): What, if any, substantive or procedural flaws have you identified in the Charter?
- 17 **Question 3:** What written publications, resources or training programmes have you used to inform yourself or advise your clients or organisation on Charter matters?
- 19 **Question 4:** Do you have any other comments on the impact of the Charter on your practice or organisation?
- 21 **Conclusion on Future Initiatives**
- 22 **Appendix A:** Charter questionnaire
- 25 **Appendix B:** Human Rights Law Resource Centre Caselaw Database Comparison

BACKGROUND AND AIM

The Attorney General must undertake a review of the operation of the first four years of the Charter of Human Rights and Responsibilities (the Charter) by 2011.

The Law Institute of Victoria's (the LIV) Administrative Law and Human Rights Section Charter of Rights Committee (the Committee) is preparing for the review and has identified that there is currently only limited sources of information about the use of the Charter, including:

- The annual Victorian Equal Opportunity and Human Rights Commission reports on the operation of the Charter (based largely on self-reporting by Victoria's 10 government departments, Victoria Police and local government, information sought from information from relevant statutory authorities and assessment of the impact of the Charter in parliament and the courts); and
- Case law reported and made available on the internet and legal databases such as the Human Rights Law Resource Centre Caselaw Database.

The Committee noted that this information does not provide any insight into the use of the Charter by the legal profession. The Committee therefore developed a pilot questionnaire to survey and report on the impact of the Charter in legal practice.

The LIV pilot questionnaire aims to improve understanding of how the Charter has begun to influence the practise of law more generally within the Victorian legal profession, including information that may not be in the public domain, such as in areas of advice, negotiation and mediation as well as matters litigated before courts or tribunals. The pilot questionnaire will assist the LIV to develop further initiatives to assess the impact of the Charter on legal practice and will contribute to the development of the LIV's submission to the 2011 review. The pilot questionnaire will also assist the LIV to develop education activities and best meet the needs of its members.

The Charter of Rights Committee would like to thank those members who took the time to complete the questionnaire.

EXECUTIVE SUMMARY

- Due to statistical limitations of the pilot questionnaire the LIV cannot make general findings about how the Charter is used in practice.
- The low response rate might suggest that, at the time the questionnaire was undertaken, the Charter was not commonly used in practice.
- The findings suggest that those who had used the Charter found it to be useful.
- The pilot results will assist the LIV to develop future initiatives to ascertain the views of the broader profession.
- The pilot has revealed that future initiatives will require substantial resources and should be based on a range of surveying techniques.
- Although not statistically relevant, the pilot has enabled the LIV to make the following initial observations about responses to the questionnaire:
 - The three rights cited most frequently by respondents were privacy and reputation (s.13), fair hearing (s.24), and recognition and equality before the law (s.8).
 - The three contexts in which Charter rights or procedures most frequently arose were housing, health and mental health, and litigation.
 - The Charter was found to be of most relevance in relation to providing advice on legal responsibilities and compliance, and in litigation.
 - The majority of respondents considered the Charter to be of benefit.
- While a large portion of respondents considered that there were no flaws in the Charter, other respondents identified flaws in both existing provisions of the Charter and in elements absent from the Charter.
- Printed materials were the preferred format for informing respondents or advising clients or organisations on Charter matters.

METHODOLOGY

The questionnaire was open for responses from 31 August 2009 to 28 November 2009. A link to an electronic version of the questionnaire (developed using the free online survey tool "Survey Monkey")¹ was posted on the Administrative Law and Human Rights 'Latest News' section of the LIV website and circulated to the Administrative Law and Human Rights Section by email in early November 2009. The questionnaire was also circulated in hard copy at the LIV Human Rights Conference on Friday, 21 August 2009, which was attended by 83 LIV members. Seven hard copy responses were received and incorporated into the pool of data.

Respondents were asked to respond to the following qualitative questions relating to their experience with the Charter in practice:

1. Has the Charter been relevant to your advice or to otherwise resolving matters for your clients or your organisation? If possible, please provide details. In particular, please let us know:
 - a. Which right or Charter procedure was relevant?
 - b. In what context the right or Charter procedure arose?
 - c. How the Charter was relevant (e.g. advice on legal responsibilities or compliance; negotiations with public authorities; litigation)?
2. What is your overall assessment of the Charter? If possible, please provide details. In particular, please let us know:
 - a. Whether you consider the Charter to be of benefit to your clients or organisation and, if so, how?
 - b. What, if any, substantive or procedural flaws have you identified in the Charter?

3. What written publications, resources and training programmes have you used to inform yourself or advise your clients or organisation on Charter matters?
4. Do you have any other comments on the impact of the Charter on your practice or organisation?

Responses were collated and analysed by the LIV. Where possible, the LIV categorised qualitative responses to assist with analysis of results. A hard copy of the questionnaire is included in this report and attached as Appendix A.

¹ See www.surveymonkey.com

RESPONDENTS

There were 110 respondents to the questionnaire. However, the response rate to each question varied and this is indicated throughout the report. Data on respondents' field of work was not collected, however it can be inferred from responses that respondents worked in a range of sectors including government, private practice and community law. Every respondent to the questionnaire was an LIV member and a member of the Administrative Law and Human Rights Section.

CONSTRAINTS

The pilot questionnaire was developed by volunteer Committee members and no external funding was received towards its design or implementation. The lack of funding has contributed to a number of limitations of the pilot questionnaire.

The LIV notes that the results were drawn from a small sample and therefore are not representative of the legal profession. Measures were taken to ensure that all information provided by respondents was used to inform the report. However, due to the qualitative nature of the questions and responses, and the fact that a small number of respondents did not engage usefully with the questions, all or parts of some responses have not been included in the analysis. A note is made in the text of the report where this has occurred.

The LIV recognises that results were potentially skewed because respondents were members of the LIV's Administrative Law and Human Rights Section and were from a self-selecting population. However, the LIV hopes that the responses to this pilot questionnaire will inform our approach to surveying the general membership at a future date.

Due to funding constraints, the questionnaire was distributed largely via electronic means and the LIV considers that this affected the response rate.

We recommend that demographic variables are built into any future questionnaires to enable the LIV to analyse respondents' engagement with the Charter according to information such as whether a respondent is rural, regional, suburban or city based, as well as practice size and years in practice. This will assist the LIV to develop education activities and best meet the needs of our members.

QUESTIONNAIRE FINDINGS

QUESTION 1: HAS THE CHARTER BEEN RELEVANT TO YOUR ADVICE OR TO OTHERWISE RESOLVING MATTERS FOR YOUR CLIENTS OR ORGANISATION?

Question aim:

Question 1 seeks to gather information about whether the Charter has been useful in legal practice.

Response rate:

62 respondents answered question 1, with 28 of the respondents answering that the Charter had been relevant, and 34 indicating that the Charter had not been relevant.

Nineteen respondents skipped this question.

YES	NO
45%	55%

QUESTION 1(A): IF THE CHARTER HAS BEEN RELEVANT, WHICH RIGHT OR CHARTER PROCEDURE WAS RELEVANT?

Question aim:

Question 1(A) was designed to assess whether respondents had encountered the Charter in practice and if so, which rights or procedures had been relevant to their work.

Response rate:

48 respondents answered this question. 62 respondents skipped this question.

CHARTER PROVISION	RESPONSE RATE
Privacy and reputation (s.13)	16
Recognition and equality before the law (s.8)	8
Fair hearing (s.24)	7
Protection of families and children (s.17)	6
Freedom of movement (s.12)	5
Property rights (s.20)	4
Protection from torture and cruel, inhuman or degrading treatment (s.10)	4
Conduct of public authorities (s.38)	4
Humane treatment when deprived of liberty (s.22)	3
Freedom of expression (s.15)	3
Rights in criminal proceedings (s.25)	3
Interpretation (s.32)	3
Right to life (s.9)	2
Taking part in public life (s.18)	2
Cultural rights (s.19)	2
Right to liberty and security of the person (s.21)	2
Right not to be tried or punished more than once (s.26)	2
Retrospective criminal laws (s.27)	2
Peaceful assembly and freedom of association (s.16)	1
Statements of compatibility (s.28)	1
Attorney-General's right to intervene (s.34)	1
Legal proceedings (s.39)	1
Freedom from forced work (s.11)	0
Freedom of thought, conscience, religion and belief (s.14)	0
Children in the criminal process (s.23)	0

ANALYSIS:

- Of the 48 people who answered question 1(A), 28 respondents cited a specific Charter right or procedure, in line with the initial part of question 1. A further 20 people reiterated that the Charter had not been relevant.
- Respondents were not provided with a list of rights or procedures in the Charter. Some respondents incorrectly cited section numbers in relation to specific rights. Where this occurred, the section number was disregarded and the description was used as the identifier of the relevant right. Some respondents raised multiple provisions and therefore the total number of citations (82) does not directly reflect the number of respondents (48) to the question.
- The table (left) includes all rights and procedures in the Charter and reveals that the three rights cited most frequently by respondents were privacy and reputation (s.13), fair hearing (s.24) and recognition and equality before the law (s.8). Comparatively, these three rights are also raised most frequently on the Human Rights Law Resource Centre Caselaw Database (the Caselaw Database),

which lists reported cases in which the Charter was raised. However, the Caselaw Database reported fair hearing as the most frequently applied Charter right, followed by privacy and reputation and then recognition and equality before the law.²

- Respondents also raised procedural issues as relevant. Most notable were the provisions relating to the conduct of public authorities (s.38) and interpretation (s.32). These two provisions were also frequently relevant in cases listed on the Caselaw Database. However, there were significantly more cases cited on the Caselaw Database in relation to these provisions and therefore this comparison is not conclusive.

² This is accurate as at 12 May 2010. For a full comparison of cases listed on the Caselaw Database, see Appendix B.

INFORMING FUTURE INITIATIVES

Respondents would be assisted by a quantitative approach to this question, such as providing a 'tick the box' option for all Charter rights and procedures. This would also assist in the analysis of the results and reduce the risk of error where respondents refer incorrectly to section numbers when citing particular rights.

KEY MESSAGE

The three rights cited most frequently by respondents were privacy and reputation (s.13), fair hearing (s.24) and recognition and equality before the law (s.8).

QUESTION 1(B): IF THE CHARTER HAS BEEN RELEVANT, IN WHAT CONTEXT DID THE RIGHT OR CHARTER PROCEDURE ARISE?

Question aim:

Question 1(B) was intended to assess the practice area and type of matter in which Charter rights or procedures arose.

Response rate:

43 respondents answered this question.
67 respondents skipped this question.

ANALYSIS:

- Responses to this question varied widely. Some respondents were confused as to the intent of the question and provided answers that would be expected in question 1(C). It is also important to note that some respondents raised multiple suggestions for contexts and therefore the number of contexts discussed does not directly reflect the number of respondents to the question. The LIV grouped the descriptive responses into categories for ease of analysis.
- Significant categories included housing, health/mental health and litigation.
 - The most frequently cited context was housing. This encompassed responses relating to preventing evictions, tenancy disputes, housing matters, residential and public housing.
- Next most frequently cited was health and mental health. This included responses mainly in relation to medical treatment, including involuntary treatment orders under the *Mental Health Act 1986* (Vic).
- Also raised frequently was litigation. This context was expressly reported however respondents did not identify in which jurisdiction litigation occurred.
- Other significant contexts reported by respondents included: advice to a public authority; criminal matters; and assessing various Acts for compatibility (including statements of compatibility). Other contexts raised included administrative law; advising a client to take a cause of action; policy; family violence; prisons; discrimination; complaint handling; civil claim; and freedom of information.³

³ A full descriptive list of respondent responses from the raw data is available on request.

CROSS-ANALYSIS OF QUESTION 1(A) AND 1(B)

Although a full cross analysis between questions cannot be undertaken due to the design of the questionnaire, it is possible to make some tentative comparisons between the rights and contexts raised by respondents by analysing responses to question 1(A) and 1(B). The tables (right) show the most frequently cited rights by the respondents who used the Charter in the areas of housing, health/mental health and litigation.

INFORMING FUTURE INITIATIVES

It appeared from the manner in which respondents answered question 1(B) that there were some difficulties in interpreting and answering this question. The use of case-examples or scenarios would have assisted respondents.

KEY MESSAGE

The three contexts in which Charter rights or procedures most frequently arose were housing, health and mental health, and litigation.

HOUSING	
RIGHTS	NUMBER TIMES RAISED BY RESPONDENTS WHO ALSO RAISED HOUSING
Privacy and reputation (s.13)	6
Protection of families and children (s.17)	4
Recognition and equality before the law (s.8)	3

HEALTH AND MENTAL HEALTH	
RIGHTS	NUMBER TIMES RAISED BY RESPONDENTS WHO ALSO RAISED HEALTH AND MENTAL HEALTH
Privacy and reputation (s.13)	4
Protection from torture and cruel, inhuman or degrading treatment (s.10)	4
Recognition and equality before the law (s.8)	3
Fair hearing(s.24)	3

LITIGATION	
RIGHTS	NUMBER TIMES RAISED BY RESPONDENTS WHO ALSO RAISED LITIGATION
Privacy and reputation (s.13)	4
Property rights (s.20)	2
Fair hearing (s.24)	2

QUESTION 1(C): IF THE CHARTER HAS BEEN RELEVANT, HOW WAS THE CHARTER RELEVANT?

Question aim:

Question 1(C) was designed to find out more information about the ways in which respondents have found the Charter to be useful in legal practice.

Response rate:

45 respondents answered this question. 65 respondents skipped this question.

HOW THE CHARTER WAS RELEVANT	RESPONSE RATE
Advice on legal responsibilities or compliance	16
Litigation	16
Negotiations with public authorities	7
Policy	2

ANALYSIS:

- This question provided three examples of how the Charter may have been relevant to assist respondents understand the question (advice on legal responsibilities or compliance, negotiations with public authorities and litigation).
- There was less variety in responses to this question, most likely because the question provided three examples for guidance. Some respondents raised multiple suggestions and therefore the number of responses does not directly reflect the number of respondents to the question. Additionally, some responses were excluded as respondents indicated that this question was not applicable or the LIV deemed the response was not applicable.

- While the majority of respondents considered that the Charter had been relevant, ten respondents considered that it had not.

INFORMING FUTURE INITIATIVES

This question demonstrates that providing examples can assist respondents in responding to the question. However, precautions are necessary to ensure that the provision of examples does not limit the variety of responses.

KEY MESSAGE

The Charter was found to be of most relevance in relation to providing advice on legal responsibilities and compliance, and in litigation.

QUESTION 2: WHAT IS YOUR OVERALL IMPRESSION OF THE CHARTER?

QUESTION 2(A): WHETHER YOU CONSIDER THE CHARTER TO BE OF BENEFIT TO YOUR CLIENTS OR ORGANISATION, IF SO, HOW?

Question aim:

Question 2(A) asked respondents to consider:

- Has the Charter been of benefit? (Part 1) and
- How has the Charter been beneficial to your clients or organisation? (Part 2)

Response rate:

45 respondents answered this question.
49 respondents skipped this question.

HAS THE CHARTER BEEN OF BENEFIT?	RESPONSE RATE
Benefit	23
No benefit	13
Limited benefit	3
Potential benefit	4

ANALYSIS:

- This question was straightforward and was answered usefully by respondents.
- Responses to the part 1 of the question were easily quantifiable and are set out in the table above. Two responses were excluded as respondents indicated that this question was not applicable or the LIV deemed the response was not applicable.
- Part 2 of the question required a qualitative analysis. Respondents who felt the Charter had been of benefit indicated that the Charter was beneficial in:
 - Providing greater protection for client rights, or giving a 'David' rights against a 'Goliath'
 - Clarifying the rights which people generally understand to be fundamental and enabling the justice system to consider how and when those rights may be compromised
 - Providing standards for public authorities in discharging responsibilities
 - Expanding the scope of legal remedies, for example, the declaration of breach of the right to fair hearing in *Kracke Mental Health Review Board & Ors (General)* [2009] VCAT 646
 - Providing a logical framework for good decision making

- A smaller number of respondents who felt the Charter had not been of benefit or had been of limited benefit suggested the following constraints:
 - The Charter impedes the operation of duly passed legislation
 - Remedies are limited and have little practical effect

INFORMING FUTURE INITIATIVES

When assessing respondents' overall impression of the Charter, it is appropriate to maintain a two-tiered approach to the quantitative assessment of whether the Charter has been of benefit and the qualitative assessment of how the Charter has been of benefit.

KEY MESSAGE

The majority of respondents considered the Charter to be of benefit.

QUESTION 2(B): WHAT, IF ANY, SUBSTANTIVE OR PROCEDURAL FLAWS HAVE YOU IDENTIFIED IN THE CHARTER?

Question aim:

Question 2(B) asked respondents to identify flaws in the Charter.

Response rate:

45 respondents answered this question.
49 respondents skipped this question.

MOST FREQUENT FLAWS IDENTIFIED BY RESPONDENTS	RESPONSE RATE
EXISTING PROVISIONS IN THE CHARTER	
Ambiguity of s.32 (interpretation provision)	2
Ambiguity of s.39 (remedies provision)	3
Definition of public authority	2
ELEMENTS ABSENT FROM THE CHARTER	
No independent cause of action	6
Lack of effective remedies	2
Economic, social and cultural rights not recognised	2
None	
	11

ANALYSIS:

- There were a variety of responses received to this question and the LIV grouped descriptive responses into categories for ease of analysis where possible. Categorised responses are identified in the table. Some respondents raised multiple suggestions for flaws and therefore the number of responses do not directly reflect the number of respondents to the question.
- Substantive and procedural flaws can be classified as either:
 - Existing provisions in the Charter;
 - Elements absent from the Charter; or
 - Other aspects of Charter practice.
- There were 12 citations of flaws in existing provisions of the Charter and 11 citations of flaws in elements absent from the Charter. There were four citations of flaws relating to other aspects of Charter practice.
- Flaws suggested by respondents relating to existing provisions in the Charter, that did not fall within categories described in the table, included that there were numerous flaws in the Charter; the paragraph on responsibilities is 'very short'; the alleged onerous requirements of Charter Notices (under the Charter itself and in Practice Directions); the claimed religious interference in s.48; and the claimed contradiction between s.38(2) and s.38(1).

- Flaws identified by respondents as other aspects of Charter practice included that the judiciary is reluctant to engage with the Charter and have adopted narrow interpretations of its provisions; the expense incurred by clients for receiving advice on the Charter; that existing legislation can be amended so that the Charter will not apply; and the difficulty in relying on the Charter in proceedings brought under Commonwealth legislation given that the Charter is Victorian law only.

INFORMING FUTURE INITIATIVES

The use of open-ended questions for identifying flaws in the Charter is appropriate to the extent that it does not constrain the information provided by respondents.

KEY MESSAGE

While a large portion of respondents considered that there were no flaws in the Charter, other respondents identified flaws in both existing provisions of the Charter and in elements absent from the Charter.

QUESTION 3: WHAT WRITTEN PUBLICATIONS, RESOURCES OR TRAINING PROGRAMMES HAVE YOU USED TO INFORM YOURSELF OR ADVISE YOUR CLIENTS OR ORGANISATION ON CHARTER MATTERS?

SOURCE	RESPONSE RATE
Human Rights Law Resource Centre training and materials	14
Seminars, conferences	8
Text books	7
Case law	7
Victorian Equal Opportunity and Human Rights Commission training and materials	7
Law Institute of Victoria materials	7
Victorian government materials	6
In-house training and materials	4
Public Interest Law Clearing House materials	3
The Charter	3
Media	3

SOURCE	RESPONSE RATE
Printed materials	38
Face to face	26

Question aim:

Question 3 was seeking information on the sources of information about the Charter relied on by respondents.

Response rate:

50 respondents answered this question. 27 respondents skipped this question.

ANALYSIS

- All respondents provided at least one suggested source of information, and some provided multiple suggestions. Therefore the number of responses does not directly reflect the number of respondents to the question.
- The table demonstrates that respondents had a clear preference for Human Rights Law Resource Centre resources. The following additional resources were also noted by respondents but are not included

in the table because they were suggested by only two or fewer respondents: legal advice; academic articles; blogs; international materials; the *LLJ*; materials from the Judicial College of Victoria; academic commentary; materials from the Australian Institute of Administrative Law; Attorney-General's guidelines; materials from the Mental Health Legal Centre and legal research.

- Respondents used a variety of materials, including printed and face to face materials to inform their work, their clients or their organisation on Charter matters. There was a preference for printed, as opposed to face to face materials.

INFORMING FUTURE INITIATIVES

Future initiatives would benefit from expressly assessing respondents' preference for printed or face to face resources, in order to assist the development of publications, training and other materials by stakeholders.

KEY MESSAGE

Printed materials were the preferred format for informing respondents or advising clients or organisations on Charter matters.

QUESTION 4: DO YOU HAVE ANY OTHER COMMENTS ON THE IMPACT OF THE CHARTER ON YOUR PRACTICE OR ORGANISATION?

Question aim:

Question 4 provided respondents with an opportunity to comment on other aspects of the Charter or its operation that may have been of relevance to their professional experience.

Response rate:

43 respondents answered this question.
34 respondents skipped this question.

ANALYSIS:

Some respondents used this opportunity to expand on their answers to previous questions, for example, why they felt the Charter provided limited or no benefit to their clients. Many respondents voiced their concerns with the limitation to the protections offered by the Charter.

"The Victorian Charter of Human Rights and Responsibilities 2006 should be celebrated as legislative recognition that the actions of individuals and the State are limited by certain established rights and responsibilities. However, the Charter does nothing to make the breach of the rights and responsibilities that it embodies a cause of action that leads to an award of damages or charges for a summary or indictable offence. The resources that contributed to its creation may have been better used fixing the problems of equal opportunity and discrimination laws."

"It has no real protective or compensatory function of any kind... In those cases where it does provide some additional right, benefit or protection, that function would be better served (for practitioners, the complainant and the public) by a discrete regime drafted in response to the problem or issue or inadequacy to hand. The effort and expense of the

Charter could have been better invested in actually addressing any areas where the protection of Victorians' rights and interest is considered deficient."

Other respondents felt that further clarification on and engagement with the Charter was required in the courts.

"Charter has met with (judicial) reluctance in Victoria to strike down legislation."

"A lack of decisions by superior Courts clarifying jurisdictional and interpretative issues makes it difficult to determine how the Charter should be interpreted, particularly with regards to what limitations may be applied whilst still complying with the Charter."

Education was a strong theme through the responses. Some respondents saw the Charter as having only an educative role, while others called for further education and awareness raising initiatives about implementation of the Charter.

"The advantage it provides is education and promotion of human rights at best."

"Domestic legal practitioners are not aware of the Charter or its application on the whole. [There is a] need [for] education as to when the Charter is engaged."

"[The Charter] should be continually embedded in practice and not just policy throughout [the] public service (especially criminal justice system) and further education [is] needed through extensive advertising especially TV and radio (like alcohol and drink driving adverts) in the community."

Several respondents felt that the Charter had directly or indirectly impacted on their own or their organisation's workload.

"As a CLC, it has added to the casework load without an increase in funding to cover the added work."

"It has significantly increased [the] workload in some areas – e.g. Mental Health Review Board Charter Practice Direction."

CONCLUSION ON FUTURE INITIATIVES

RESPONDENT FEEDBACK SUGGESTS THAT FUTURE INITIATIVES SHOULD ADDRESS:

- The use of discrete-answer options in questionnaires, to allow a quantitative analysis of data, with the option for respondents to provide additional descriptive comments.
- The provision of case examples or scenarios to assist respondents in responding to questions.
- The 'drop-off' in respondent responses that can occur in questionnaires with multiple tiers within questions.
- The collection of demographic information from respondents, such as field of work, whether a respondent is rural, regional, suburban or city based, as well as practice size and years in practice.
- Building a Privacy Collection Statement into the questionnaire.

APPENDIX A: CHARTER QUESTIONNAIRE

THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES: LIV QUESTIONNAIRE FOR LAWYERS

AUGUST 2009

The Victorian *Charter of Human Rights and Responsibilities* came into full effect on 1 January 2008. A review of the operation of the first 4 years of the Victorian Charter's operation must be undertaken by the Attorney General by 2011.

The Law Institute of Victoria's Administrative Law and Human Rights Section Charter of Rights Committee is assessing the Victorian Charter's impact on legal practice for the purposes of providing input into the 2011 Review and into any federal initiatives that might arise from the report of the National Human Rights Consultation Committee due on 30 September 2009.

The Charter of Rights Committee would be grateful if you would complete the questionnaire (see overleaf) on the relevance of the Charter to your practice or organisation.

Please return the completed questionnaire to Laura Helm at lhelm@liv.asn.au by 30 September 2009.

BACKGROUND ON VICTORIAN CHARTER

The Victorian Charter creates procedures to ensure that law-makers and public decision-makers take account of human rights.

For example:

- From a law-maker's perspective, members of parliament must prepare statements of compatibility to accompany any new bills (section 28);
- From a decision-maker's perspective, statutory provisions must be interpreted in a way that is compatible with human rights (section 32);
- From a public authority's perspective, it is unlawful to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right (section 38);
- From a plaintiff's perspective, a person may, in the context of an action concerning an unlawful act or decision of a public authority, seek relief or remedy on a ground of unlawfulness under the Charter (section 39).

The types of rights protected under the Victorian Charter include (see sections 8-27):

- Right to recognition and equality before the law
- Right to life
- Right to protection from torture and cruel, inhuman or degrading treatment
- Right to privacy and reputation
- Freedom of thought, conscience, religion and belief
- Freedom of expression
- Right to take part in public life
- Cultural rights
- Property rights
- Right to liberty and security of person
- Right to a fair hearing
- Rights in criminal proceedings

Further information about the Charter can be found at: www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Human+Rights/Human+Rights+Charter.

THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES: LIV QUESTIONNAIRE FOR LAWYERS

YOUR NAME (OPTIONAL) (please print): _____

SPECIFIC AREA/S OF PRACTICE (please print): _____

1 Has the Charter been relevant to your advice or to otherwise resolving matters for your clients or your organisation?

Yes or No

If possible, please provide details. In particular, please let us know:

- Which right or Charter procedure was relevant?
- In what context the right or Charter procedure arose?
- How the Charter was relevant (e.g. advice on legal responsibilities or compliance; negotiations with public authorities; litigation)?

2 What is your overall assessment of the Charter?

If possible, please provide details. In particular, please let us know:

- Whether you consider the Charter to be of benefit to your clients or organisation and, if so, how?
- What, if any, substantive or procedural flaws have you identified in the Charter?

3 What written publications, resources and training programmes have you used to inform yourself or advise your clients or organisation on Charter matters?

4 Do you have any other comments on the impact of the Charter on your practice or organisation?

APPENDIX B: HUMAN RIGHTS LAW RESOURCE CENTRE CASELAW DATABASE COMPARISON

CHARTER CASE STUDIES: COMPARATIVE TABLE¹

	NUMBER RESPONSES INDICATING THAT A RIGHT WAS RAISED IN LIV CHARTER QUESTIONNAIRE DATA ANALYSIS	NUMBER REPORTED CASES RAISED ON HUMAN RIGHTS LAW RESOURCE CENTRE WEBSITE
s.8 Recognition and equality before the law	8	11
s.9 Right to life	2	0
s.10 Protection from torture and cruel, inhuman or degrading treatment	4	4
s.12 Freedom of movement	5	3
s.13 Privacy and reputation	16	12
s.15 Freedom of expression	3	7
s.16 Peaceful assembly and freedom of association	1	1
s.17 Protection of families and children	6	2
s.18 Taking part in public life	2	0
s.19 Cultural rights	2	not reported
s.20 Property rights	4	1
s.21 Right to liberty and security of the person	2	5
s.22 Humane treatment when deprived of liberty	3	5
s.24 Fair hearing	7	18
s.25 Rights in criminal proceedings	3	6

26 ASSESSING THE IMPACT OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ON LEGAL PRACTICE

s.26 Right not to be tried or punished more than once	2	1
s.27 Retrospective criminal laws	2	0
s.28 Statements of compatibility	1	not reported
s.32 Interpretation	3	18
s.34 Attorney-General's right to intervene	1	not reported
s.38 Conduct of public authorities	4	5
s.39 Legal proceedings	1	2

¹ Accurate as at 12 May 2010.

CONTACT

Laura Helm Policy Adviser
Law Institute of Victoria
470 Bourke Street, Melbourne VIC 3000
P: 9607 9380
E: lhelm@liv.asn.au
W: www.liv.asn.au

