

Growing a human rights culture



Victorian Equal Opportunity
& Human Rights Commission



2016 report on the operation
of the Charter of Human Rights
and Responsibilities



Victorian Equal Opportunity & Human Rights Commission

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Contact us

Enquiry Line 1300 292 153 or (03) 9032 3583
Fax 1300 891 858
Hearing impaired (TTY) 1300 289 621
Interpreters 1300 152 494
Email information@veohrc.vic.gov.au
Website humanrightscommission.vic.gov.au

2016 report on the operation of the Charter of Human Rights and Responsibilities

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13 October 2017

Dear Attorney-General

On behalf of the Victorian Equal Opportunity and Human Rights Commission, it is with pleasure that I present to you our tenth annual report on the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) covering the 2016 calendar year.

In accordance with section 41(a)(i) of the Charter this report examines the operation of the Charter, including its interaction with other statutes and the common law.

During 2016 there were no declarations of inconsistent interpretation made by the Supreme Court of Victoria. Accordingly, it has not been necessary for this report to examine matters under section 41(a)(ii) of the Charter. One override declaration – in relation to a provision of the *Corrections Act 1986* (Vic) – was passed by the Victorian Parliament. This is examined in Chapter 4: Human rights in lawmaking, in accordance with section 41(a)(iii) of the Charter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kristen Hilton', with a long horizontal flourish extending to the right.

Kristen Hilton

Victorian Equal Opportunity
and Human Rights Commissioner

About the Commission

The Commission is an independent statutory body with responsibilities under Victoria's key human rights laws: *Equal Opportunity Act 2010*, the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) and the *Racial and Religious Tolerance Act 2001*.

The Equal Opportunity Act makes it against the law to discriminate against people on the basis of a number of different personal characteristics. The Racial and Religious Tolerance Act makes it against the law to vilify people because of their race or religion. The Charter requires government and public bodies to consider human rights when making laws and providing services.

Our role is to protect and promote human rights in Victoria. We do this through a range of functions under our laws:

Resolve complaints: We resolve complaints of discrimination, sexual harassment and racial and religious vilification by providing a free confidential dispute resolution service.

Research: We undertake research to understand and find solutions to systemic causes of discrimination and human rights breaches.

Educate: We provide information to help people understand and assert their rights. We conduct voluntary reviews of programs and practices to help organisations comply with their equal opportunity and human rights obligations. We provide education and consultancy services to government, business and community to drive leading practice in equality, diversity and human rights, including a collaborative approach to developing equal opportunity action plans.

Advocate: We raise awareness across all parts of the community about the importance of equality and human rights, encouraging meaningful debate, leading public discussion and challenging discriminatory views and behaviours.

Monitor: We monitor the operation of the Charter of Human Rights and Responsibilities to track Victoria's progress in protecting fundamental rights.

Enforce: We intervene in court proceedings to bring an expert independent perspective to cases raising equal opportunity and human rights issues. We also conduct investigations to identify and eliminate systemic discrimination.

Acknowledgements

The Victorian Equal Opportunity and Human Rights Commission acknowledges and thanks the following people and organisations for their invaluable assistance and input into the completion of this report:

- representatives of Victoria's state government departments who responded to the Commission's online survey
- representatives of local councils who responded to the Commission's online survey
- independent statutory authorities who responded to the Commission's online survey
- specialist monitoring bodies that have provided their perspectives on the operation of the Charter
- the Victorian Public Sector Commission which consulted with us and shared its People Matter Survey data
- the Supreme Court of Victoria for its consideration of the operation of the Charter in courts
- the Human Rights Unit of the Department of Justice and Regulation, which assisted the Commission in engaging with public authorities and shared its expertise on the operation of Charter
- the Commission staff who worked with great dedication to prepare this report.

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Foreword from the Commissioner

I am pleased to present the *2016 report on the operation of the Charter of Human Rights and Responsibilities*. Each year the Victorian Equal Opportunity and Human Rights Commission is required to produce this report as part of our role as the independent monitor of the Charter. This involves assessing how the law operates in practice, including its interaction with other statutory provisions and the common law.

Victoria can be proud of the progress we've made in the 10 years since the Charter was introduced. We can be proud of the way the Charter is used to improve the quality of government services and decisions, to reduce discrimination and to create fairer laws, policies and practices.

Although the Charter is now established law, over recent years it has become clear there is still work to do on embedding a strong culture of human rights within government. A strong culture is essential for ensuring that the human rights enshrined in the Charter are, in practice, thoughtfully considered and applied to the decisions about people's lives that government staff make on a daily basis.

The independent review of the Charter, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 (the Eight-Year Review)*, observed that community organisations believe that progress on the Charter had 'stalled'. The Commission has also reported previously on the fact that the rights of some vulnerable people – including Aboriginal people, young people, people with disabilities and people in closed environments – are not always protected as they should be.

In July 2016 the Victorian Government responded to the Eight-Year Review by supporting 45 of its 52 recommendations. Of note, the government prioritised human rights training and education within the public sector, providing an additional \$1.25

million to the Commission and to the Department of Justice and Regulation's Human Rights Unit to conduct training during 2016/17. While this commitment to human rights education is a critical step towards strengthening government's human rights culture, meaningful change requires sustained effort.

I encourage an ongoing commitment in this regard.

The Commission's vision for a strong culture of human rights within government is to move from a culture of compliance, to a culture where the rights of end users are thoughtfully considered and prioritised in everyday business. The Charter is a key vehicle for driving this cultural change within government. It provides a framework that helps government prioritise the promotion and protection of human rights *before* decisions are made and *when* services, policies and programs are designed and delivered.

As part of this year's report, we surveyed more than 100 departments, agencies and local councils to understand the activities undertaken in 2016 to improve the government's human rights culture. We based our survey questions on the three cultural influences suggested by the Eight-Year Review. These are adopted as the key ingredients for a healthy human rights culture and include: senior leadership, operational capacity and external input and oversight. We asked public authorities what activities they undertook in 2016 under each of these three cultural influences.

We also include in this report data from the Victorian Public Sector Commission's (the VPSC) 2016 People Matter Survey, specifically, the data relating to growing human rights culture. It is valuable to have the opportunity to highlight the VPSC's human rights data, and I am grateful to the VPSC for allowing this opportunity.



Overall, the survey results indicate that public authorities are taking steps to improve their human rights culture, but that they could be doing more. For example, under the senior leadership influence, we found that while public authorities are encouraging senior leaders to champion human rights, not many are publicly communicating the government's commitment to human rights and the Charter.

Under the operational capacity influence, the survey results show that public authorities are strong on ensuring their operational policies are compliant with human rights obligations, however more could be done to incorporate human rights into team business plan activities.

Under the external input and oversight influence, the survey results show that public authorities factor human rights into complaints handling policies, but they could improve how they consult with the community on human rights issues.

Separate from the survey, efforts are being made across government. A standout example is the government's efforts to address the prevalence of family violence in Victoria, which demonstrates human rights being placed at the core of culture, policy and decision-making.

In March 2016 the Royal Commission into Family Violence published its report, which included 227 recommendations directed at creating a long-term reform program dealing with all aspects of family violence. In April 2016 the Victorian Government accepted all recommendations from the report and made a \$572 million funding commitment in the 2016–17 state budget to start delivering on 65 of the Royal Commission's most urgent recommendations.

The Victorian approach to addressing family violence illustrates this state's willingness and ability to provide a sophisticated response to a complex and entrenched human rights issue. It is evidence of a commitment to genuine human rights protections – making human rights real for vulnerable Victorians. The response centres on the rights of the victims and serves to embed a human rights culture into the organisations and individuals within the family violence response system.

Another notable development in human rights in Victoria occurred in December 2016, with the landmark Supreme Court decision of *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children*. This case highlighted the critical importance of proper consideration by public authorities of human rights in government decision-making. In that case, the decision made by the Victorian Government to transfer a number of young people from a juvenile justice centre to a unit within a maximum security prison was found by Justice Garde to be unlawful



The most effective way of achieving a strong human rights culture is to encourage people to undertake daily work activities that promote and protect human rights in a practical and meaningful way.



because the decision had been made without proper consideration of the young peoples' human rights. The decision illustrates how powerful the Charter can be in providing a check on government decision-making and, ultimately, for upholding rights.

When the Charter was first enacted it was recognised that growing a strong human rights culture takes time. It is an incremental process that requires an ongoing commitment. It involves not only making laws and practices more compliant with human rights standards, but changing underlying attitudes and values that influence behaviour. In examining the influence the Charter has had on the practices of public authorities, the decisions of courts and tribunals, and on law-making in Parliament, this 2016 Charter report aims to assist Victorians to reflect on how far we have come in embedding a human rights culture since the Charter's enactment in 2006.

The most effective way of achieving a strong human rights culture is to encourage people to undertake daily work activities that promote and protect human rights in a practical and meaningful way – such as incorporating human rights considerations into complaints handling, publicly promoting human rights on an organisation's website, and providing tailored training to front line staff on the Charter's application to public sector services. All these activities, when combined with resources and educational initiatives, can make a real difference. They help to grow a strong and sustainable culture of human rights.

I encourage everyone, whether you are a local council employee or a government secretary, to use this 2016 Charter Report to think about the practical steps you can take in this next year to grow your organisation's human rights culture – to help fulfil the Charter's objective of creating a tolerant and inclusive Victorian community.

Kristen Hilton

Victorian Equal Opportunity
and Human Rights Commissioner



Chapter 1: The Charter in context

Overview

Victoria's Charter of Human Rights and Responsibilities enshrines civil, political and cultural rights into Victorian law. In 2006, as a community, we supported the Charter's creation in recognition of how important these rights are for our quality of life, and for those of future generations.

The twenty rights contained in the Charter can be summarised as promoting and protecting the values of freedom, respect, equality and dignity:

- **freedom** – freedom of movement, expression, assembly and association; freedom of thought, conscience, religion and belief; freedom from forced work; the right to liberty and security; fair hearing, rights in criminal proceedings; the right not to be tried or punished more than once and not to be subject to retrospective criminal laws; and property rights
- **respect** – the right to life; protection of families and children; cultural rights (including recognition that human rights have a special importance for the Aboriginal people of Victoria)
- **equality** – recognition and equality before the law (including being entitled to protection from discrimination), and the entitlement to participate in public life
- **dignity** – protection from torture and cruel, inhuman or degrading treatment; protection of privacy and reputation; and the right to be treated humanely when deprived of liberty.

The human rights within the Charter are subject to limitations, and the Charter sets out a test for deciding when a right can be limited. Under the Charter, a human right may be limited only when doing so can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. This means that any limitation placed on a human right must be reasonable, necessary, justified and proportionate – otherwise such limitation may be in breach of the Charter.

The Charter operates by placing obligations on all three arms of government: the executive, the legislature and the judiciary – the aim being to instil respect for human rights as well as developing an understanding of what these rights mean in a practical sense.

The Commission produces a number of publications that explain the content and operation of the Charter. Visit our website for more information: humanrightscommission.vic.gov.au/charter.

Charter rights

Section 8: The right to recognition and equality before the law

Section 9: The right to life

Section 10: The right to protection from torture and cruel, inhuman or degrading treatment

Section 11: The right to freedom from forced work

Section 12: The right to freedom of movement

Section 13: The right to privacy and reputation

Section 14: The right to freedom of thought, conscience, religion and belief

Section 15: The right to freedom of expression

Section 16: The right to peaceful assembly and freedom of association

Section 17: The right to protection of families and children

Section 18: The right to take part in public life

Section 19: Cultural rights (including Aboriginal cultural rights)

Section 20: Property rights

Section 21: The right to liberty and security of person

Section 22: The right to humane treatment when deprived of liberty

Section 23: Rights of children in the criminal process

Section 24: The right to a fair hearing

Section 25: Rights in criminal proceedings

Section 26: The right to not be tried or punished more than once

Section 27: The right to protection from retrospective criminal laws

The history of the Charter



Many people wanted to see their human rights better protected to shield themselves and their families from the potential misuse of government power. For even more people, however, the desire for change reflected their aspiration to live in a society that strives for the values that they hold dear, such as equality, justice and a 'fair go' for all. The idea of a community based upon a culture of values and human rights is one that we heard again and again during our consultations. Victorians sought not just a new law, but something that could help build a society in which government, Parliament, the courts and the people themselves have an understanding of and respect for our basic rights and responsibilities.¹

– George Williams AO, Chair of the Human Rights Consultation Committee



The Charter has been a part of Victorian law now for ten years. It was the first bill of rights to be enacted by an Australian state.

There was extensive public consultation to assist in deciding whether Victoria should adopt a Charter of Rights. Over six months the Community consultation

committee, led by George Williams AO, conducted 55 community meetings, 75 focus groups and received 2525 submissions. The result of the consultation was that more than 84 per cent of the people consulted said they wanted to see the law changed to better reflect human rights.²

Timeline of the Charter's

13 November 1980

Australia signs the *International Covenant on Civil and Political Rights* (ICCPR), an international human rights treaty that protects civil and political rights. The Charter is based on the ICCPR.



30 November 2005

The Human Rights Consultation Committee releases a report to Parliament after extensive public consultation. The report recommends the enactment of the Charter.



1 January 2007

The obligations of the Charter come into force.



2004

2006

1980

2005

2007



27 May 2004

Attorney-General Rob Hulls releases the Justice Statement setting out 25 initiatives to modernise the legal system. The need for a charter of rights is a key initiative.



25 July 2006

the Bill enacting the Charter is given royal assent after passing through both houses of Parliament. Victoria becomes the first state to have a charter of rights.

introduction and operation

14 September 2011

The Scrutiny of Acts and Regulations Committee (SARC) undertakes the Four-Year Review of the Charter. SARC is required to consider whether additional human rights should be included in the Charter.



17 September 2015

Michael Brett Young conducts the Eight-Year Review of the Charter. After eight open forums, 60 meetings with individuals and organisations, and receiving 109 written submission, Mr Brett Young reports to the Attorney-General on 1 September 2015, with 52 recommendations.



2008



1 January 2008

All remaining obligations under the Charter become fully operative.

2011

2012



14 March 2012

The Victorian Government publishes a response to the Four-Year Review – no changes to the law are made.

2015

2016



22 July 2016

The Victorian Government releases its response to the Eight-Year Review. The Government supported 45 of the 52 recommendations made by the review. In doing so, the Government publicly re-commits to improving the Charter and strengthening human rights culture in Victoria.

How the Charter works – the ‘dialogue model’

The Charter sets out the human rights that Victorians believe should be respected and observed.

Public authorities, the Victorian Parliament, and courts and tribunals all have a significant role to play in protecting and promoting rights under the Charter.

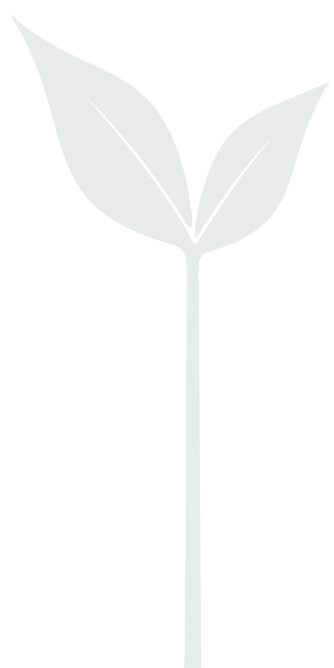
Public authorities under the Charter

- Public officials
- Ministers of Parliament
- Local councils (including councillors and council staff)
- Victoria Police
- Statutory entities that have functions of a public nature
- Entities that carry out functions of a public nature on behalf of a public authority
- Courts and tribunals when they are acting in an administrative capacity.

At the heart of the Charter’s creation was the desire to develop a framework that was more than a new law but, ‘something that could help build a society in which government, Parliament, the courts and the people themselves have an understanding of and respect for our basic rights and responsibilities’.³

To achieve this, the Charter creates what is known as a ‘dialogue model’ of rights. It creates a constructive and continuous conversation about human rights between the Victorian community and the three arms of government – the Parliament, the executive (including Ministers and public authorities) and the courts. It encourages each part of our democratic system to play a role in protecting and promoting human rights.

The dialogue model helps to ensure that fundamental human rights are considered in all Victorian law reform, policy development and government decision-making. The model strengthens the democratic process by providing feedback to government and ensures there are checks on legal developments and decision-making. While each arm of government is subject to checks and balances, ultimate sovereignty rests with Parliament. Parliament cannot be forced to adopt a particular position on a human rights issue and, in extreme circumstances, can enact legislation that overrides the Charter.⁴



How the dialogue model operates:

Public authorities

- Public authorities must comply with the Charter and give proper consideration to human rights in decision-making and actions.
- Public authorities may make decisions on behalf of the community, and consult with the community on how to best balance human rights.

Parliament

- When a Bill is introduced into Parliament, it must be accompanied by a statement of compatibility which sets out, with reasons, whether the Bill complies with the Charter.
- All legislation must be assessed for compatibility with human rights by the bipartisan Scrutiny of Acts and Regulation Committee (SARC).
- In exceptional circumstances, Parliament may pass a law that overrides a right in the Charter.

Courts

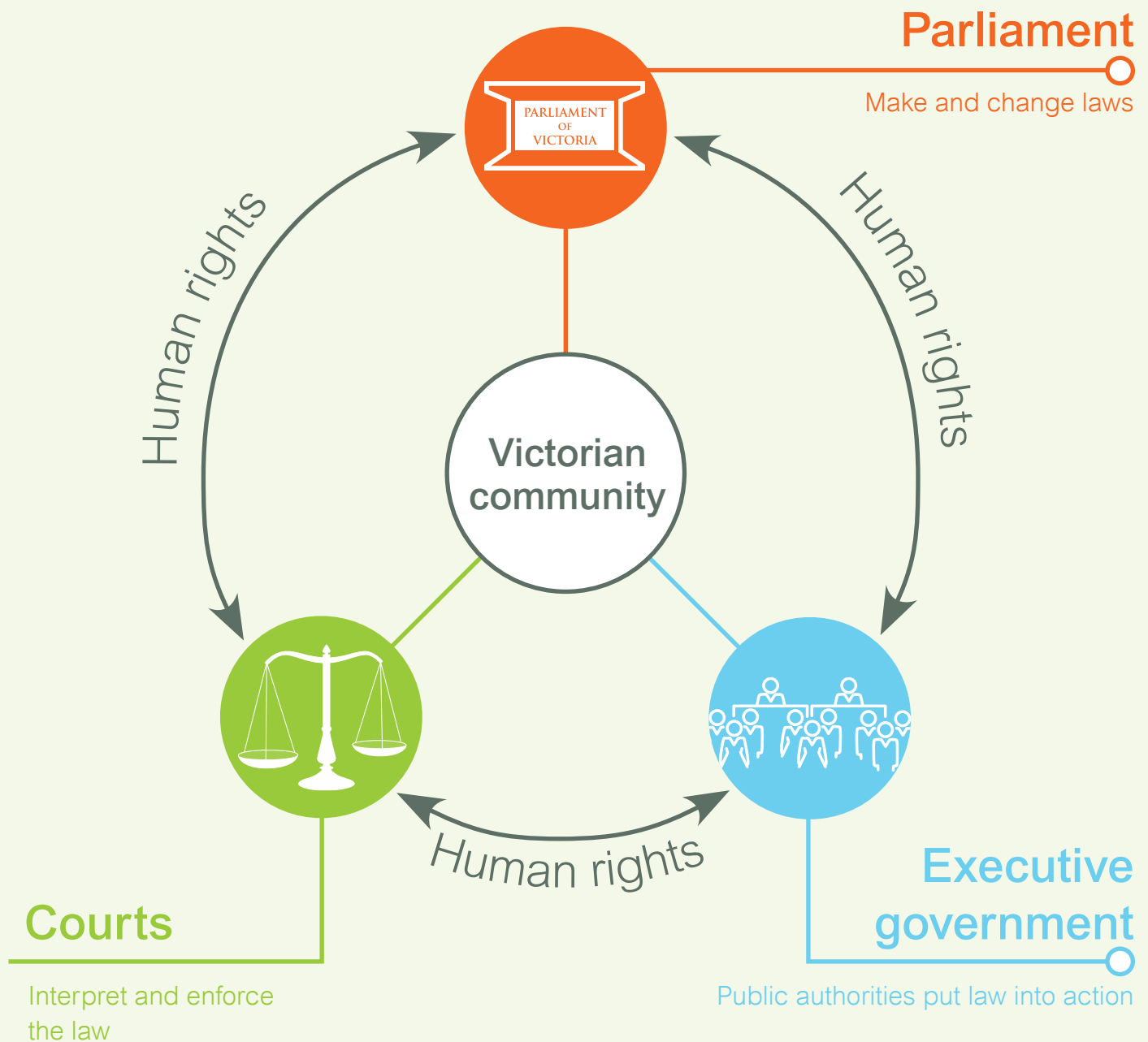
- Courts and tribunals must interpret legislation consistently with human rights, and may have regard to international, regional and comparative domestic human rights law.
- Where legislation cannot be interpreted in a way that is consistent with the Charter, the Supreme Court may make a Declaration of Incompatibility, and the relevant Minister must provide a response to this declaration.
- A court may find that a public authority has failed to give proper consideration to or act compatibly with a Charter right.
- The Attorney-General and the Commission may intervene in a legal matter before a court or tribunal that is applying the Charter.

Community

- The Charter protects the human rights of all Victorians. The Commission provides information to the community about the Charter.
- Individuals and community organisations can advocate and provide insight to government about how or whether human rights are being considered in law, policy and everyday decisions. Individuals or their advocates can also make complaints about breaches of human rights to public authorities, or where relevant to the Victorian Ombudsman or Independent Broad-based Anti-corruption Commission (IBAC).
- The Charter may also provide additional grounds of relief or remedy in legal proceedings.



Victoria's human rights dialogue



Endnotes

- 1 Victoria, *Victoria's Charter of Human Rights and Responsibilities: Lessons for the National Debate*, Parl Paper No 46 (2006) <http://www.aph.gov.au/senate/~/~/~link.aspx?_id=A20FB46F919D44A68AF6D8CB54EE2076&_z=z>.
- 2 Ibid.
- 3 Ibid.
- 4 Ibid.



Chapter 2: Reinvesting in a human rights culture



The Charter is, at its heart, a set of shared principles based on the values of the Victorian community. When government organisations embody human rights in their everyday practices we are promoting standards of behaviour, decision-making and actions that uphold principles essential to a democratic society. The impact of such behaviour should not be underestimated. A government that lives and breathes human rights reminds us all that we live in a community that values the rule of law, human dignity, equality and freedom.

– Kristen Hilton, Victorian Equal Opportunity and Human Rights Commissioner



Overview

The Charter was designed to build a stronger culture of human rights over time in the Victorian Government.¹

‘Culture’ is the assumptions, beliefs and values of an organisation, sector or community. It informs how individuals relate to one another and to the broader community.

Human rights cultural change has been described as ‘the process of moving an organisation to be more inclusive, and to fully respect and accommodate the dignity, worth and rights of all people’.² This process involves not only making practices more compliant with human rights standards, but also changing the underlying attitudes and values that influence behaviour in an organisation. This is an ongoing and incremental process that requires a sustained commitment to ensure its success.

The Charter provides public authorities with a framework for considering human rights when making decisions and delivering services to the public. The most important benefit of a strong human rights culture across government is that it leads to fairer decisions and outcomes for all Victorians.

Over the past ten years, the Commission has seen the government’s human rights culture grow.

However, we have also seen it stall in recent years. This observation is reflected in the findings from the Eight-Year Review.³ More needs to be done to ensure that growing a strong human rights culture remains a priority for government.

The Victorian Government supported or partly supported 45 of the 52 recommendations from the Eight-Year Review, demonstrating a commitment to strengthening human rights culture in Victoria and to making the Charter more effective, accessible and practical.

To grow a strong culture of human rights, government must move beyond a ‘culture of compliance,’ to a culture where the rights of end users are thoughtfully considered and prioritised in everyday business. The Charter can drive this cultural change within government. It provides a framework that helps government to front-load considering how best to promote and protect human rights *before* decisions are made and *when* services, policy and programs are designed and delivered.

For this report, we surveyed public authorities and community organisations to understand the activities undertaken in 2016 to build a strong human rights culture. The survey and results are explained in Chapter 3 of this report.

The benefits of a human rights culture and the Charter

A strong human rights culture leads to fairer decisions and outcomes for all Victorians. It can also lead to benefits for public authorities themselves.

These benefits include:

Values

The Charter is a law that connects with our values – it allows the public sector to take action because it is the right thing to do. This inspires and gives purpose in the work of the public sector as well as offering value for the community.

Commitment

The creation of the Charter demonstrates a genuine commitment to human rights. The Charter is an expression of the Victorian Government's commitment to the values of freedom, dignity, equality, fairness and respect in our community, and of how the Government will recognise and protect those values.

Risk management

Proactive assessment of human rights compliance mitigates against organisational risks, such as litigation, by requiring public authorities to consider, at the earliest possible stage, the human rights impact of decisions and actions on those affected.

Better decision-making

The Charter provides a decision-making framework to identify, assess and balance human rights against other rights and interests. This can break down sectoral silos and lead to a more integrated response to complex problems.

Participatory decision-making

A human rights based approach encourages community participation in decision-making – where decisions are not based on assumptions about the views and expectations held by the community, but are well informed and evidence based.



Working in ways that allow citizens to participate in decision-making, that is to help us define the problem and design the solution, isn't just desirable, it's essential if we are to make significant progress on some of society's most complex issues.⁴

– Chris Eccles, Secretary of the Department of Premier and Cabinet

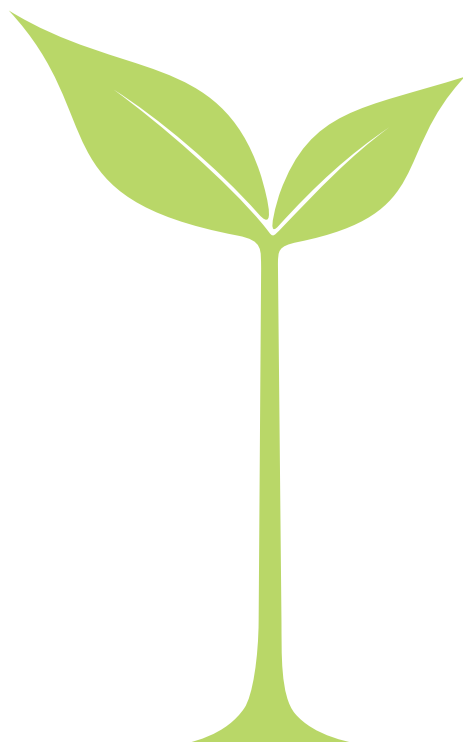


Social progress and economic growth

Human rights sharpen the focus to protect the most marginalised, excluded and disadvantaged in our community – and, as is well documented, equality is a driver of social progress and economic growth.⁵

Legitimacy

The Charter rights are derived from international human rights treaties, which all comparable Western democracies have legislated to protect (other than Australia). This connects Victoria with international efforts to translate human rights goals and standards into results for the people of Victoria. Victorians can be proud of their state's efforts to embrace international best practice and laws protecting human rights.



Benefits of a human rights culture

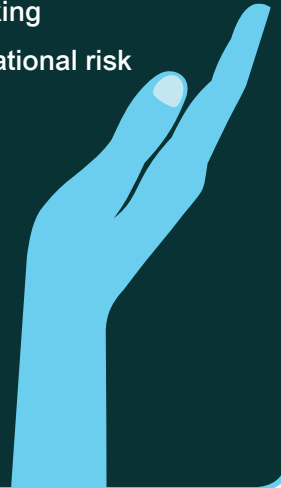
For government

- Builds relationship with the community
- Shines a light on problem areas
- Improves democratic legitimacy
- Reinforces other work: for example, safety, equality, multiculturalism



For public authorities

- Improves quality of service design
- Improves decision-making
- Helps manage organisational risk
- Builds reputation and credibility
- Creates a framework for solving problems



For staff

- Inspires staff
- Reconnects staff with core public service values
- Gives staff a framework to act on moral compass when dealing with people



For community members and advocates

- Assists government to make decisions that consider rights
- Establishes clear non-negotiable standards
- Strengthens cases where change is needed
- Empowers individuals
- Contributes to a fairer and more inclusive society



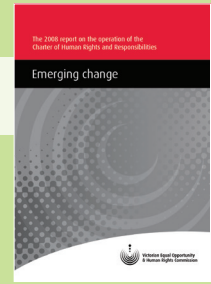
Victoria's decade of Charter implementation



2007

A lot of work has been done in the lead up to the full operation of the Charter. Some agencies have made progress training staff, developing policies and providing information. There is still much to be done, particularly by local government.

Most people in the community have a limited understanding of what the Charter means for them.

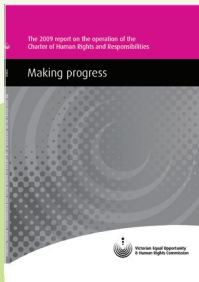


2008

1 January 2008: The Charter comes into full effect.

Victorian agencies have only just begun to develop a human rights culture. There is a need for human rights to be more fully integrated into daily operations, instead of being seen as an 'optional extra'.

We are seeing a growing interest in a community dialogue about human rights.



2009

The Charter continues to evolve as a strong and positive force in making laws and policies, improving service delivery and developing a human rights culture in Victoria.

There is a strong community concern about public safety and street violence. The government has curtailed rights through increased police powers without demonstrating that this would lead to improved community safety.

Other issues include freedom of religion balanced against equal opportunity exemptions for religious organisations, and the safety and wellbeing of international students.



2010

The Charter's impact across government and local government is inconsistent.

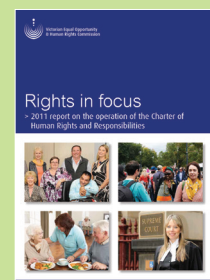
There has been a significant investment in developing and applying a human rights culture.

In some cases, rights-focused policy has failed to translate into practical implementation and service delivery. Human rights dialogues have been overridden, or moved through Parliament without adequate time for SARC scrutiny.

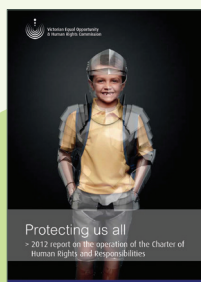
2011

It is clear the Charter is having a tangible impact on the lives of ordinary Victorians, in the operation of government, and on the development and interpretation of laws.

There has been a clear commitment across government to uphold human rights, but implementation has been variable. SARC's process could be strengthened, and the interaction between the areas of operation of the Charter – Individuals, public authorities, Parliament and the courts – could be strengthened.



These observations summarise the progress made towards the Charter's implementation and efforts to build a human rights culture over the past decade. The observations are taken from the Commission's previous Charter reports.



2012

An understanding of the Charter within government is maturing and it is increasingly being seen as a useful operational tool.

However, in some cases, public officers simply follow policy directives, resulting in breaches of human rights. Avoiding situations where rights are violated requires rigorous engagement with the principles that underpin the Charter. Issues in 2012 include government recognition of human rights in risk management and of Aboriginal cultural rights.



2013

There are many positive examples of public authorities, including local government, taking people's rights into account. However, it is clear that there are some areas where public authorities are failing people and need to do better. Human rights breaches are occurring in closed environments. Concerning circumstances have led to children being held in solitary confinement, and some people with disabilities in care environments experiencing human rights abuses.



2014

The Charter has been used as a key driver to facilitate law reform, including to mental health laws.

Community concerns include entrenched discrimination towards Aboriginal Victorians, the impact of law and order reforms, the independence of investigations of complaints against police, children in out-of-home care, family violence and the abuse of people in disability services.

The respect and promotion of cultural rights is emphasised as an important area for improvement.



2015

The Commission has observed a declining investment in human rights education and in the development of a human rights culture. There is more to be done to ensure that the Charter is embedded into government policies and to make Victorians aware of their rights and how to exercise them. Strong human rights leadership and a sustained commitment to change are critical to tackle the existing complex human rights issues.

Positive examples of leadership in human rights include: Victoria Police commissioning an independent review into sex discrimination and sexual harassment, including predatory behaviour, within the organisation; the Department of Environment, Land, Water and Planning for its genuine commitment to flexible work practices, and the Victorian Government for appointing the first Gender and Sexuality Commissioner and for establishing an LGBTI taskforce.

The Eight-Year Review of the Charter

The Eight-Year Review of the Charter, undertaken by Michael Brett-Young in 2015, was an important milestone in the development of the Charter. Its objective was to examine how the Charter is operating in practice to protect and promote human rights and, among other things, to recommend ways to enhance its effectiveness.

The review noted that the Charter has helped to build greater consideration and adherence to human rights principles within the public sector, Parliament and the courts in key areas.⁷ However, the review stated that the community perceived that some of this progress had stalled. The review drew on the Victorian Council of Social Service (VCOSS) submission. This submission noted that knowledge and application of the Charter remains inconsistent and VCOSS members reported examples of attempts to use the Charter to raise an issue or advocate on behalf of clients that were not taken seriously by government departments.⁸ The review also noted the City of Darebin submission. This submission reported that the council was struggling to establish a systemic human rights culture within the organisation due to lack of investment by the Victorian Government.⁹

In the past few years, the Commission has also observed a declining investment in human rights education and the development of a human rights culture within government. We have noted a lack of ongoing funding and a lack of coordinated, whole-of-government investment.

The review made 52 recommendations to make the Charter more accessible, effective and practical, and to rebuild a human rights culture in Victoria.¹⁰ The Government accepted in full, or in principle, 45 of the 52 recommendations in the government response.¹¹

Growing a stronger human rights culture

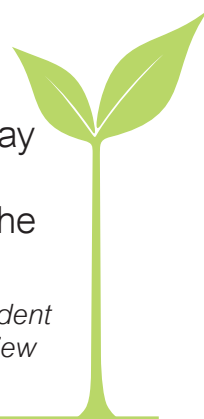
The subject of a number of recommendations from the Eight-Year Review was the need to build a strong human rights culture, including the need for public authorities 'to give life to human rights in their everyday work'.¹²

There is no magic solution to achieving positive cultural change. Culture is specific to each organisation and it will not be the same across government. Given that each public authority has its own unique culture, including its own human rights culture, the actions needed to strengthen human rights culture will be unique to each entity.



The best human rights outcomes are achieved if people's rights are considered in the everyday business of government and its interactions with the community.⁶

– Michael Brett Young, Independent Reviewer for the Eight-Year Review of the Charter



To build and maintain a strong human rights culture, public authorities need to take stock of how they operate and govern. They need to consider what improvements can be made to best protect and promote the human rights of the people they serve.

The review suggested three cultural influences that can help and that are currently underused by government:

1. **Senior leadership and organisational vision:** the role of senior leaders, the law, and vision and values at the whole of organisation level
2. **Operational capacity:** operational policies and procedures, supervisors and team behaviours, recruitment and promotion and building the knowledge and capability of staff
3. **External input and oversight:** community attitudes and expectations, key advisers in the legal sector, and external accountability and oversight.¹³

These cultural influences offer a solid entry point for engaging in human rights cultural change. In the Commission's view, if public authorities worked harder at using and combining activities within each of these influences, it would help to create substantial and sustainable human rights cultural change.

Victorian Government response to the Charter – focus on education

In mid-2016 the Government accepted, either in full or in principle, ten of the eleven recommendations regarding re-engaging with the three cultural influences required to build a stronger human rights culture.¹⁴

It stated that a major focus of its response to the Eight-Year Review was 'to ensure that an appropriate human rights culture continues to be built in the Victorian public sector'. The Government advised

that to achieve this it would prioritise human rights training and education for public sector employees.¹⁵ It provided \$1.25 million to the Commission and the Department of Justice and Regulation's (DJR) Human Rights Unit to develop human rights resources, deliver training across the public sector and to deliver the staged implementation of key recommendations regarding education supported by government. The funding allows the Commission and Human Rights Unit to re-energise its education and capacity building work within the public sector until mid-2018.

Charter education project – growing a culture of human rights

Since the Government's response to the Eight-Year Review, the Commission and the Human Rights Unit of Department of Justice and Regulation have commenced a Culture of Human Rights project for the Victorian Public Sector (VPS). The purpose of the project is to support the VPS to grow a stronger culture of human rights. By the end of the project it is expected that there will be greater commitment, capacity, resources, leadership and expertise to achieve this purpose.

The project recognises that meaningful cultural change is the result of sustained commitment and efforts over time. It also requires partnerships and community support and, therefore, the project works with community organisations.

Within the project, the Commission and DJR are focusing on a number of priorities including direct engagement with public authorities, resource development, including e-learning, and the establishment a community of practice for a culture of human rights.

Direct engagement with the public sector involves the design and rollout of education and capacity development programs. The Commission and DJR have adopted a partnership approach with a range of public authorities in order to focus on building capacity, knowledge and skills. For each audience, human rights education is informed by consultation and assessment. This ensures participants not only have an enhanced understanding of their obligations under the Charter, but also know how to use the Charter as a decision-making framework in their day-to-day work. Customised education has been complemented with other elements of the program, including resource review and development, leadership commitment and expectations regarding consideration of human rights, linking human rights directly to governance and strategy, and nurturing an engaged and informed community of 'Human Rights Champions' across the public sector. The combination of these actions is designed to support public authorities better embed a human rights culture within their organisations.

Building a culture of human rights in the VPS

The Commission is working with a range of organisations to build a culture of human rights in the VPS. The aim is to support the VPS to continue its journey from focusing on compliance with the Charter to using the Charter as a progressive and dynamic framework to make human rights part of the everyday business of government. Genuine cultural change cannot happen overnight. It is a long-term goal requiring vision, commitment, education, resources, capacity and partnerships.

In supporting efforts to build a culture of human rights in the public sector, the Commission tailors its services to an organisation's circumstances and stage of embedding human rights practice. The Commission and the DJR's Human Rights Unit are working with the public sector across different levels to support various initiatives such as:

Senior leadership and organisational vision

- Supporting senior leaders to give a clear commitment to human rights and to communicate those commitments
- Supporting senior leaders to role model behaviour and expectations regarding human rights practice within their organisation
- Providing technical support to the development of action plans to build a human rights culture
- Integrating human rights into organisational vision, values, and strategic planning
- Dedicating resources to support good human rights practice
- Identifying and empowering human rights champions to guide internal capacity

Operational capacity

- Working to strengthen policies and procedures for good human rights practice
- Influencing behaviours in the workplace by building supervisor knowledge and skills to foster good human rights practice among their teams
- Acknowledging a commitment to human rights practice in recruitment and promotion practices and processes
- Developing the capacity of new and existing staff in knowledge and skills
- Ongoing education and professional development
- Designing tools and resources to reinforce good practice
- Reviewing consumer and community grievance and complaints handling processes to ensure they reflect a human rights-based approach
- Capturing learning, best practices and use of evaluation frameworks
- Enabling human rights champions to connect with a community of practice and sustain current and contextualised best practice within their departments

External input and oversight

- Identifying ways for an information exchange between the public and community sectors
- Encouraging the public sector to take community views into account
- Considering consultative mechanisms for stakeholder management

People Matter Survey – human rights results 2016

A commitment to human rights is a VPS value and is included within the VPS Code of Conduct.¹⁶

The VPS Code of Conduct places the following obligation on public sector employees:

Human Rights – *public officials should respect and promote the human rights set out in the Charter of Human Rights and Responsibilities by:*

(i) making decisions and providing advice consistent with human rights; and

(ii) actively implementing, promoting and supporting human rights.¹⁷

Including human rights as a value within the VPS Code of Conduct helps to strengthen a human rights culture because it sets the expectation on all public sector staff to consider human rights as part of their everyday work. It also has the potential to inspire staff by providing purpose within their work, as well as offering value for the community as a transparent and accountable set of standards.

Connected to the VPS Code of Conduct, the annual Victorian Public Sector Commission (VPSC) People Matter survey provides useful data for assessing the state of human rights knowledge, awareness and culture within the public sector.

The VPSC surveys public sector employees annually for their views on how values and employment principles are demonstrated in their organisation by colleagues, managers and senior leaders. As part of this survey, the VPSC asks questions specific to human rights culture.

The VPSC data is an important source of information that helps public authorities to identify gaps and, by extension, improve the human rights knowledge and skills of their staff.

The results of the VPSC 2016 People Matter Survey

The 2016 VPSC survey captured the views of 58,678 staff from 169 organisations within the public sector.

The VPSC asked employees whether they agree, on a scale from strongly agree to strongly disagree, with the following statements about human rights culture:

- my organisation encourages employees to act in ways that are consistent with human rights
- in my working group, human rights are valued
- I understand how the Charter of Human Rights and Responsibilities applies to my work
- I understand how the Charter of Human Rights and Responsibilities affects me as an employee.

The data on the following page provides insight into government's efforts to grow a human rights culture.

Figure 1: My organisation encourages employees to act in ways that are consistent with human rights

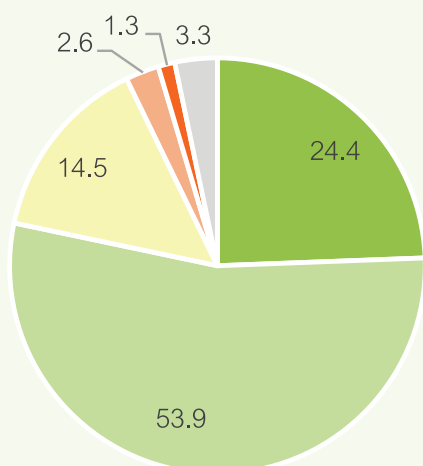
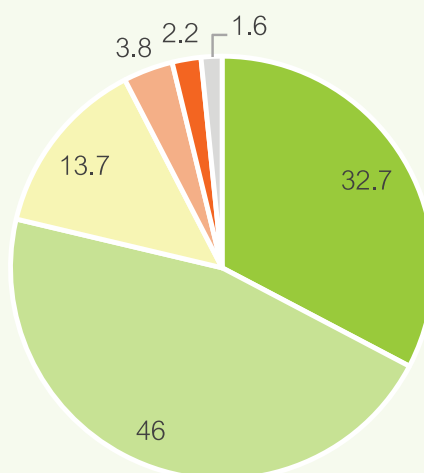


Figure 2: In my working group, human rights are valued



■ % Strongly agree
 ■ % Agree
 ■ % Neither agree nor disagree
 ■ % Disagree
 ■ % Strongly Disagree
 ■ % Don't Know

Figure 3: I understand how the Charter of Human Rights and Responsibilities applies to my work

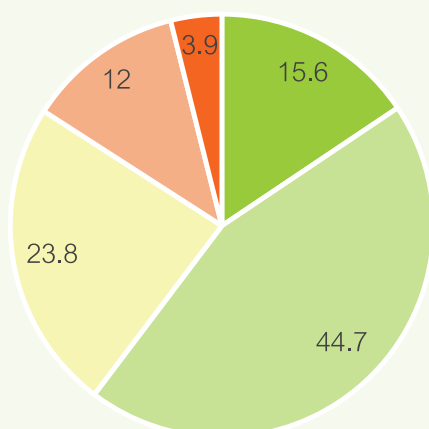
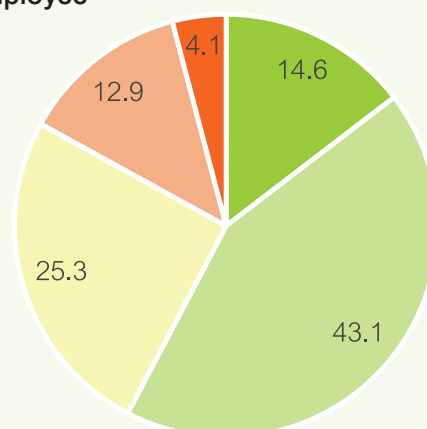


Figure 4: I understand how the Charter of Human Rights and Responsibilities affects me as an employee



The results of the VPSC survey indicate that Charter rights and obligations are becoming part of the core culture of government, with the majority of employees responding to each statement in the affirmative – either agreeing or strongly agreeing.

Almost 80 per cent of employees surveyed agreed that their employer encourages them to act in ways consistent with human rights, and that human rights are valued in their workgroups.

However, the data also suggests that there is room for improvement, particularly in relation to the survey statements directed at employees' understanding of how the Charter applies to their work (Figure 3) and how the Charter affects them as employees (Figure 4).

Almost a quarter of employees (23.8 per cent) responded to the statement 'I understand how the Charter of Human Rights and Responsibilities applies to my work' by stating that they 'neither agree nor disagree'. Similarly, 25.3 per cent of employees responded to the statement 'I understand how the Charter of Human Rights and Responsibilities affects me as an employee' by stating that they 'neither agree nor disagree'.

These results indicate that more needs to be done to make human rights principles part of the core of public sector culture. The survey statements go to the heart of what is required for a strong human rights culture – employees should understand how the Charter applies to their work. That is, how they can use the Charter as a framework for protecting and

promoting the human rights of all Victorians. Equally, employees should understand how the Charter applies to them as employees, including how their own rights are protected in the workplace.

A reinvestment in human rights culture by government is needed to build greater awareness of the Charter and the role it can play in the work of public sector employees. If this is undertaken successfully, it should

reduce the number of employees in the 'neither agree nor disagree' categories of the VPSC survey.

These results will be discussed further in the next chapter as part of the analysis of the Commission's 2016 survey of human rights culture within government.

Endnotes

- 1 Human Rights Consultation Committee, 'Rights, Responsibilities and Respect' (Report, 30 November 2005) ii–iii.
- 2 Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (Report, 1 September 2015) 23, citing Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context* 228, 243.
- 3 *Ibid* 22.
- 4 Chris Eccles, 'Governing in an Era of Distrust' (Speech delivered at the IPAA Victoria's Public Sector Week, Victoria, 17 August 2017).
- 5 John Ward et al, 'Evidence for Action: Gender Equality and Economic Growth' (Research Report, Chatham House, September 2010); The European Institute for Gender Equality (EIGE), 'Economic Benefits of Gender Equality in the European Union' (Report on the Empirical Application of the Model, European Institute for Gender Equality, March 2017).
- 6 Brett Young, above n 2, 21. We have adapted this from the Research Team, 'The Impact of a Human Rights Culture on Public Sector Organisations: Lessons from Practice' (Research Report, Equality and Human Rights Commission, June 2009) 89.
- 7 Brett Young, above n 2, 19.
- 8 *Ibid* 22.
- 9 *Ibid*.
- 10 *Ibid* 23.
- 11 For a full list of the recommendations and what was supported by government please see: State Government of Victoria, *Government Response to the 2015 review of the Charter of Human Rights and Responsibilities Act* (20 July 2017) <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/human+rights+legislation/government+response+to+the+2015+review+of+the+charter+of+human+rights+and+responsibilities+act>>.
- 12 State Government of Victoria, *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act* (20 July 2017) <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/human+rights+legislation/government+response+to+the+2015+review+of+the+charter+of+human+rights+and+responsibilities+act>>.
- 13 Brett Young, above n 2, 8.
- 14 *Ibid* 10.
- 15 State Government of Victoria, above n 11.
- 16 State Government of Victoria, 'Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act' (Media Release, 22 July 2016) <<http://www.vic.gov.au/news/government-response-to-the-2015-review-of-the-charter-of-human-rights-and-responsibilities-act.html>>.
- 17 Victorian Public Sector Commission, *Code of Conduct for Victorian Public Sector Employees: Public Sector Values* (31 May 2015) <<http://vpsc.vic.gov.au/html-resources/code-of-conduct-for-victorian-public-sector-employees/public-sector-values/>>.
- 18 *Ibid*.



Chapter 3: Human rights culture in public authorities

Overview

The Charter provides an effective framework for driving human rights cultural change within government. It is a framework that can be applied to all aspects of everyday public sector work.

This year, we surveyed public authorities and community organisations to understand what activities were undertaken in 2016 to strengthen the Victorian Government's human rights culture.

We adopted the Eight-Year Review's three cultural influences as the framework for surveying the status of human rights culture within government.

The three cultural influences below offer an entry point for engaging in cultural change. In the Commission's view, if public authorities worked harder at using and combining activities within each of these influences, it would help to create a substantial and sustainable improvement in human rights culture across government.

1. **Senior leadership and organisational vision:** the role of senior leaders, the law, and vision and values at the whole of organisation level
2. **Operational capacity:** operational policies and procedures, supervisors and team behaviours, recruitment and promotion and building the knowledge and capability of staff
3. **External input and oversight:** community attitudes and expectations, key advisers in the legal sector, and external accountability and oversight.

Overall the data indicates that public authorities are taking steps to improve their human rights culture, but that they could be doing more. This is evidenced by the fact only half (54 per cent) of public authorities surveyed reported changing their approach in 2016 to human rights compliance or making efforts to improve their human rights culture as a result of the review.

Workplace culture is not uniform. Each public authority should use this report as a means to check its leadership, operational practices and external input and oversight frameworks for opportunities to improve its human rights culture, thereby ensuring that it places the protection of people's rights at the heart of its daily activities.

Building a human rights culture requires sustained effort and leadership from all levels of government. As this survey suggests, human rights culture can be built in a number of ways. For example:

- a secretary commenting publicly on their department's commitment to promoting and protecting people's human rights
- a local council employee creating an annual team business plan that includes human rights service improvement activities
- a statutory authority that provides public services providing more opportunities for community input on human rights issues relevant to its service delivery.

The additional practical activities that public authorities could undertake under the three cultural influences are relatively small but, in combination, they will improve human rights culture in a substantial and sustainable way, which in turn will lead to fairer decisions and outcomes for all Victorians.

The Commission's survey of human rights culture in public authorities

Methodology

Who we consulted

The Commission created an online survey to identify the activities public authorities undertook in 2016 to improve human rights culture in government.

The Commission consulted with all Victorian government departments, local councils, the Supreme Court and selected statutory agencies and community organisations. In total more than 150 entities were sent the survey, including 50 community organisations.

Survey Responses

Out of those we consulted, we received the following survey responses:

- 18 departments and agencies
- 61 local councils
- 27 community organisations.

What we asked

We based our survey questions on the three areas of cultural influence that the Eight-Year Review recommended as the most effective in creating a human rights culture: senior leadership and organisational vision; operational capacity; and external input and oversight.¹

Under each cultural influence, we listed practical activities, and asked public authorities to confirm whether any of these steps were undertaken in 2016. The practical activities were based on the content of the Eight-Year Review and existing resources setting out milestones for cultural change, including the Victorian Local Governance Association local government toolkit.² The activities are not intended to be definitive indicators of an effective human rights culture. They are, however, a useful entry point for taking action to grow a strong human rights culture.

Survey respondents who answered in the affirmative were asked to provide examples of the activities under the three cultural influence areas.

The Charter is a people centred law, developed as a result of extensive community consultation. The voice of the community is an important means of continuing any dialogue about the role of human rights under the Charter. To bring community organisations into the dialogue on human rights culture the Commission asked them to provide examples of public authority initiatives in 2016 that they believed demonstrated a positive human rights culture, and areas they believe indicated room for improvement.

Survey results

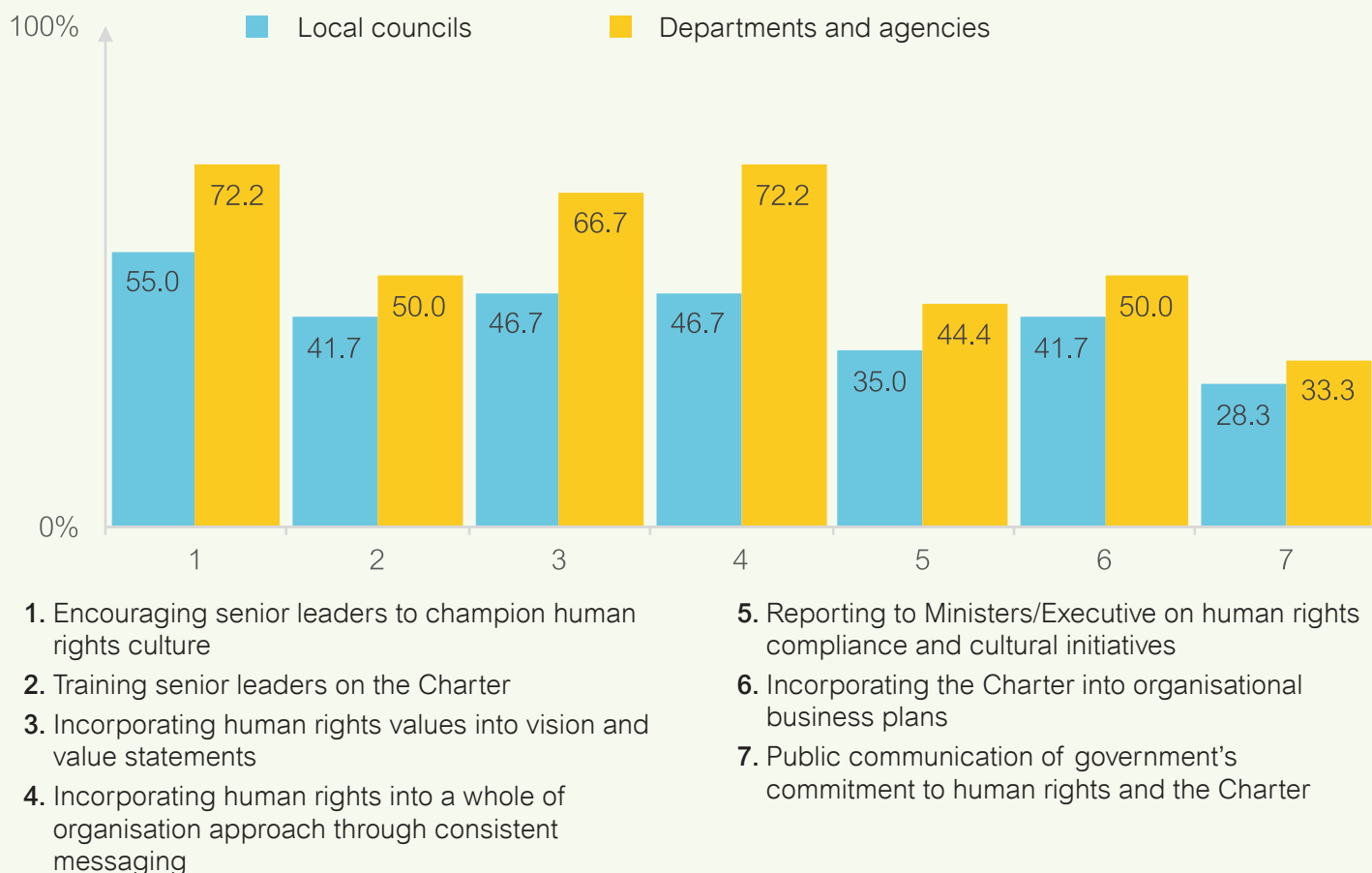
In the following section we outline the results of our survey. The results are presented with reference to the three cultural influence areas required for an effective human rights culture. The data is separated into data from departments and agencies, and data from local councils.

We suggest highlights and areas for improvement identified from the data. We include examples of activities that public authorities advised they undertook under the first two cultural influences. We include community organisations' views of some positive human rights initiatives and areas perceived to indicate the need for improvement from government. We also include some suggestions from public authorities themselves for activities that they could undertake to improve their human rights culture.

First influence – senior leadership and vision

A positive human rights culture starts at the top of an organisation. Effective cultural change within government begins with the strong commitment of senior leaders through their role, vision and the championing of an organisational approach to values.³

Figure 5: Departments and agencies' and local councils' activities under the first cultural influence to build a strong human rights culture in 2016



Under the first cultural influence, the survey asked participants to state whether in 2016 they undertook activities related to embedding human rights into following areas:⁴

- **Senior leadership:** To achieve a positive human rights based culture, the leadership of an organisation must be committed to it.
- **Law:** New laws can lead to changes in behaviour, especially when institutions enforce those laws.
- **Vision and values at the whole-of-organisation level:** The organisational paradigm (what the organisation does and why) is also a key element of developing a human rights culture. Its influence on culture involves setting human rights within an organisation's overarching vision and values.

Departments and agencies and local councils

The data above shows the activities departments and agencies and local councils advised that they undertook in 2016 under the first cultural influence of senior leadership, law, vision and values.

Survey data analysis

Highlights and areas for improvement in senior leadership, law, vision and values

The results indicate that public authorities are undertaking activities to strengthen human rights culture through the influence of using senior leadership, law, vision and values.

There is, however, considerable room for improvement, given that within only four of the 14 datasets, more than 50 per cent of public authorities agree that they undertake the listed activities.

To build a human rights culture public authorities should incorporate into everyday business as many of the activities listed within the cultural influence of senior leadership, law, vision and values as possible. Public authorities should adopt an 'if not, why not' approach to implementation. These are practical activities that public authorities can undertake to provide strong leadership and vision to staff and to the public on protecting and promoting the human rights of end users within decision-making and service delivery.

The more embedded the Charter is within government organisations, the more the Charter will operate at the front end of government to inform decision-making and service delivery.

Below are the highlights and areas for improvement for public authorities that the Commission identified under the first human rights cultural influence.

Highlights

The highlights are the three results where more than 65 per cent of departments and agencies undertake activities to grow a strong human right culture within the cultural influence of senior leadership, law, vision and values.



Encouraging senior leaders to champion human rights

Just over 72 per cent of departments and agencies undertake activities to 'encourage senior leaders to champion human rights culture'. This indicates that most departments and agencies understand the importance of senior leaders championing human rights and are actively using this technique.

Fifty-five per cent of local councils undertake activities to 'encourage senior leaders to champion human rights culture'. Although this was the highest result for local councils within the first cultural influence, it also suggests room for improvement, given that it represents just over half the local councils surveyed.



Incorporating human rights into whole of organisation approach through consistent messaging

Just over 72 per cent of departments and agencies use consistent messaging to incorporate human rights into a whole of organisation approach.

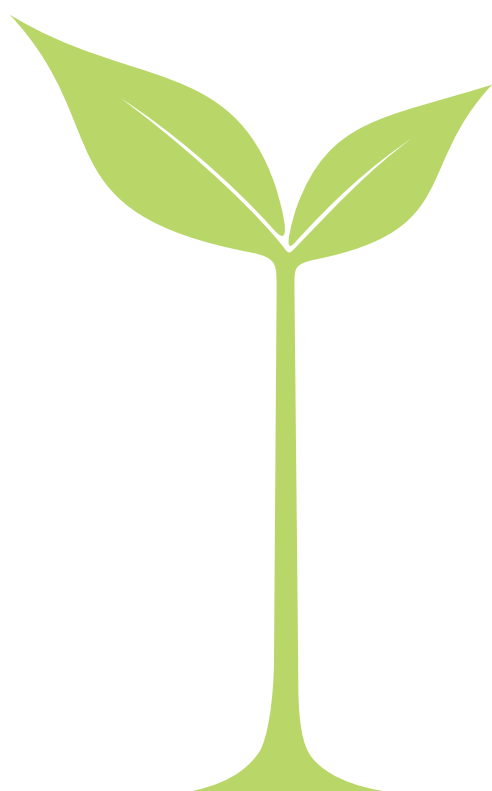
This result indicates that most departments and agencies understand that providing consistent messaging to staff on incorporating human rights into everyday business helps set clear organisational expectations for decision-making and service delivery.



Incorporating human rights into vision and value statements

66.7 per cent of departments and agencies incorporate human rights into their vision and value statements.

Vision and value statements can be powerful tools for shaping an organisation's culture. These statements have total organisational reach and, when used effectively, can be both aspirational and affirming for staff. Including human rights in vision and value statements can guide staff decision-making in





Embedding a culture that embraces human rights within the Department of Education and Training is critical if we are to put ourselves in the shoes of the diverse Victorian community we serve. Our first diversity and inclusion strategy for corporate staff, which is being championed by senior leaders across the Department, continues our work on building a workplace where diversity is valued and all staff feel safe, supported and able to truly contribute.⁵

– Gill Callister, Secretary Victorian Department of Education and Training.



complex situations where the right decision is not clear cut.

Improvements



Senior leadership training in human rights

Only 50 per cent of departments and agencies and 41.7 per cent of local councils reported training their senior leaders on the Charter. This low result is consistent with the VPSC survey. The VPSC survey statement: 'I understand how the Charter applies to my work' received the second largest 'disagree' result, with 15.6 per cent of employees disagreeing with the statement, and a further 23.8 per cent stating that they 'neither agree nor disagree'.⁶

Training senior leaders in the Charter is critical to ensuring they can champion protecting and promoting human rights in a meaningful way. It also ensures senior leaders can lead by example by demonstrating to staff the importance of prioritising human rights training.

The Commission anticipates an increase in this activity over the next year, as a result of the Charter Education Project.⁷ However, this activity needs to be continual and sustained, rather than a training event that occurs every four years when additional funding is available.



Public commitment to human rights and the Charter

Only 33.3 per cent of departments and agencies and 28.3 per cent of local councils reported expressing publicly their commitment to human rights and the Charter. This was the lowest result for public authorities within the first cultural influence of senior leadership, law, vision and values.

This is a missed opportunity for public authorities to demonstrate their commitment to human rights to the Victorian public. The relatively low results for this activity are consistent with the views we heard from

community organisations about the need to better engage with the community to understand different views on human rights issues.

Publicly expressing a commitment to human rights is a critical step towards improving Victoria's 'dialogue model' of human rights. A strong human rights culture is one where government understands the human rights expectations and needs of the community it serves. Meaningful engagement with community is the best way to achieve this.



Reporting to Ministers/Executive on human rights compliance and cultural activities

Only 44.4 per cent of departments and agencies and 35 per cent of local councils advised that they report human rights compliance and cultural activities to ministers and/or the executive.

Requiring this reporting reinforces to staff the expectation that an activity is important to the organisation. This helps to set the culture on respecting the human rights of end users. Compliance with the Charter is a legal requirement for public authorities, and should be included within any legal compliance reporting frameworks. Reporting on human rights compliance in turn helps senior leaders to monitor and identify where organisations can improve their decision-making and service delivery.

Leading by example - examples of activities under senior leadership, law, vision and values

This table contains examples of the activities public authorities provided to demonstrate their affirmative survey response to activities within the cultural influence of senior leadership, law and vision and values.

| Activity | Example |
|---|---|
| Encouraging senior leaders to champion human rights culture | <p>The executive commenced implementing the 'Charter Awareness Program' to enhance human rights awareness and foster a human rights culture. The program consists of executive briefing and training sessions for all staff. It was delivered in conjunction with the Victorian Equal Opportunity and Human Rights Commission and the Department of Justice and Regulation's Human Rights Unit.</p> <p><i>Consumer Affairs Victoria</i></p> |
| | <p>Senior leadership demonstrate a commitment to priority populations by presenting at key conferences such as 'Improving Care for Aboriginal Patients' held by the Victorian Aboriginal Community Controlled Health Organisation and participating in events such as the 'Midsumma Pride March'.</p> <p><i>Mental Health Complaints Commissioner</i></p> |
| | <p>Consistently promoted human rights through leadership group's support of various activities and campaigns such as 'White Ribbon' and the Local Government 'Listen, Learn and Lead Gender Equity Program'.</p> <p><i>Monash City Council</i></p> |
| Training senior leaders on the Charter | <p>Created and delivered tailored Charter training to housing staff managers and team leaders. The training was designed to ensure staff understand how the Charter is relevant to their decisions on public housing.</p> <p><i>Department of Health and Human Services</i></p> |
| | <p>Department of Education and Training (DET) engages with the Commission regularly on aspects of the Human Rights portfolio, and promotes an ongoing and constructive dialogue about the Charter. This includes quarterly meetings of the DET and the Commission Consultative committee.</p> <p><i>Department of Education and Training</i></p> |
| Incorporating human rights values into Vision and Value statements | <p>Included in the Code of Conduct a section entitled 'Shared Values of Council' which embodies human rights values. The Code requires that council members treat customers, the community and each other with equality, respect and dignity.</p> <p><i>Dandenong City Council</i></p> |
| | <p>Since 2015 DET has adopted a new approach to embedding a human rights culture, by including human rights as a Department value. As part of the promotion of the DET values, the Department provides practical guidance to staff on respecting and promoting human rights in their day-to-day work.</p> <p><i>Department of Education and Training</i></p> |
| | <p>Established a new agency, Family Safety Victoria, to address a number of the key recommendations arising out of the Royal Commission on Family Violence. 'Rights and respect' is one of the eight principles underpinning – Ending Family Violence, Victoria's Plan for Change.</p> <p><i>Department of Health and Human Services</i></p> |

| | |
|--|---|
| Incorporating human rights into a whole of organisation approach through consistent messaging | <p>Developed the Mitchell Shire Council Social Justice Framework 2017–2021, a document which affirms the council’s obligations under the Charter and actions council’s vision to build a diverse, equitable and well-connected community through social justice principles of participation, advocacy, empowerment, equity, access and diversity.</p> <p><i>Mitchell Shire Council</i></p> |
| | <p>Kept senior department leaders informed about the Commission’s Aboriginal Cultural Rights in Victoria project.</p> <p><i>Human Rights Unit, Department of Justice and Regulation</i></p> |
| | <p>Delivered information about staff responsibilities relating to the Charter through an online induction model and the Department’s intranet.</p> <p><i>Department of Premier and Cabinet</i></p> |
| Reporting to Ministers/Executive on human rights compliance and cultural initiatives | <p>Developed an executive reporting template that ensures that human rights are considered in all reports prepared for executive or council consideration.</p> <p><i>Mitchell Shire Council</i></p> |
| | <p>Developed an annual action plan which is attached to the ‘Draft Human Rights and Social Justice Framework’. The implementation of this plan will be overseen by the Human Rights and Social Justice Steering Group.</p> <p><i>Maribyrnong City Council</i></p> |
| Incorporating the Charter into organisational business plans | <p>Incorporated the Charter into the review of Council services which is linked to business planning. For example, Council’s ‘Infrastructure Delivery Service Review Scope’ contains a requirement that any recommended service model must be in line with the Charter.</p> <p><i>Bass Coast Shire Council</i></p> |
| | <p>Human rights were included in the 2015–2016 Business Plan via a vision for the Koori community to live free from racism and discrimination, and enjoy the same access to civil and legal rights, and experience the same justice outcomes as the broader Victorian community.</p> <p><i>Koori Justice Unit, Department of Justice and Regulation</i></p> |
| Public communication of Government’s commitment to human rights and the Charter | <p>Made submissions to the Senate Community Affairs References Committee’s Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia. By publishing the submissions on its website and on the inquiry’s websites, OPA made a public commitment to implementing and respecting the rights and responsibilities contained in the Charter.</p> <p><i>Office of the Public Advocate (OPA)</i></p> |
| | <p>Established various programs supporting the aims of, and showing public commitment to, the Charter, including a youth support group called Glen Eira Pride.</p> <p><i>Glen Eira City Council</i></p> |
| | <p>Supported the ‘Melba Support Services – Human Rights Roadshow in 2016’, involving a group of people with diverse disabilities offering training to Council and advocating for human rights. The interactive session influenced Council officers and increased their capacity to ensure that Council services are accessible to everyone. The personal stories and interactions in the training made human rights tangible and applicable to everyday circumstances.</p> <p><i>Yarra Ranges Council</i></p> |

Second influence – human rights at the operational level

The second influence necessary to grow a human rights culture surveyed was ‘operational capacity’ – that is, what public authorities do at an operational level to strengthen their human rights culture.

The survey asked participants to state whether in 2016 they undertook activities related to embedding human rights into the following areas:⁸

- **Plans, policies and procedures:** Setting human rights goals and targets helps to identify the organisation’s desired improvements and achievements. Building them into an action plan, or into existing business planning and reporting mechanisms, helps give them the focus and attention needed to implement them.
- **Supervisor and team behaviours:** Supervisors translate an organisation’s mission and values into real action, and the team’s subculture has a self-regulating impact on its members.
- **Recruitment and promotion:** Having the right supervisors and the right team culture starts at recruitment.
- **Staff knowledge and capability:** Building a human rights culture that permeates all levels of government will require an ongoing commitment to human rights training and education.

Departments and agencies and local councils

Figure 6 on the following page shows the activities departments and agencies and local councils advised they undertook in 2016 under the second cultural influence of operational level activities.

Survey data analysis

Highlights and areas for improvement in operational level activities

The data indicate that public authorities are taking action to grow their human rights culture through a range of operational level activities, including reviewing and developing operational policies to ensure human rights compliance, training staff on the Charter, and incorporating human rights into decision-making and legal compliance frameworks.

The results suggest that public authorities are taking more action under this cultural influence than the first influence of senior leadership, law, vision and values. There is, however, considerable room for improvement, given that within only eight of the 16 datasets, more than 50 per cent of public authorities agree that they undertake the listed activities.

To grow a strong human rights culture, public authorities should incorporate as many of the activities listed within the cultural influence of operational capacity as possible. Public authorities should adopt an ‘if not why not’ approach to implementation. The more embedded the Charter is within government organisations, the more the Charter will operate at the front end of government to inform decision-making and service delivery.

Below are the highlights and areas for improvement for public authorities that the Commission identified under the second human rights cultural influence data.

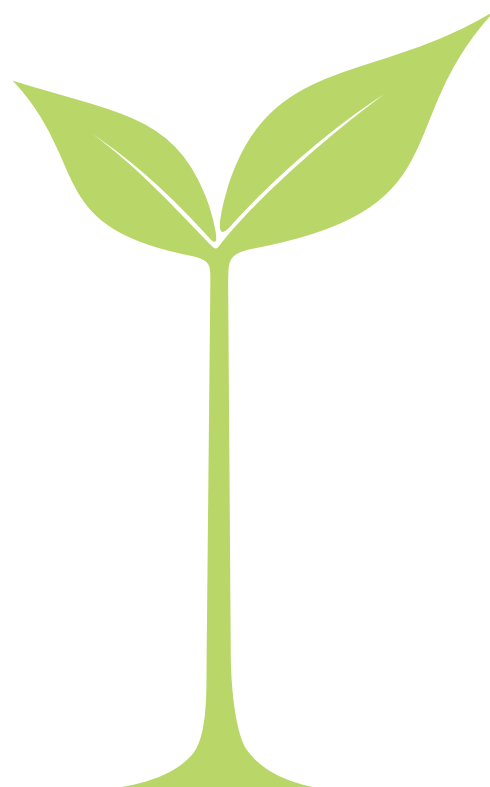
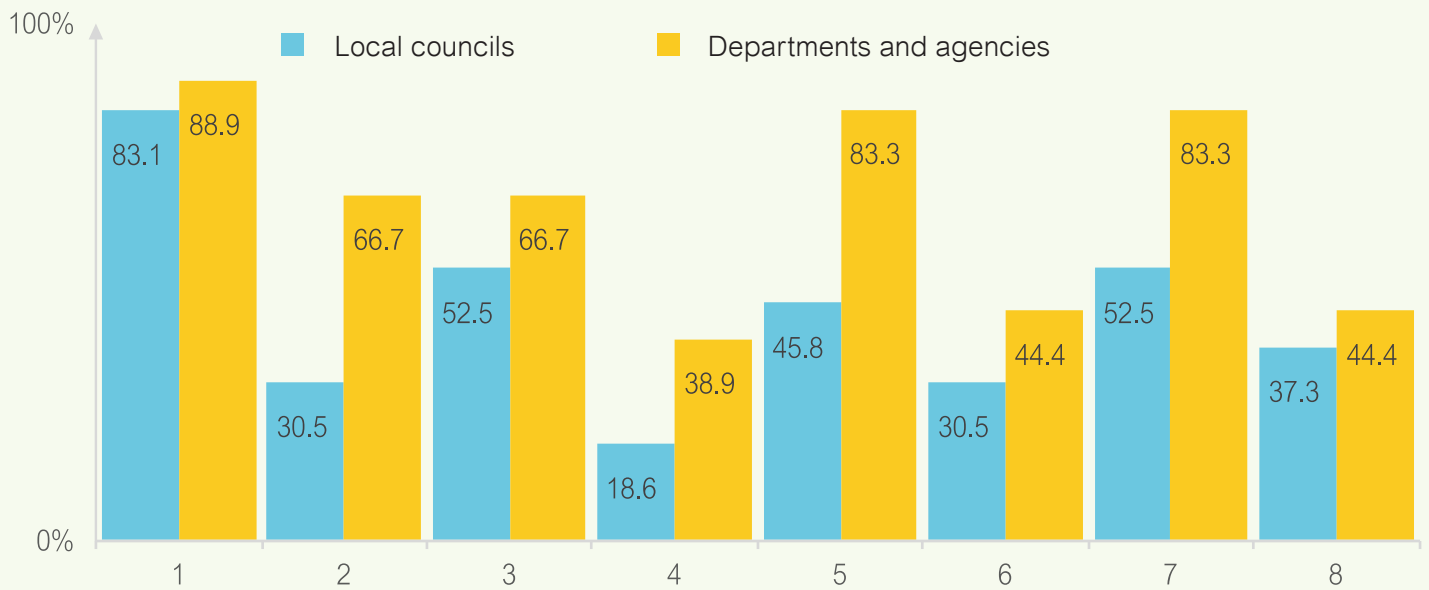



Figure 6: Departments' and agencies' and local councils' activities under the second cultural influence to build a strong human rights culture in 2016



1. Review or development of operational policies to ensure they are human rights compliant
2. Review, use or development of staff evaluation tools that monitor human rights awareness among staff
3. Incorporating the Charter into any legal compliance frameworks
4. Incorporating the Charter into team business plans
5. Training staff on the Charter
6. Putting relevant human rights issues on meeting agendas
7. Incorporating human rights issues into decision-making frameworks
8. Ensuring contracts and procurement processes incorporate Charter compliance

Highlights

The highlights are the three activities where over 80 per cent of departments and agencies undertook activities to grow a strong human rights culture, and the one survey result where over 80 per cent of councils undertook an activity to grow their human rights culture.

 *Review or develop operational policies to ensure they are human rights compliant*

A standout result for departments and agencies and for local councils was the activity of 'reviewing or developing operational policies to ensure they are human rights compliant', with 88.9 per cent of department and agencies and 83.1 per cent of local councils confirming that they undertake this activity.

This is a strong result that suggests that public authorities understand that an effective way to promote compliance with legal obligations, and to grow a culture that promotes and protects human rights is to have policies that incorporate these obligations.

 *Incorporating human rights issues into decision-making frameworks*

Eighty-three point three per cent of departments and agencies incorporate human rights into decision-making frameworks. Although local councils reported a lower result (52.5 per cent), this was still a relatively high result within their dataset.

This indicates that most public authorities understand that a strong human rights culture is created by prompting staff to consider human rights factors when they make decisions. A decision-making framework that includes human rights considerations prompts staff to consider the human rights of people impacted by decisions before decisions are made.



Training staff on the Charter

Eighty-three point three per cent of departments and agencies train their staff on the Charter. Again, while local councils reported a much lower result (45.8 per cent), this was a relatively high result within their dataset.

This result indicates that public authorities understand the importance of training staff on the Charter.

However, it is noteworthy that while 83.3 per cent of departments and agencies report training staff on the Charter, the 2016 VPSC survey data reports that only 60.2 per cent of the 58,678 employees surveyed agreed with the statement: 'I understand how the Charter applies to my work,' and only 57.8 per cent of public sector employees agreed with the statement, 'I understand how the Charter affects me as an employee' (Figure 4).

This suggests that despite departments and agencies reporting high levels of training initiatives, staff are not reporting high levels of understanding how the Charter applies to their work. Public authorities should ensure that their education strategies on the Charter and human rights are sustained, and that they are sufficiently tailored and practical for staff.

Improvements



Review, use, develop staff evaluation tools that monitor human rights awareness among staff

Over 66 per cent of departments and agencies and 30.5 per cent of local councils report that they undertake staff evaluation and monitoring activities to monitor human rights awareness. We would like to see this activity used more by public authorities.

Monitoring rights awareness among staff is critical to ensuring staff understand and know how to apply the Charter framework to their jobs. Monitoring and evaluating how staff have promoted and protected the human rights of end users within staff performance evaluations, for example, will help to grow human rights culture beyond compliance with legal obligations. Such activities will reinforce, in a practical setting, the importance of human rights and make it clear to staff that respecting human rights is everyone's responsibility.





Demonstrating a public commitment to the Charter by holding events that consider the right of all Victorians to take part in public life – such as Banyule’s Sensory Friendly Festival which supported the attendance of children on the autism spectrum at major sporting and culture events – helps the Banyule community contribute to a fairer and more inclusive society. These activities help us build a relationship with the community we serve and show that human rights are concepts that have a practical application to all Victorians.

– Simon McMillan, CEO Banyule City Council.



Incorporate the Charter into any legal compliance frameworks

When contrasted with the relatively high result for the category of ‘review or develop operational policies to ensure they are human rights compliant’, the results for ‘incorporating the Charter into legal compliance frameworks’ is quite low (66.7 per cent for departments and agencies and 52.5 per cent for local councils).

Incorporating the Charter into legal compliance frameworks is an ‘easy win’ for public authorities, as well as good risk management given that the Charter is legislation with which public authorities must be compliant.

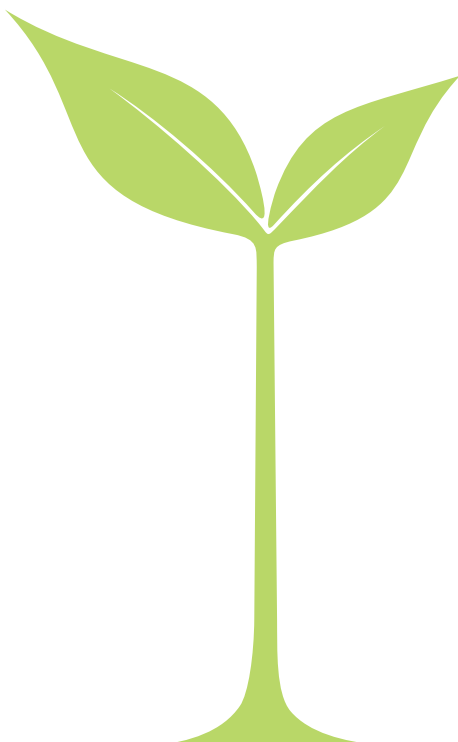


Incorporating the Charter into team business plans

The lowest result for departments and agencies and for local councils was: ‘incorporating the Charter into team business plans’. Only 38.9 per cent of departments and agencies and 18.6 per cent of local councils incorporate the Charter into team business plans.

Having the Charter incorporated into team business plans ensures that human rights are incorporated into everyday business and made relevant and practical for staff. An advanced human rights culture is one that has human rights initiatives reflected within all levels of strategic and business planning.

The highest human rights data result within the VPSC survey was for the statement: ‘In my workgroup, human rights are valued’ (Figure 2). Seventy-eight point seven per cent of the 58,678 public sector employees surveyed agreed with this statement. This suggests that there is likely an appetite for workgroups to incorporate human rights into their business plans. This may also, therefore, represent an ‘easy win’ for public authorities in strengthening human rights culture. Most importantly, embedding human rights into team business plans is also likely to improve staff capacity to act in ways that are consistent with people’s human rights.



Leading by example: examples of activities for operational level activities

This table contains examples of the activities public authorities provided to demonstrate their affirmative survey response to activities within the cultural influence of operational level activities.

| Activity | Example |
|---|--|
| Review or development of operational policies to ensure they are human rights compliant | <p>Updated operational policies to better reflect appropriate language and principles in relation to sexual and gender diversity. For example, one amendment included adopting a guiding principle that prisoners should be imprisoned in the prison of their gender rather than their sex assigned or assumed at birth.</p> <p><i>Corrections Victoria</i></p> |
| | <p>Implemented the 'Aboriginal Social and Emotional Wellbeing Plan' through the delivery of cultural safety and awareness training, the provision of a full-time Clinical Aboriginal Consultant to work across the prison system, and the support and funding of tertiary scholarships for Aboriginal students in a health or mental health related field.</p> <p><i>Justice Health</i></p> |
| | <p>Implemented the Department's 'Respectful Relationships' program as a core component of the Victorian educational curriculum from Prep to Year 12 in 2016. This was in response to the identification by the 'Royal Commission into Family Violence' of the critical role that schools have in creating a culture of respect to change the story of family violence for future generations.</p> <p><i>Department of Education and Training</i></p> |
| Review, use or development of staff evaluation tools that monitor human rights awareness among staff | <p>Reviewed processes and practices in relation to organising community events. One of the areas for improvement related to accessibility at Council events for people with a disability. Particular attention was given to the fact that people on the autism spectrum often face barriers attending noisy events. We made changes to the way events were planned to introduce sensory friendly festivals, which support the attendance of children on the autism spectrum at major sporting and culture events.</p> <p><i>Banyule City Council</i></p> |
| | <p>Discussed discrimination in recruitment at the division's 2016 planning day. This discussion culminated in the division seeking to be included in the Victorian Government's Recruit Smarter program.</p> <p><i>Civil Law Policy division, Department of Justice and Regulation</i></p> |
| | <p>Asked staff to conduct a self-assessment against the DET Values, one of which is human rights, for discussion with their manager as part of the Department's annual performance development process.</p> <p><i>Department of Education and Training</i></p> |
| Incorporating the Charter into any legal compliance frameworks | <p>Commenced the rollout of a new 'Appropriate Workplace Behaviours Policy' which incorporates human rights with a number of other behavioural policy aspects across the whole of Council, involving more than 900 staff.</p> <p><i>City of Dandenong</i></p> |
| | <p>Adopted a new policy to guide the development of organisational policies, which includes a requirement to assess each organisational policy against the Charter.</p> <p><i>City of Yarra</i></p> |

| | |
|--|--|
| Incorporating the Charter into team business plans | <p>Incorporated a strong focus on the Charter into the 2015–2017 business plan for the North West Metropolitan Area (NWMA) division, particularly regarding priorities to reduce Aboriginal representation in the NWMA's justice system and to improve responsiveness to family violence.</p> <p><i>Corrections Victoria</i></p> |
| | <p>Developed guidelines within the Aboriginal Programs Unit for the Kaka Wangity, Wangin-Mirrie cultural program grants for culturally-specific programs in Victoria's prisons and community correctional services. The grants cover a range of key service areas, including cultural strengthening, healing family violence, parenting and women's programs.</p> <p><i>Corrections Victoria</i></p> |
| Training staff on the Charter | <p>Offered education sessions to all staff on the Charter and how it applies in the workplace and policy making.</p> <p><i>Department of Treasury and Finance</i></p> |
| | <p>Developed a human rights e-learning package and rolled out human rights 'train the trainer' package.</p> <p><i>Victoria Police</i></p> |
| | <p>All staff are expected to complete a Charter e-learning program which evaluates awareness among staff as to responsibilities and considerations under the Charter. Staff must repeat the module until they pass.</p> <p><i>Department of Health and Human Services</i></p> |
| Putting relevant human rights issues on meeting agendas | <p>Placed human rights on the monthly Council meeting agenda to ensure consideration of human rights issues before making Council decisions.</p> <p><i>Moorabool Shire Council</i></p> |
| | <p>Included discussions on the 'Policy and Research Unit' team meeting agendas in relation to building a knowledge base from which the unit can advocate for public policy and legislative reform in relation to priority human rights issues.</p> <p><i>The Office of the Public Advocate</i></p> |
| Incorporating human rights issues into decision-making frameworks | <p>Implemented family violence risk assessment and risk management frameworks, aligned with the Charter, which will be targeted to a broad range of government and non-government organisations.</p> <p><i>Department of Health and Human Services</i></p> |
| | <p>Developed and implemented a human rights assessment toolkit to assist officers to incorporate human rights into decision-making processes.</p> <p><i>Knox City Council</i></p> |
| | <p>Developed policies, procedures and guidelines to assist 'Advocate Guardians' to identify Charter rights relevant to their decision-making.</p> <p><i>The Office of the Public Advocate</i></p> |
| Ensuring contracts and procurement processes incorporate Charter compliance | <p>Commenced work on updating the 'Procurement and Contract Management Framework' to include human rights as a relevant consideration. The Framework emphasises that officers should be aware of potential impacts on human rights in carrying out a procurement activity.</p> <p><i>Department of Justice and Regulation</i></p> |
| | <p>Commenced adding Charter considerations to contract and procurement processes.</p> <p><i>East Gippsland Shire Council</i></p> |

Third influence – external input and oversight

The third cultural influence surveyed was ‘external input and oversight’.

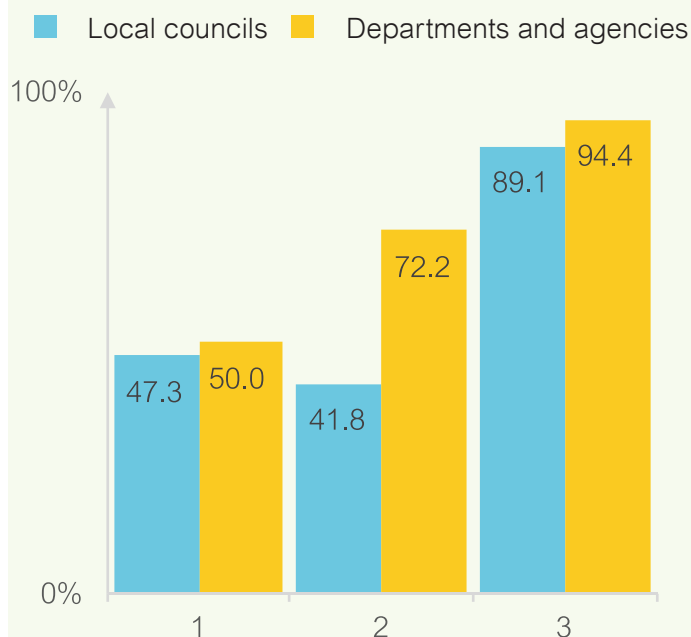
The Eight-Year Review describes this influence as ‘factors that sit outside of the public sector’. These include community attitudes and expectations, key advisers in the legal sector and external accountability and oversight mechanisms.¹⁰

As part of our survey, we asked government departments, agencies and local councils what type of external engagement they undertake to encourage and assist with external input and oversight, including whether they factored human rights into their internal complaints handling processes. We asked community organisations for their views on how effectively public authorities engage with them on human rights. We sought community organisations’ views on examples of government activities in 2016 that demonstrated a positive human rights culture, and those demonstrating a culture with room to grow. We also asked public authorities what they could do better to grow a stronger culture of human rights.

Departments and agencies, and local councils

Figure 7 shows the activities departments and agencies and local councils advised they undertook in 2016 under the third cultural influence of external input and oversight.

Figure 7: Percentage of departments and agencies that engage externally on human rights issues and have an internal accountability mechanism



1. Consulting with the community to identify attitudes and expectations in respect of human rights issues relevant to your work
2. Engaging with bodies, such as the Commission or Human Rights Unit of the DJR to seek guidance on human rights matters
3. Factoring human rights into your complaints handling policies, procedures and decision-making

Community organisations’ views – priorities for external input and oversight activities

To bring community organisations into the dialogue, the Commission asked them to suggest their view on the order of priority for the three activities listed in external input and oversight.

Community organisations’ order of priority for public authority activities under external input and oversight.

1. Consulting with the community to identify attitudes and expectations in respect of human rights issues
2. Factoring human rights into complaints handling policies, procedures and decision-making
3. Engaging with external advisers, such as the Commission or Human Rights Unit of the DJR


Survey data analysis

Highlights and areas for improvement in external input and oversight

Consistent with the first two influences outlined in this chapter, the data indicates that public authorities are undertaking activities within this cultural influence, but that more could be done to maximise the opportunities this influence enables to grow a strong human rights culture.

Below are the highlights and areas for improvement for public authorities that the Commission identified under the third human rights cultural influence data.

Highlights

 *Factoring human rights into complaints handling policies, procedures and decision-making*

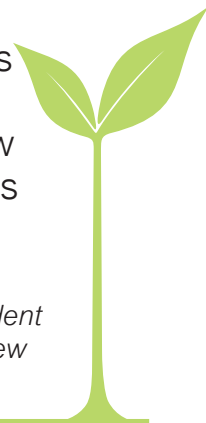
The strongest result for departments and agencies and for local councils was the activity of ‘factoring human rights into complaints handling policies, procedures and decision-making’. More than 94 per cent of departments and agencies and 89.1 per cent of local councils reported that they undertake this activity. These were the highest level results recorded for both departments and agencies and for local councils within the survey.

This result suggests a genuine commitment from public authorities to growing a human rights culture in a context that really counts – complaints handling. Although complaints handling is a reactive rather than a proactive process for growing a human rights culture, it nonetheless provides a powerful catalyst for improving services. By ensuring that human rights are considered as part of complaints handling processes and decision-making, public authorities are helping to ensure human rights considerations are heard and acted upon, both in terms of individual outcomes and within systems and service improvements.




An important aim of the Charter of Human Rights and Responsibilities would be to create a new dialogue on human rights between the community and government.⁹

– Michael Brett Young, Independent Reviewer for the Eight-Year Review of the Charter



Improvements

 *Consulting with the community to identify attitudes and expectations in respect of human rights issues relevant to public authorities’ work*

An area for improvement for departments, agencies and local councils is ‘consulting with the community to identify attitudes and expectations in respect of human rights issues relevant to their work’. Only 50 per cent of departments and agencies, and 47.3 per cent of local councils reported undertaking this activity.

Such low results reinforce community organisations’ perceptions that the Victorian Government’s human rights culture has ‘stalled’.¹¹

The community’s feedback – including insights and expectations on the operation of the Charter and on how government makes decisions relating to human rights issues – is fundamental to an effective human rights ‘dialogue’ in Victoria.

Community organisations expect that public authorities will consult with them to understand attitudes and expectations regarding human rights issues. Community organisations view consultation as the top priority of the three activities suggested for external input and oversight.

Community organisations’ expectations of greater consultation on human rights matters are understandable considering the relatively low level of consultation that the survey data suggests is currently occurring.

Some positive examples of constructive community consultation were provided by public authorities. These suggest ways public authorities can engage with the community on human rights issues.

- **Mental Health Complaints Commissioner:** Established an advisory group including people from diverse backgrounds. We improved accessibility by making our complaints reference sheets available in 15 languages and producing two videos in Auslan.
- **Mornington Peninsula Shire:** Consulted with the All Abilities Consultative Committee on human rights issues for people with disability and the Mornington Peninsula Advisory Committee for Elders on the rights of older adults.
- **Maribyrnong City Council:** Undertook community consultation on the draft Human Rights and Social Justice Framework 2017–2021.
- **Yarra Ranges Council:** Operate regular disability advisory committee meetings and Indigenous advisory meetings.

The community has an important role in holding government to account for how it protects and promotes the human rights of the people it serves. Meaningful and timely consultation with the community can help government to identify human rights issues and implement effective solutions.

Community perceptions of positive human rights initiatives and areas for improvement

The Commission surveyed community organisations for their perspectives on government action and decision-making that demonstrate a positive human rights culture in 2016. The survey also asked community organisations for their perspective on instances where the human rights culture could be improved.

The following are most common examples cited.

Community organisations' view of positive initiatives

Response to the Royal Commission into Family Violence

The most frequently cited example of government demonstrating a positive human rights culture was its commitment to implementing all family violence recommendations from the Royal Commission into Family Violence, and of its approach to community engagement on this challenge.

The commitment by the Victorian Government to implement all 227 recommendations of the Royal Commission into Family Violence should be applauded – especially given the level of recognition the Royal Commission afforded to the experiences of Aboriginal women. The release of this report was a watershed moment that created a level of public awareness of the disproportionate impact of family violence and systemic discrimination experienced by Aboriginal women which had not been sufficiently acknowledged before. The subsequent implementation and reform process has been informed by a genuine commitment to principles of co-design and self-determination. We look forward to continuing to work with government and the sector to make sure Aboriginal women have a voice in these very important and ongoing reforms.

– Aboriginal Family Violence Prevention and Legal Service Victoria¹²

Pride Centre & LGBTI Task Force

The development of the Pride Centre by the Victorian Government was another frequently cited example of a positive initiative supported by government that promotes Charter rights.

In 2016 the Victorian Government announced it would put \$15 million towards a Pride Centre. The aim of the Pride Centre is to:

*Showcase LGBTI art and history, bring together advisory, health and support services, and feature community spaces to provide a safe social environment.*¹³

The Pride Centre will allow LGBTI groups and organisations to share ideas and resources that support equality, diversity and inclusion. The initiative was designed to promote equality through building a space where the LGBTI community can come together to honour and celebrate its history. The establishment of the Pride Centre builds on extensive consultation in the form of surveys, interviews and community consultation, and will be located in St Kilda.

The ongoing role for the LGBTI Taskforce, which was established in 2015, to provide advice to the Minister for Equality is also an initiative that received positive support from survey respondents. The taskforce is supported by two working groups and provides advice on civil law, criminal law, youth justice, safer communities and corrections.

Community organisations' view on activities indicating room for improvement

Children's rights in the youth justice context

Community organisations raised concerns regarding the housing of detained children in cells designed for adult prisoners. Community organisations were concerned that this decision, and the consequent operational decisions such as requiring the children to stay in cells for 23 out of 24 hours, did not prioritise the right of acting in the best interest of the child.

Liana Buchanan, Principal Commissioner for Children and Young People, when asked by the Commission about the current approach to Children's rights in the Victorian youth justice system, stated:

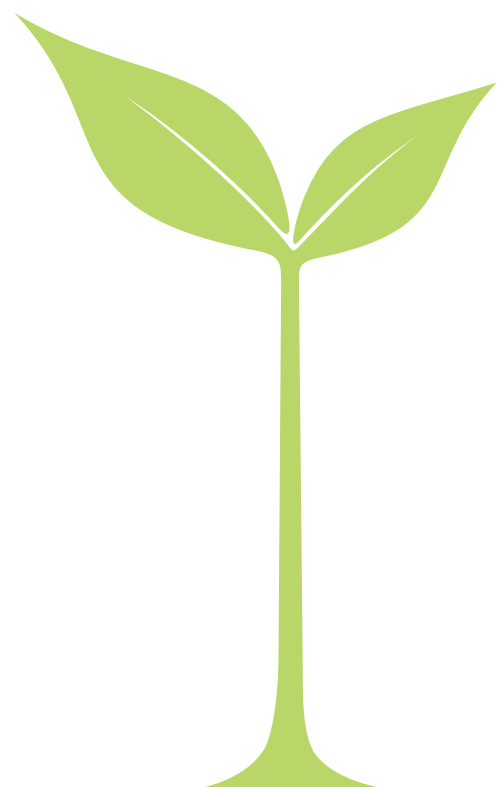
That our youth justice system must be focused on rehabilitation and must respond to children's distinct needs have been longstanding and fundamental principles here in Victoria. These principles are supported by the evidence and a raft of United Nations instruments, yet the past year has shown how easy it is to lose sight of the fundamentals and how much we have to lose if we do so. It is time to re-focus on rehabilitation and humane, effective responses to youth crime.

Providing awareness of Charter rights in regional and rural areas

Those living in regional and rural areas reported a lack of visibility on Charter awareness. They highlighted the continued need to better ensure the spread of Charter education and training resources across the state, so that Charter knowledge can be accessible to all Victorians.

One respondent noted:

I live in regional/rural area of Victoria, I see issues with lack of awareness and training in human rights across all organisations except legal supports as they are trained generally in this area.... I feel human rights training needs to be promoted, supported and funded well to change a lacking of human rights education within most of society at present especially regionally/rurally.
– Grampians DisAbility Advocacy.¹⁵



Public authorities self-reporting on activities to strengthen human rights culture

The following are activities that public authorities reported they would undertake to better embed a culture of human rights:

- Induction education and/or refresher education on the Charter to staff
- Embed human rights values and the Charter into business plans
- Develop a Social Justice Charter or similar social inclusion policy
- Implement action plans specific to particular human rights issues
- Place human rights updates on meeting agendas
- Discuss human rights obligations in formal and informal reports
- Upload resources relating to the Charter and human rights compliance to intranet
- Make a public commitment to the Charter on website
- Incorporate regular reporting on the application of the Charter
- Upgrade policies to ensure human rights compliance
- Provide education to community groups on human rights
- Gain a greater understanding of diversity in communities
- Consult with the Commission for further ideas

In the Commission's view, these activities are all worthwhile. We encourage public authorities to implement these improvements to how they factor human rights into their everyday business. These activities will help to strengthen a culture of human rights. The Commission can assist public authorities to design and implement them in a tailored and relevant way.

Case study on effectively growing a human rights culture

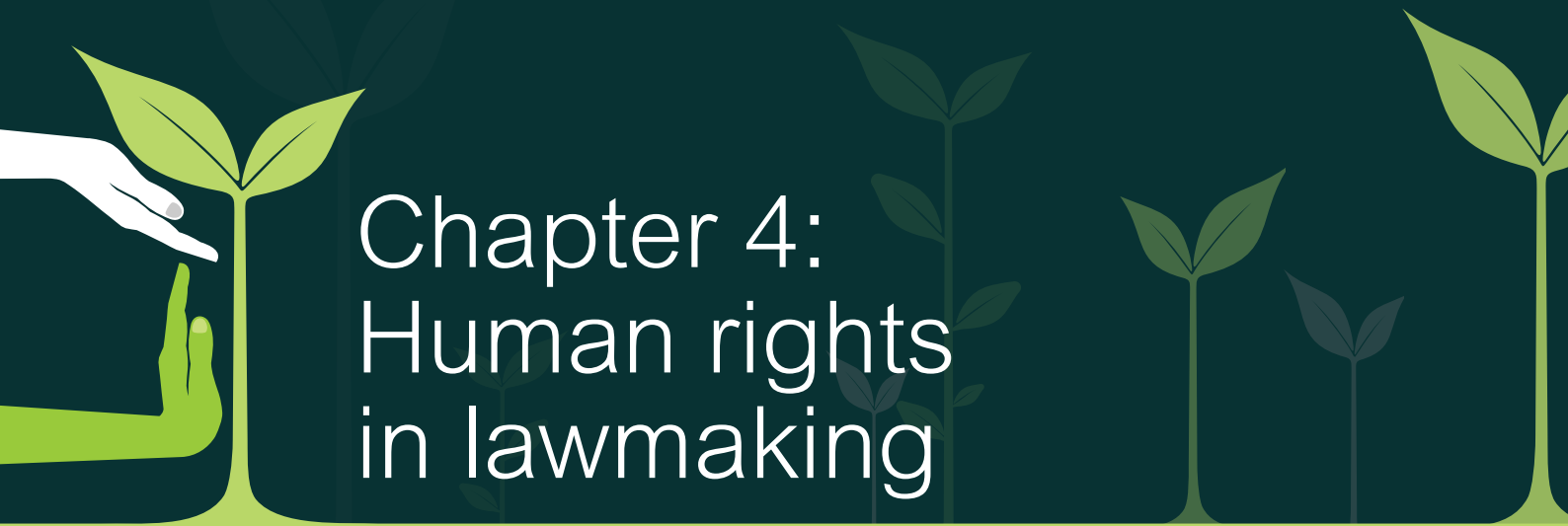
The Victorian Government's decision to launch a royal commission into family violence and, in 2016, accept all 227 recommendations, is an example of how to grow a strong human rights culture.

In the Commission's view this example highlights how all three cultural levers can be used to build a strong human rights culture. The government, through its actions on improving Victoria's culture around preventing and protecting family violence victims has:¹⁴

- **strong senior leadership and vision** including making firm public statements that family violence will not be tolerated in Victoria. It has invested \$572 million in the 2016–2017 State Budget to start delivering on 65 of the most urgent recommendations.
- **implemented operational level activities** including creating a 10-year plan for change, *Ending Family Violence: Victoria's Plan for Change*, which is 'a reform agenda to transform the way in which we address family violence and to drive lasting change to attitudes which contribute to family violence'. It has also implemented a number of priority operational prevention and safety programs across government, including providing substantial funding to relevant agencies to assist with cultural change.
- **encouraged external input and oversight** including by establishing the royal commission in the first instance, and agreeing to implement all 227 recommendations. It is also undertaking significant consultation with victim survivors and sector workers in order to prioritise the voices of those with lived experience of family violence and experience using and working in relevant services. A Family Violence Steering Committee, Victim Survivors' Advisory Council and the Industry Taskforce have all been established to facilitate the consultation process. The government is also consulting with Aboriginal groups in order to deliver culturally sensitive and specific services, and is guided by the Indigenous Family Violence Partnership Forum and the Aboriginal Family Violence Co-Design Forum in this regard.

Endnotes

- 1 Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (Report, 1 September 2015) 10.
- 2 Victorian Local Governance Association, *From Compliance to Culture: A Toolkit for Local Governments to Implement the Victorian Charter of Human Rights and Responsibilities* (2017) <<http://www.vlga.org.au/What-were-saying/Publications/From-Compliance-to-Culture-A-toolkit-for-local-governments-to-implement-the-Victorian-Charter-of-Human-Rights-and-Responsibilities>>.
- 3 Brett Young above n 1, 24.
- 4 The Commission adopted the guidance provided in Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (Report, 1 September 2015) 24–7.
- 5 Gill Callister, Secretary Victorian Department of Education and Training, provided in response to the Commission 2016 Charter Report consultation.
- 6 See page 19 of this report
- 7 See page 17 of this report for a description of this project.
- 8 The Commission adopted the guidance provided in Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (Report, 1 September 2015) 32–4.
- 9 See Human Rights Consultation Committee, 'Rights, Responsibilities and Respect' (Report, 30 November 2005) iii.
- 10 Brett Young above n 1, 44.
- 11 Ibid 22.
- 12 Aboriginal Family Violence Prevention and Legal Service Victoria, provided in response to the Commission 2016 Charter Report survey.
- 13 Daniel Andrews, 'Australia's First Pride Centre' (Media Release, 20 April 2016) <<http://www.premier.vic.gov.au/australias-first-pride-centre/>>.
- 14 Victoria State Government, 'One Year on from the Royal Commission into Family Violence' (Report, 2017) <http://www.vic.gov.au/system/user_files/Documents/fv/DPC01%20One%20year%20on%20from%20the%20Royal%20Commission%20into%20Family%20Violence.pdf>.
- 15 Grampians DisAbility Advocacy provided in response to the Commission 2016 Charter Report survey.



Chapter 4: Human rights in lawmaking

The role of the Charter in lawmaking

The dialogue model established by the Charter enables human rights considerations to be taken into account at every stage of the law-making process. Under the model, the human rights impact of a Bill may be considered right from the drafting stage, when a statement of compatibility is prepared to accompany the Bill's introduction into Parliament. This informs parliamentarians of the human rights that are potentially limited by the Bill and why any proposed limitations are reasonable and justified. Members can consider this assessment and raise any concerns during the parliamentary debate. To assist this process, the Scrutiny of Acts and Regulations Committee (SARC) also prepares a report that is tabled in Parliament that considers whether, in its view, human rights are adversely impacted by the Bill. SARC also accepts public submissions on Bills they are considering, which are available on the SARC website with the relevant Alert Digest. In this way, the human rights impact of a proposed law can be thoroughly scrutinised.

The Charter's parliamentary scrutiny provisions provide an important mechanism for promoting public accountability in law-making and for highlighting human rights considerations raised in Bills. During 2016 these provisions assisted parliamentarians and the community to consider the human rights implications of potential legislation, and also provided a mechanism for international human rights jurisprudence to be taken into account.

In the Commission's view some aspects of the process could be strengthened. In some cases, Bills have moved through Parliament without human rights issues being adequately identified and debated. The Eight-Year Review made findings and recommendations to strengthen the parliamentary scrutiny process, and the Commission welcomes the Victorian Government's commitment to implementing the review recommendations to improve how human rights are considered in lawmaking.

Statements of compatibility

A minister or member of Parliament must provide a statement of compatibility when introducing a Bill into Parliament, setting out how the Bill is compatible with human rights or, where relevant, the nature and extent of any incompatibility. Well-drafted statements can inform parliamentary debate and the deliberations of the public. While statements have become more concise and to-the-point over the past decade, the Commission outlines in this section areas in which the statement process could improve.

A sufficiently detailed statement of incompatibility can be an important flag to ensure closer public scrutiny of a Bill for human rights impact, potential changes to address incompatibility and, at a minimum, increased accountability.

An important part of the effective scrutiny of new legislation is the capacity for ministers and members to acknowledge the instances where a Bill is potentially or partially incompatible with human rights. While most Bills drafted are compatible with human rights, there are instances where this is not achieved. In these instances the minister or member will explain the nature and extent of a potential incompatibility, and, in so doing, give Parliament the chance to identify a possible solution.

During 2016 a statement of partial incompatibility was provided in relation to one Bill only – the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016*.

Figure 8: Formal statements of incompatibility

| Year | 2016 | 2015 | 2014 | 2013 | 2012 |
|-------------------------------|------|------|------|------|------|
| Statements of incompatibility | 1 | 1 | 0 | 0 | 0 |

Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016

The *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* introduced a presumption against parole for a certain category of prisoner, to apply retrospectively. The presumption specifically targets prisoners serving a prison sentence with a non-parole period for an offence of murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer. The Act prohibits the Adult Parole Board from making a parole order in such cases unless satisfied that, because the prisoner is in imminent danger of dying or is seriously incapacitated, they are no longer able to harm anyone, nor pose a risk to the community.

The Bill contained a statement of partial incompatibility in relation to this reform. SARC reported on the Government's Bill in Alert Digest No 1 of 2017. SARC observed that the Bill extended to child offenders who were sentenced as adults regardless of whether special reasons (for example, impaired mental functioning or mental illness) exist and that both the United Nations Human Rights Committee and the Supreme Court of the United States have held that imprisoning a person for life without parole for crimes committed as a child may be incompatible with human rights in some circumstances.

Override declarations

Under the Charter, Parliament can declare that a law or part of a law has effect despite being incompatible with human rights.¹ This is known as an 'override declaration'. It signals to courts, public authorities and the community that a law does not have to be interpreted compatibly with the Charter and that public authorities do not need to act compatibly when implementing it.

An override declaration is intended to be used in exceptional circumstances only.² In its report recommending the creation of the Charter, the Human Rights Consultative Committee referred to the *International Covenant on Civil and Political Rights* (ICCPR) in setting out the circumstances when an override might apply.³ Article 4 of the ICCPR states that governments should only act incompatibly with human rights 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'.⁴

The committee also strongly stated, echoing the ICCPR, that it would be inappropriate to use the override clause to sanction a breach of important rights such as the right to life, freedom from slavery, freedom from torture and freedom of conscience, thought and religion.⁵

The Commission reiterates that resorting to an override declaration should only occur in extreme situations, where there is an evidence base and urgent serious risk to public security or a state of emergency. All override declarations should continue to be constrained by a sunset clause ensuring a provision's expiry no later than five years after it is introduced. This means that a decision to re-enact an override declaration is subject to review and public scrutiny.⁶

During 2016 the Corrections Amendment (Parole) Bill 2016 introduced a second permanent override by inserting an amendment in the *Corrections Act 1986* to provide for the ongoing incarceration of a prisoner, Dr Craig Minogue. However, this Bill has been superseded by the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (covering the same subject matter), which does not contain an override declaration.

Override declarations

| Year | Override | Rationale for override | Duration of Override validity | Further Information |
|------|---|---|---|---|
| 2014 | <i>Legal Profession Uniform Law Application Act 2014 and Schedule 1</i> | Section 6 aims to ensure uniformity in interpretation and application of legal professional conduct scheme across all jurisdictions, including those jurisdictions without an equivalent to the Charter. | Perpetual: new section 6(2) states that Charter section 31(7), which limits overrides to five years, does not apply. | Victoria is host jurisdiction. Other participating jurisdictions (only NSW to date) apply law as if it is their own. |
| 2014 | <i>Corrections Amendment (Parole) Act 2014</i> | Amends <i>Corrections Act 1986</i> (Vic) by restricting capacity of Parole Board to grant convicted murderer Julian Knight (responsible for 1987 Hoddle Street Massacre) parole unless 'in imminent danger of dying/seriously incapacitated'. Enacted in case a court considered that the legislation not Charter compatible. | Perpetual: new section 74AA states that Charter section 31(7), which limits overrides to five years, does not apply. | Minister considered amendment was Charter compatible because any limitations on Charter rights it included were reasonable and justified due to the egregious nature of Knight's crimes and his ongoing risk. |
| 2016 | <i>Corrections Amendment (Parole) Bill 2016</i> | Amends <i>Corrections Act 1986</i> (Vic) to restrict capacity of Parole Board to grant Dr Craig Minogue (convicted murderer involved in 1986 Russell Street bombings) parole unless 'in imminent danger of dying/seriously incapacitated'. ⁷ | Perpetual: new section 74AAC states that Charter section 31(7), which limits overrides to five years, does not apply. | Member included override to ensure imposition of life sentence for 'one of the most serious criminal actions ever to take place in the community' and to protect community from ongoing risk of serious harm. |

In total, three override declarations have been included in Victorian Bills. None of these override declarations appear to have involved exceptional circumstances, in the sense of constituting a serious threat to national security or a state of emergency.⁸ Further two overrides have provided for perpetual, ongoing regimes of detention of individual prisoners. The Commission notes that override declarations were not intended to be ongoing. Section 31(7) of the Charter provides that override declarations expire after five years.⁹

House amendments to Bills

Members or ministers can propose amendments to Bills following parliamentary debate. There is currently no requirement for a statement of compatibility to be prepared or updated when amendments are proposed, despite the fact that amendments can raise significant and unique human rights issues.

Public accountability may be impacted if new human rights issues are not analysed and raised when house amendments are proposed. The Commission welcomes the Victorian Government's support of the recommendation of the Eight-Year Review that house amendments be accompanied by an updated statement of compatibility.¹⁰

SARC's Alert Digest on the Primary Industries Legislation Amendment Bill 2016 observed that although it is not mandatory to provide a statement of compatibility in relation to an amendment to a Bill, a supplementary statement of compatibility should be given. SARC expressed concern that if this does not happen, the scrutiny process may be undermined.

The Scrutiny of Acts and Regulations Committee

SARC is a bipartisan parliamentary committee that provides independent scrutiny of Bills and statutory rules for compatibility with human rights. SARC reports on the compatibility of Bills in Alert Digests tabled in Parliament each sitting week.

The SARC scrutiny process is crucial to the effectiveness of the dialogue model and the successful operation of the Charter, particularly in circumstances where a statement of compatibility has not fully considered human rights implications. It provides feedback to Parliament and the executive on the human rights issues contained in a Bill. Well-drafted SARC reports can have a significant impact on policy development, allowing Parliament and the public to effectively engage in the lawmaking process. As there is scope for community organisations and individuals to provide submissions to SARC on a Bill, the scrutiny process also has potential to facilitate meaningful human rights dialogue between the community and government.

Since the Charter has been in operation, SARC has developed considerable Charter expertise, and has provided valuable scrutiny of legislation. Nevertheless, there are a number of aspects of the SARC scrutiny process that could be strengthened.

Effectiveness of SARC reports

SARC identified and reported on human rights issues in relation to 38 of the 90 Bills introduced into Parliament in 2016. It found four Bills were potentially incompatible with the Charter. This was a significant drop from the previous two years, in which it found 23 Bills were potentially incompatible. See Figure 9.

Figure 9: Number of Bills SARC found to be potentially incompatible with the Charter

| Year | 2016 | 2015 | 2014 | 2013 | 2012 |
|-------|------|------|------|------|------|
| Bills | 4 | 23 | 16 | 14 | 19 |

The Committee referred questions regarding human rights to parliament in relation to seven Bills scrutinised in 2016, and received four responses. The Committee referred questions regarding human rights to a member or minister in relation to 36 Bills and received 31 responses.

During 2016 parliamentarians referred to SARC reports on Bills in a number of instances. For example, parliamentary debate included reference to SARC's report on the Upholding Australian Values (Protecting Our Flags) Bill 2015,¹¹ the Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016,¹² the Heritage Bill 2016,¹³ and the National Domestic Violence Order Scheme Bill 2016.¹⁴

While these figures indicate a fairly robust dialogue, we note parliamentarians only referred to SARC reports during debate a handful of times.¹⁵ Further, no house amendments were made in 2016 as a consequence of questions raised in SARC reports. This figure has remained low over the past five years. See Figure 10. An effective scrutiny process relies on members and ministers raising in Parliament issues raised by SARC. This aspect of the scrutiny process is currently greatly underutilised.

Figure 10: House amendments resulting from SARC reports

| Year | 2016 | 2015 | 2014 | 2013 | 2012 |
|------------|------|------|------|------|------|
| Amendments | 0 | 3 | 3 | 0 | 1 |

Public submission process

The opportunity for organisations and individuals to provide submissions on particular Bills to SARC is a key mechanism to promote public accountability in the lawmaking process. The Commission recognises, however, that organisations have repeatedly noted the challenges they face in engaging in the SARC review process.¹⁶ In particular, concerns have been expressed about the length of time available to make submissions. Generally, SARC has around two weeks to prepare a Charter report and, in some cases, less time than this. Although some circumstances may justify urgency and a Bill's swift passage through Parliament, the potential impact on consideration of human rights issues may be significant.

The current procedures provide a very short time for SARC to consider the human rights implications of a Bill. They also provide community organisations with a very short time to provide a submission. Organisations have observed that the SARC process needs to set out clear timelines and processes for engagement.¹⁷ While SARC publishes submissions on its website, concerns have also been expressed that SARC typically does not reflect the content of submissions in its reports, despite the fact that they often raise significant human rights concerns and drafting requires considerable time and effort.¹⁸

These issues are likely key factors in the lack of engagement by community organisations in the SARC process. The number of submissions received by SARC every year is considerably low and has recently decreased significantly. During 2016, community organisation submissions were only provided to SARC in relation to one Bill.¹⁹

Figure 11: Number of public submissions to SARC

| Year | 2016 | 2015 | 2014 | 2013 | 2012 |
|-------------|------|------|------|------|------|
| Submissions | 5 | 14 | 15 | 21 | 0 |

SARC's engagement with the public would be greatly improved if the Committee encouraged public submissions and provided an analysis of those submissions in its reports to Parliament. The Commission's submission to the Eight-Year Review made this recommendation.²⁰ The Eight-Year Review report included a recommendation that the Committee refer to the content of submissions in its reports,²¹ supported in principle by the Government in its 2016 response.²²

Whenever possible, SARC should also consider holding public or private hearings on Bills with substantial human rights implications. This would provide community groups and experts with an opportunity to put evidence on the record in a public forum. SARC could notify the Parliament of its intention to do so, giving Parliament an opportunity to delay consideration of a Bill until SARC has reported on the hearings. The Eight-Year Review included a recommendation that the government consider how best to ensure that the Committee has sufficient time to scrutinise Bills that raise significant human rights issues.²³ In its response, the government acknowledged that:

The timing of the parliamentary process sometimes requires the scrutiny process to be undertaken relatively quickly and will consider how to provide the Scrutiny of Acts and Regulations Committee (SARC) with additional time in appropriate cases.²⁴

The Commission welcomes any developments to resolve this issue.

Endnotes

- 1 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31(1).
- 2 Human Rights Consultation Committee, 'Rights, Responsibilities and Respect' (Report, 30 November 2005) 75.
- 3 Ibid. See also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1, 21.
- 4 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 13 November 1980) art 4.
- 5 Human Rights Consultation Committee, 'Rights, Responsibilities and Respect' (Report, 30 November 2005) 75.
- 6 Victorian Equal Opportunity and Human Rights Commission, '2014 Report on the Operation of the Charter of Human Rights and Responsibilities' (Report, June 2015) 62.
- 7 This Bill has been superseded by the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic) that covers the same subject matter and does not contain an override declaration.
- 8 Potential exceptional circumstances envisaged in the Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21 cl 31 included 'threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria'.
- 9 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31(7).
- 10 See Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (Report, 1 September 2015) 190 recommendation 43.
- 11 Victoria, *Parliamentary Debates*, Legislative Council, 9 March 2016, 1075 (Fiona Patten).
- 12 Victoria, *Parliamentary Debates*, Legislative Council, 24 May 2016, 2355 (Edward O'Donohue), 2357 (Sue Pennicuik).
- 13 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 November 2016, 4668 (Richard Wynne).
- 14 Victoria, *Parliamentary Debates*, Legislative Assembly, 30 August 2016, 3187 (Murray Thompson).
- 15 For example, as shown above, in 2016 parliamentary debate referred to SARC's report on the Upholding Australian Values (Protecting Our Flags) Bill 2015 (Vic), the Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016 (Vic), the Heritage Bill 2016 (Vic) and National Domestic Violence Order Scheme Bill 2016 (Vic).
- 16 Brett Young, above n 10, 182.
- 17 Ibid 183–5.
- 18 Ibid 182–3.
- 19 Five submissions were provided in relation to the Equal Opportunity Amendment (Religious Exceptions) Bill 2016.
- 20 Victorian Equal Opportunity and Human Rights Commission, Submission No 90 to *Eight-Year Review of the Charter of Human Rights and Responsibilities Act 2006*, 2015, 44–5.
- 21 Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (Report, 1 September 2015) 185 recommendation 37(c).
- 22 State Government of Victoria, *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act* (20 July 2017) <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/human+rights+legislation/government+response+to+the+2015+review+of+the+charter+of+human+rights+and+responsibilities+act>>.
- 23 Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (Report, 1 September 2015) 185 recommendation 37(a).
- 24 State Government of Victoria, above n 22.



Chapter 5: Human rights in courts and tribunals

Overview

Courts and tribunals play a crucial role in the Charter's human rights protection framework, giving them a significant voice in Victoria's human rights dialogue. They act as a mechanism for Victorians to hold government and public authorities to account for conduct that infringes their rights.

2016 was a significant year for the Charter. Important cases contributed to a growing body of law that clarifies the human rights contained in the Charter, and the responsibilities held by each arm of government to protect them. In particular, a landmark decision highlighted the critical importance of proper consideration by public authorities of human rights in government decision-making. It also illustrated the significant consequences that can occur when human rights are not sufficiently embedded into the policies and practices of the Victorian public sector (VPS).¹

Charter obligations on courts and tribunals

Without limiting the independence of courts in decision-making, the Charter requires courts and tribunals to incorporate human rights in the following ways:²

- courts and tribunals must interpret Victorian laws, so far as it is possible to do so consistently with the law's purpose, in a way that is compatible with human rights.³ Where the Supreme Court of Victoria is unable to interpret a law compatibly with human rights, the Court can make a declaration of inconsistent interpretation⁴

- courts and tribunals must act compatibly with those rights that affect court proceedings,⁵ including the right to equality before the law, the right to a fair hearing and the rights in criminal proceedings.⁶

Courts and tribunals must also act compatibly with human rights in the exercise of their administrative functions,⁷ which include such activities as committal proceedings, issuing warrants, listing cases and adopting practices and procedures.⁸

Resources to assist the judiciary

The Charter Bench Book

On 10 May 2016 the Judicial College of Victoria published the *Charter of Human Rights Bench Book* (the Charter Bench Book), an online resource covering the operation and effect of the Charter. The Charter Bench Book is a significant tool to assist courts and tribunals on the operation of the Charter.

The Charter Bench Book is a valuable tool for the whole legal profession, not just the judiciary. As such, the book was developed under the guidance of an editorial committee comprising members of the judiciary, along with representatives of the Commission, the Law Institute of Victoria and the Victorian Government Solicitor's Office.

The Charter Bench Book contains a current and clear statement of the law, covering each human right protected by the Charter and each of the Charter's operative provisions as they have been interpreted and applied by Victorian courts. The book also contains international jurisprudence in relation to Charter rights which have not been considered by Victorian courts. This international commentary focuses on ICCPR jurisprudence, drawing on European, South African and Canadian materials.

Comprehensive updates were made to the Charter Bench Book on 1 September 2017 to reflect developments in case law.

The Disability Access Bench Book

In December 2016 the Judicial College of Victoria and the Commission published an online resource for judicial officers designed to promote access to justice for people with disabilities – the *Disability Access Bench Book*.⁹

In early 2017 the Supreme Court acknowledged the usefulness of the Disability Access Bench Book in its decision of *Matsoukatidou v Yarra Ranges Council*.¹⁰ The Supreme Court cited the book as an important contribution to compliance in Victoria with access to justice requirements.¹¹ In that case the Supreme Court noted that the book's discussion of the issues to be considered by courts and tribunals in relation to the right of equality under section 8(3) of the Charter deserves 'careful consideration'.¹² These issues include:

- equal participation
- equal understanding of proceedings
- equal capacity to exercise decision-making
- equal access (modifications or adjustments)
- equal treatment of evidence.¹³

Citing the *Disability Access Bench Book*, the Court found that courts and tribunals may need to treat people differently in order to achieve an equal outcome. It found that different treatment will often involve making adjustments for people with a disability to participate in court proceedings on an equal basis with others.¹⁴

This case provides an example of how the *Disability Access Bench Book* may be relied upon by courts in their consideration of how to provide people with disabilities equality before the law. Similarly, the book may be relied upon in relation to other rights particularly applicable to courts and tribunals – for example the right to a fair hearing, rights in criminal proceedings, and the rights of children in the criminal process (where the child has a disability).

Key cases

Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children

The Charter requires public authorities to act in a way that is compatible with human rights and to give proper consideration to relevant human rights when making a decision.¹⁵

The landmark decision of *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children*¹⁶ (*Certain Children*) provides an example of the critical importance of proper consideration by public authorities of human rights in government decision-making. It also illustrates the significant consequences that can occur when human rights are not sufficiently embedded into the policies and practices of the VPS.

In mid-November 2016 a series of incidents in Parkville resulted in extensive property damage to parts of the Melbourne Youth Justice Centre. Consequently, many of the children and young people held on remand and in custody at the centre needed to be rehoused.

Orders in council published in the Victorian Government gazette on 17 November 2016 included orders to establish the Grevillea unit within Barwon Prison as a remand centre and a youth justice centre to be used 'for emergency accommodation'. The Minister for Families and Children announced that about 40 young offenders would be sent to the newly gazetted youth justice unit.¹⁷

Over subsequent days and weeks, children and young people were removed from Parkville and from the Malmsbury Youth Justice Precinct to Barwon. In *Certain Children* Justice Garde found that at least in the first two weeks of occupancy of the Grevillea unit, young people may have been subject to a breach of their human rights by reason of the 'harsh conditions' at the Grevillea unit, including long periods of solitary confinement and the treatment by staff (including use of fear and threats, handcuffs, and German shepherd dogs).¹⁸ In addition, at least one young person self-harmed using the physical infrastructure of the cells.¹⁹

The Secretary of the Department of Health and Human Services subsequently settled the initial action brought by the Victorian Aboriginal Legal Service, by giving an undertaking to the Court that the Department of Health and Human Services would not authorise or cause the removal of any Aboriginal or Torres Strait Islander children to any facility at Barwon Prison unless the Aboriginal Commissioner for Children and Young People provided advice that

the transfer was in the child's best interests. While this was a welcome development, other children and young people who did not gain the benefit of the undertaking remained at the facility.²⁰

In December 2016 children detained in the Grevillea unit initiated proceedings in the Supreme Court of Victoria by their litigation guardian. The defendants were the Minister for Families and Children, the Secretary to the Department of Health and Human Services, and the State of Victoria. The Commission intervened in the proceeding to make submissions concerning the Charter's application and effect.

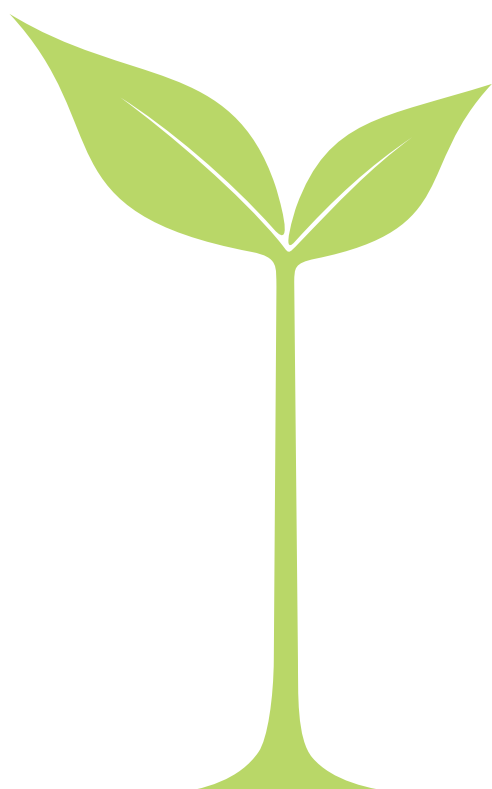
Human rights affected

The children sought an order of the Supreme Court of Victoria directing their release from Barwon Prison, and an order quashing the orders that established the Grevillea unit as a remand centre and as a youth justice centre. The children also argued that a number of their human rights protected by the Charter were limited by the orders and transfer decisions. These rights included protection from cruel, inhuman or degrading treatment (section 10(b)), protection of the family unit (section 17(1)), protection of children in their best interests (section 17(2)), and the right to humane treatment when deprived of liberty (section 22(1)).

In *Certain Children* Justice Garde found that a number of the children's rights had been unreasonably limited by the orders and the transfer decisions. Specifically, his Honour found that at least in the first two weeks of occupancy in the Grevillea unit:

- one or more children had been subjected to cruel, inhuman or degrading treatment, including "very long" periods of solitary and prolonged confinement of young people in cells designed for adult prisoners; fear and threats by staff and the use of the Security and Emergency Services Group of Corrections Victoria inside the unit, including German shepherd dogs; lack of space, amenities and programs for children and young people; and absence of family visits and lack of access to legal advisers and religious services.²¹
- The children's right to be subjected to humane treatment when deprived of liberty had also been infringed. His Honour stated that 'the starting point should be that prisoners not be subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty'.²² His Honour found that the conditions within the Grevillea unit – including those described above – infringed the children's right to humane treatment when they were deprived of liberty.²³
- The orders and the transfer decisions contravened Charter obligations to protect the best interests of the child. His Honour found that the establishment of the youth justice facility within the walls of Barwon Prison 'has widespread ramifications for the young people who may be transferred to these facilities', including in relation to their sense of security, their capacity to receive visits from relatives, friends and lawyers, and their ability to have their medical, religious and cultural needs met.²⁴

The only right raised by the plaintiffs found not to be affected by the orders and the transfers was the right to protection of the family unit. While his Honour accepted that it may be less convenient for many families to visit children and young people at Barwon, he was not satisfied that this inconvenience and potential additional cost was enough to engage the human right of family protection.²⁵



Lessons learned

Importance of 'proper consideration' of human rights in decision-making

Certain Children provides an example of the critical importance of proper consideration of human rights in government decision-making. Justice Garde found that the decision-making process leading to the orders did not involve any consideration or evaluation of the human rights of young persons to be transferred to the Grevillea unit.²⁶ His Honour noted that:

*Neither the Minister nor anyone else turned their minds to the impact of the establishment of the new facilities at Barwon Prison on young persons such as the plaintiffs. Their thoughts were directed at coping with the circumstances at Parkville, and the pursuit of their view that tougher measures were needed and that the perpetrators of the damage had to face serious consequences. As a result, the impact on the human rights of persons such as the plaintiffs was unplanned and largely unforeseen.*²⁷

Following the accepted test for determining whether proper consideration to the children's human rights had been given,²⁸ his Honour found that the Minister (whether personally or by anyone acting on her behalf):

- a) did not understand in general terms which human rights would be affected by the making of the Orders in Council or how they may be interfered
- b) did not seriously consider the possible impact of the Orders in Council on any person's human rights
- c) did not identify the countervailing interests or obligations
- d) did not balance competing private and public interests.²⁹

His Honour concluded that the Minister's recommendation and decision was substantively incompatible with the human rights of the children transferred to the Grevillea unit.³⁰

Embedding a culture of human rights

This case illustrates the importance of creating a human rights culture within public sector agencies – in embedding rights into everyday practices and procedures – to ensure that proper consideration is given to rights in all instances of government decision-making.

In the case of *Certain Children* Justice Garde found that:

*Had greater attention been given during the decision-making process to the need to provide for the protection, care, custody or treatment of the young persons detained at the Grevillea unit as to how their entitlements would be met on the first day of occupation of the Grevillea unit, a very different result might have ensued. A report as to the condition of the Grevillea unit and as to compliance with appropriate standards before the decision to move was made would have been very useful. Human rights complaints might have been fewer in number or not occurred at all.*³¹

Justice Garde went on to note that the result was that the 'impact on the human rights of persons such as the plaintiffs was unplanned and largely unforeseen. It is not a situation where a meticulous decision-maker fully evaluated the human rights in question coming to a careful and controlled decision limiting the impact on human rights'.³²

Certain Children provides clear authority for the fact that human rights cannot be forgone in cases of an emergency or extreme situation. Justice Garde noted that 'in the absence of statutory provision to the contrary ... the Charter will operate to require proper consideration be given by public authorities to relevant human rights in emergencies or extreme circumstances or where great expedition is required in decision-making'.³³

*In an emergency or extreme circumstance, or where critical decisions have to be made with great haste, there are grave risks that human rights may be overlooked or broken, if not life or limb endangered. The existence of an emergency, extreme circumstance or need for haste confirms, not obviates, the need for proper consideration to be given to relevant human rights.*³⁴

Creating a culture of human rights within organisations will ensure that rights are embedded into everyday practices and procedures, and engrained in the values of decision-makers. This will assist in ensuring that proper consideration is given to human rights in all instances, especially in cases of emergency or extreme circumstances.³⁵

Further proceedings

On 29 December 2016 the Court of Appeal dismissed the Minister's appeal against this decision, and adjourned its hearing on the human rights grounds of appeal. This aspect of the appeal was discontinued by the appellant.

Children's rights in the criminal process

In *DPP (Vic) v S L*,³⁶ Justice Bell confirmed the need to ensure that court processes involving young people in custody are age-appropriate, and also rehabilitation focused.³⁷ His Honour found that when hearing and determining criminal charges brought against children, the Supreme Court must apply relevant human rights to procedures to be followed in hearings, detention, at court and trial.³⁸

Justice Bell considered the relevance of the *Convention on the Rights of the Child*³⁹ and European case law, noting that, where courts accustomed to trying adults have not appropriately adapted their procedures when trying a child, the human right of the child to a fair trial has been found to have been breached. Justice Bell applied the principle that courts should take reasonable and necessary steps to ensure the trial process does not expose a child defendant to avoidable intimidation, humiliation and distress, and to assist them to effectively participate.⁴⁰ Justice Bell provided a procedural direction governing directions hearings and sentencing. This allowed for a child to have regular breaks, to sit with family or legal representatives, and not to be handcuffed or kept with adult prisoners. It also required the court and legal representatives to use plain English when explaining the course of proceedings.⁴¹

Proper consideration of human rights

In *De Bruyn v Victorian Institute of Forensic Mental Health*,⁴² Mr De Bruyn, a long-term smoker and involuntary patient in a hospital run by the Victorian Institute of Forensic Mental Health challenged the lawfulness of a smoke-free policy at the Hospital. Mr De Bruyn argued, among other things, that the Institute had failed to give proper consideration to his relevant human rights in approving and adopting the smoke-free policy. Mr De Bruyn argued that a number of his rights had been infringed – including the right to humane treatment when deprived of liberty, the right not to be subjected to medical treatment without full, free and informed consent, and the right to property.

The proceeding was dismissed. Justice Riordan found that the smoke-free policy did not limit Mr De Bruyn's rights. His Honour found that the policy was intended to benefit all patients, visitors and staff by preventing the known harmful effects of smoking. Its broad scope and access to counselling and nicotine replacement therapy meant it was not an affront to dignity.⁴³

Justice Riordan observed that in the *Bare* decision,⁴⁴ the court found that a decision-maker must seriously turn his or her mind to the possible

impact of the decision on a person's human rights and the implications for those affected, identifying countervailing interests or obligations. In *Patrick's case*, Justice Bell set out that the 'proper consideration' to be given to relevant human rights requires public authorities to do so in a practical and common-sense manner. Judicial review should therefore focus on the substance of a decision-maker's consideration.⁴⁵

Justice Riordan found that the Institute discharged its duty to give proper consideration to relevant human rights.⁴⁶ The Institute demonstrated that it spent four years comprehensively considering matters relevant to its decision to bar patients, employees and visitors from smoking on the premises, including any potential legal risk of impact on human rights under the Charter. This included conducting a range of consultations with affected groups and developing strategies to address negative impacts. The Institute also contemplated legal opinion, international precedents and extensive literature associated with smoking bans in mental health facilities. The text of the policy and associated procedures also specifically referred to the Charter.⁴⁷

Right to privacy

In *Jurecek v Director, Transport Safety Victoria*,⁴⁸ Justice Bell confirmed that employers can investigate social media for suspected employment misconduct in a decision on an unsuccessful appeal against dismissal. Justice Bell found that the employer had conducted a legitimate employment misconduct investigation, which did not breach the right to privacy under the Charter. There was no obligation on the employer to notify the employee about their collection of information, as doing so would jeopardise the integrity of the disciplinary investigation.⁴⁹

A Federal Court matter – *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* – contemplated whether Consumer Affairs Victoria (CAV) had acted incompatibly with the right to privacy. CAV inspectors had secretly recorded conversations with employees to investigate allegations of misleading or deceptive conduct.⁵⁰ The Federal Court referred to the common law, observing that the issue of whether someone has a reasonable expectation of privacy turned on whether the person being recorded speaks in circumstances where it is reasonable to expect to be heard only by the person they address. While the right to privacy may apply to covert electronic recording of conversations at work, in this case the conversations occurred in a public place, the television area of retail stores.⁵¹

Right to security and privacy legislated

In the 2015 Charter Report, the Commission reported on Review Decision A72/2015 (decision on publication)⁵² of the Police Registration and Services Board. The Board made an order under the *Victoria Police Act 2013* prohibiting the publication of names and locations to protect the human rights of witnesses and complainants to police misconduct, aiming not to deter future complaints.

The Commission was invited by the Board to intervene and make submissions. The submission outlined relevant findings from the Independent review into sex discrimination and sexual harassment in Victoria Police to highlight that identification of complainants gives rise to a real risk of further harm and detriment and may deter complaints by others in the future. The Commission also identified relevant human rights the Board should consider in assessing whether or not it is in the public interest for the Board to identify witnesses or complainants. These included the right to security, privacy and to a fair hearing.⁵³

The Board's decision acknowledged that it is required to comply with the Charter as a public authority. It considered that the human rights of vulnerable persons, including the right to privacy and the right to security, are to be given particular weight in applying 'open justice' provisions of the *Victoria Police Act*. The decision intended to provide guidance to the Board in future cases.

Significantly, this decision led to legislative reform. The *Police and Justice Legislation Amendment (Miscellaneous) Act 2016* passed in November 2016, implementing a requirement for the Board to exclude from its reasons and prohibit disclosure of information from a hearing likely to identify a complainant, witness or affected person unless doing so is in the public interest. The Act sought to support the Independent Review and encourage the reporting of inappropriate behaviour by protecting the identity of those directly affected. This reform received positive comment from members of Parliament in debate as a measure to address the prevalence of sexual harassment within Victoria Police.⁵⁴ This reform demonstrates the capacity of the Charter's dialogue model to create legislative change.

Application of the Charter to an application for a writ of habeas corpus

The decision of *Daniels v Eastern Health*⁵⁵ involved an unsuccessful application for a writ of *habeas corpus* to enable Mr Daniels to be released from involuntary detention at Eastern Health under an inpatient treatment order (ITO). Mr Daniels contended that the Mental Health Tribunal had no power under the *Mental Health Act 2014* to extend an ITO, arguing that an extension beyond its original expiry was inconsistent with his human rights. Justice McDonald found that the Court of Appeal in the *Slaveski* decision observed that section 32 of the Charter does not authorise the reading in of words which are not explicit or implicit in a provision, or the reading down of words so as to change the true meaning of the provision.⁵⁶ The Court was of the view that in the circumstances of this case, the Tribunal did have the power to extend the ITO or to create a new one that could operate beyond the expiry date of a previous order.⁵⁷

Interventions in Charter cases

The Commission may intervene in, and may be joined as a party to, any proceeding in which a question of law arises that relates to the application of the Charter, or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter. The Attorney-General also has a right to intervene in proceedings that raise the Charter.

The Commission's role as an intervener is to assist the court in its understanding and application of the Charter, not to represent any parties in the proceedings. The Commission has publicly available guidelines to help determine those cases in which we will intervene.⁵⁸

In 2016 the Commission has continued to use its intervention function by assisting courts and tribunals in understanding the Charter's operative provisions and interpreting the scope of the Charter's human rights.

Commission interventions

During 2016 the Commission was notified of 25 instances in which the Charter was raised in court and tribunal matters. The Commission intervened in the following matters:

- *Goode v Common Equity Housing Limited* (Human Rights) [2016] VCAT 93 (21 January 2016)
- *Baker (a pseudonym) v DPP (Vic)* [2017] VSCA 58 (22 March 2017)
- *Gembrook Views Estate Pty Ltd v Cardinia Shire Council* SC (Red Dot) [2017] VCAT 604
- *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796

Attorney-General interventions

- *Daniels v Eastern Health* [2016] VSC 148 (22 March 2016)
- *Baker (a pseudonym) v DPP (Vic)* [2017] VSCA 58 (22 March 2017)
- *H L* [2016] VSC 750 (13 December 2016)

Endnotes

- 1 See *Certain Children* [2016] VSC 796 (21 December 2016) [43] (Garde J).
- 2 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(2)(b).
- 3 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).
- 4 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.
- 5 This is through the application of *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(2)(b). For interpretation of this provision in relation to courts and tribunals, see *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 (28 February 2017) [32] (Bell J) (*Matsoukatidou*), applying *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 61–4 [241]–[254] (Bell J).
- 6 See *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237, 247 [52]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 63–4 [250], [254] (Bell J); *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221, 258–9 [165]–[167] (Bell J); *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [247]–[249], [252] (Tate JA).
- 7 See *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38(1), 5.
- 8 See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(j) note.
- 9 The Disability Access Bench Book was produced by the Judicial College of Victoria and the Commission in consultation with peak disability sector groups and overseen by a steering committee of Judge Elizabeth Gaynor (County Court of Victoria), Magistrate Ann Collins (Magistrates' Court of Victoria), Deputy President Genevieve Nihill AM (Victorian Civil and Administrative Tribunal), Phil Grano OAM (Office of Public Advocate) and Charlene Micallef (Office of Public Prosecutions Witness Assistance Service).
- 10 [2017] VSC 61 (28 February 2017).
- 11 *Matsoukatidou* [2017] VSC 61 (28 February 2017) [109] (Bell J).
- 12 *Matsoukatidou* [2017] VSC 61 (28 February 2017) [115] (Bell J).
- 13 *Matsoukatidou* [2017] VSC 61 (28 February 2017) [115] (Bell J).
- 14 *Matsoukatidou* [2017] VSC 61 (28 February 2017) [115] (Bell J).
- 15 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.
- 16 [2016] VSC 796 (21 December 2016).
- 17 Gayle Tierney, 'Young Offenders to be Put in Adult Prison' (Media Release, 17 November 2016) <<http://www.premier.vic.gov.au/young-offenders-to-be-put-in-adult-prison/>>.
- 18 *Certain Children* [2016] VSC 796 (21 December 2016) [169], [178] (Garde J).

- 19 *Certain Children* [2016] VSC 796 (21 December 2016) [46] (Garde J).
- 20 *Certain Children* [2016] VSC 796 (21 December 2016) [53] (Garde J).
- 21 *Certain Children* [2016] VSC 796 (21 December 2016) [169], [178] (Garde J). The Commission notes that on appeal, Dixon J ultimately came to a different view, finding that the treatment of the children did not constitute cruel, inhuman or degrading treatment: *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2017] VSC 251 (11 May 2017) [249]–[258] (Dixon J).
- 22 *Certain Children* [2016] VSC 796 (21 December 2016) [175] (Garde J), citing *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 169 [108] (Emerton J).
- 23 *Certain Children* [2016] VSC 796 (21 December 2016) [178] (Garde J).
- 24 *Certain Children* [2016] VSC 796 (21 December 2016) [157]–[158] (Garde J).
- 25 *Certain Children* [2016] VSC 796 (21 December 2016) [308] (Garde J).
- 26 *Certain Children* [2016] VSC 796 (21 December 2016) [216] (Garde J).
- 27 *Certain Children* [2016] VSC 796 (21 December 2016) [220]–[221] (Garde J).
- 28 *Certain Children* [2016] VSC 796 (21 December 2016) [186], [190]. The test was first set out by Emerton J in *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 184 [185]–[186], and subsequently approved by the Court of Appeal in *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129.
- 29 *Certain Children* [2016] VSC 796 (21 December 2016) [229] (Garde J).
- 30 *Certain Children* [2016] VSC 796 (21 December 2016) [223] (Garde J).
- 31 *Certain Children* [2016] VSC 796 (21 December 2016) [218] (Garde J).
- 32 *Certain Children* [2016] VSC 796 (21 December 2016) [221] (Garde J).
- 33 *Certain Children* [2016] VSC 796 (21 December 2016) [188] (Garde J).
- 34 *Certain Children* [2016] VSC 796 (21 December 2016) [188] (Garde J).
- 35 This point was also made in Michael Brett Young, ‘From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006’ (Report, 1 September 2015) 20–1.
- 36 [2016] VSC 714 (29 November 2016) [5] (Bell J).
- 37 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(2) binds courts and tribunals to apply the Charter in their ‘administrative’ functions.
- 38 *DPP (Vic) v S L* [2016] VSC 714 (29 November 2016) [5]–[6] (Bell J).
- 39 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- 40 *DPP (Vic) v S L* [2016] VSC 714 (29 November 2016) [11]–[12] (Bell J).
- 41 *DPP (Vic) v S L* [2016] VSC 714 (29 November 2016) [25] (Bell J).
- 42 (2016) 48 VR 647.
- 43 *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 692 [129], 709–10 [167] (Riordan J).
- 44 *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129.
- 45 *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 700–1 [140]–[142] (Riordan J), discussing *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129; *PJB v Melbourne Health* (2011) 39 VR 373 (*Patrick’s Case*).
- 46 An obligation which is outlined in s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- 47 *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 701–5 [143]–[147] (Riordan J).
- 48 [2016] VSC 285 (11 October 2016).
- 49 [2016] VSC 285 (11 October 2016) [121] (Bell J).
- 50 (2016) 245 FCR 529.
- 51 *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* (2016) 245 FCR 529, 562 [124] (Moshinsky J).
- 52 *Re ABC and the Chief Commissioner of Police* (Review Decision, Police Registration and Services Board, Case No A72/2015, 22 January 2016).
- 53 Victorian Equal Opportunity and Human Rights Commission, ‘In the Matter of an Application for Review Pursuant to Section 146(1)(m) of the Victoria Police Act 2013 against a Decision to Dismiss ABC from Victoria Police (A72/15): Submission of the VEOHRC on Issues related to the Application of Sections 154A and 157 of the Victoria Police Act 2013 and the Publication of Witness Details in Decisions’, 22 January 2016, 15, 19–23.
- 54 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 August 2016, 3302–3 (Sam Hibbins); Victoria, *Parliamentary Debates*, Legislative Council, 11 October 2016, 4877–9 (Sue Pennicui).
- 55 [2016] VSC 148 (22 March 2016).
- 56 *Daniels v Eastern Health* [2016] VSC 148 (22 March 2016) [12] (McDonald J).
- 57 *Daniels v Eastern Health* [2016] VSC 148 (22 March 2016) [7] (McDonald J), discussing *Slaveski v Smith* (2012) 34 VR 206.
- 58 For the Commission’s Guidelines, see: Victorian Equal Opportunity and Human Rights Commission, ‘The Victorian Equal Opportunity and Human Rights Commission Intervention Power under the Charter of Human Rights and Responsibilities: When Will the Commission Intervene?’ (Intervention Guidelines) <<https://www.humanrightscommission.vic.gov.au/human-rights/the-role-of-the-commission-under-the-charter/interventions/intervention-guidelines>>.



Victorian Equal Opportunity
& Human Rights Commission

Contact us

| | |
|------------------------|--|
| Enquiry Line | 1300 292 153 or (03) 9032 3583 |
| Fax | 1300 891 858 |
| Hearing impaired (TTY) | 1300 289 621 |
| Interpreters | 1300 152 494 |
| Email | information@veohrc.vic.gov.au |
| Website | humanrightscommission.vic.gov.au |